7535-01-U

NATIONAL CREDIT UNION ADMINISTRATION

12 CFR Part 701

RIN 3133-AF24

Fees Paid by Federal Credit Unions

AGENCY: National Credit Union Administration (NCUA).

ACTION: Final rule.

SUMMARY: The NCUA Board (Board) is amending its regulation governing assessment of an annual operating fee to federal credit unions (FCUs). First, for purposes of calculating the annual operating fee, the final rule amends the current rule to exclude from total assets any loan an FCU reports under the Small Business Administration's Paycheck Protection Program (PPP) or similar future programs approved for exclusion by the NCUA Board. Second, the final rule deletes from the current regulation references to the Credit Union System Investment Program and the Credit Union Homeowners Affordability Relief Program, both of which no longer exist. Third, the final rule amends the period used for the calculation of an FCU's total assets. Currently, total assets are calculated using the FCU's December 31st Call Report of the preceding year. Under the final rule, total assets will be calculated as the average total assets reported on the FCU's previous four Call Reports available at the time the NCUA Board approves the agency's budget for the upcoming year, adjusted for any excludable programs as determined by the Board. Finally, the final rule makes some minor technical changes.

DATES: This final rule is effective on [INSERT DATE 30 DAYS AFTER DATE OF PUBLICATION IN THE FEDERAL REGISTER].

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I. INTRODUCTION

At its July 2020 meeting, the Board issued a proposed rule[1] to amend the NCUA's regulation governing assessment of an annual operating fee to federal credit unions (FCUs), 12 CFR 701.6. For purposes of calculating the annual operating fee, the proposed amendments would have: (1) excluded from total assets any loan an FCU reports under the Small Business Administration's (SBA) Paycheck Protection Program (PPP), or similar future programs approved for exclusion by the NCUA Board; (2) deleted from the current regulation references to the Credit Union System Investment Program and the Credit Union Homeowners Affordability

[1] 85 FR 53708 (Aug 31, 2020).

Relief Program, both of which no longer exist; and (3) revised the period used for the calculation of an FCU's total assets. Currently, total assets are calculated using the FCU's December 31st Call Report of the preceding year. Under the proposal, total assets would be calculated as the average total assets reported on the FCU's previous four Call Reports available at the time the NCUA Board approves the agency's budget for the upcoming year, adjusted for any excludable programs as determined by the Board. Finally, the proposal would have made some minor technical conforming changes.

A. Background on the NCUA Annual Budget and Fees Paid by FCUs

The NCUA charters, regulates, and insures deposits in FCUs and insures deposits in state-chartered credit unions that have their shares insured through the National Credit Union Share Insurance Fund (Share Insurance Fund). To cover expenses related to the NCUA's tasks, the Board adopts an annual budget in the fall of each year. The Federal Credit Union Act (FCU Act) provides two primary sources to fund the budget: (1) requisitions from the Share Insurance Fund;[2] and (2) operating fees charged against FCUs.[3] The Board uses an allocation formula, the Overhead Transfer Rate (OTR), to determine the amount of the budget that it will requisition from the Share Insurance Fund.[4] Remaining amounts needed to fund the annual budget are charged to FCUs in the form of operating fees, based on each FCU's total assets.[5]

[2] *See, e.g.*, 12 U.S.C. 1783(a) (making the Share Insurance Fund available "for such administrative and other expenses incurred in carrying out the purpose of [Subchapter II of the FCU Act] as [the Board] may determine to be proper.").
[3] 12 U.S.C. 1755(a) ("In accordance with rules prescribed by the Board, each Federal credit union shall pay to the Administration an annual operating fee which may be composed of one or more charges identified as to the function or functions for which assessed.").
[4] *See, e.g.*, Request for Comment Regarding Revised Overhead Transfer Rate Methodology, 82 FR 29935 (June 30, 2017).
[5] 12 CFR 701.6(a).

The FCU Act requires each FCU to, "in accordance with rules prescribed by the Board [. . .] pay to the [NCUA] an annual operating fee which may be composed of one or more charges identified as to the function or functions for which assessed."[6] The fee must "be determined according to a schedule, or schedules, or other method determined by the Board to be appropriate, which gives due consideration to the expenses of the [NCUA] in carrying out its responsibilities under the [FCU Act] and to the ability of [FCUs] to pay the fee."[7] The statute requires the Board to, among other things, "determine the periods for which the fee shall be assessed and the date or dates for the payment of the fee or increments thereof."[8]

Section 701.6 of the NCUA's regulations governs operating fee processes.[9] The regulation establishes the following: (1) the basis for charging operating fees (i.e., total assets of the FCU, with certain exclusions, as of December 31st of the preceding year); (2) the notice the NCUA must provide to FCUs regarding the fees; (3) coverage provisions providing certain exceptions for new FCU charters, conversions, mergers, and liquidations; and (4) the assessment of administrative fees and interest for late payment, among other principles and processes.[10] Certain aspects of and adjustments to the operating fee process, such as the multipliers used to determine fees applicable to designated asset tiers, are not included in the NCUA's regulations.

[6] 12 U.S.C. 1755(a).
[7] 12 U.S.C. 1755(b).
[8] *Id.*
[9] 12 CFR 701.6.
[10] *Id.*

Instead, the Board generally adopts an operating fee schedule at an open meeting each year and publishes the schedule in the agency's annual budget and on its web site.[11]

Section 701.6(a) sets out the basis on which the NCUA assesses the operating fee. Paragraph (a) provides that FCUs must pay the NCUA an annual operating fee based on the credit union's total assets.[12] The NCUA calculates an FCU's operating fee by multiplying the dollar amount of its total assets by a percentage set by the Board based on asset tiers after considering the expenses of the NCUA and the ability of FCUs to pay the fee. The term "total assets" for purposes of the operating fee presently includes all assets, with certain exclusions, reported on an FCU's Call Report as of December 31st of the previous fiscal year.

Operating fee payments are due from FCUs in April each year, and the NCUA prepares invoices using reported assets from the prior year's December Call Report.[13] In order to provide clarity to FCUs about their operating fee charges for the upcoming year, the Board typically approves the budget and sets the associated operating fee rates in November or December of the year before the operating fee is billed. Because the budget and operating fee rates are approved before December Call Report data is available, the Chief Financial Officer uses projected FCU asset growth to set the operating fee rates. Therefore, if actual total assets reported in December Call Reports are below the projected asset growth used for setting the operating fee rates, the

[11] In November 2015, the Board delegated authority to the Chief Financial Officer to administer the Board-approved methodology and to set the operating fees as calculated per the approved methodology each annual budget cycle beginning with 2016. *See* Board Action Memorandum on 2016 Operating Fee (Nov. 19, 2015), https://www.ncua.gov/About/Documents/Agenda%20Items/AG20151119Item6a.pdf. Since that time, the operating fee schedule has been published in the NCUA's annual budget. *See* 2020-2021 Budget Justification (December 12, 2019), https://www.ncua.gov/files/agenda-items/AG20191212Item1b.pdf.
[12] 12 CFR 701.6(a).
[13] *Id.*

NCUA will collect less in operating fee revenue than it requires to fund the budget. Conversely, if total assets reported in December Call Reports are greater than projected growth, the NCUA may collect more than is required.

B. Background on the CARES Act and the SBA's Paycheck Protection Program

On March 27, 2020, President Trump signed the Coronavirus Aid, Relief, and Economic Security Act, or CARES Act, into law.[14] The law is designed to provide aid to the U.S. economy in the midst of the COVID-19 pandemic. The CARES Act authorized the SBA to create a loan guarantee program, the PPP, to help certain businesses affected by the COVID-19 pandemic meet payroll needs (including employee salaries, sick leave, other paid leave, and health insurance expenses), as well as mortgage, rent, and utilities expenses. Provided credit union lenders comply with the applicable lender obligations set forth in the SBA's interim final rule, the SBA will fully guarantee loans issued under the PPP, backed by the full faith and credit of the United States. Most federally insured credit unions were eligible to make PPP loans to members.[15] Under the CARES Act, PPP loans must receive a zero percent risk weighting for purposes of the NCUA's risk-based capital requirements.[16]

[14] Pub. L. 116-136 (Mar. 27, 2020).
[15] Credit unions that are currently permitted to make loans under the SBA's 7(a) program are automatically approved to make PPP loans. Federally insured credit unions that are not current SBA 7(a) lenders can receive approval by submitting an application to the SBA, unless they are currently designated as being in troubled condition or are subject to a formal enforcement action that addresses unsafe and unsound lending practices. Non-depository financing providers, such as credit union service organizations, may qualify as a PPP lender subject to the requirements listed in the interim final rule.
[16] Pub. L. 116-135, section 1102(a)(2).

Following enactment of the CARES Act, the Board issued an interim final rule to make several amendments to the NCUA's regulations relating to PPP loans.[17] The April 27, 2020 interim final rule provided that if a covered PPP loan made by a federally insured credit union is pledged as collateral for a non-recourse loan that is provided as part of the Board of Governors of the Federal Reserve System's (FRB) PPP Liquidity Facility,[18] the covered loan can be excluded from a credit union's calculation of total assets for the purposes of calculating its net worth ratio.[19] The exclusion of PPP loans pledged to the FRB's Liquidity Facility was comparable to an interim final rule issued by the other banking agencies with respect to their capital regulations,[20] which is consistent with the statutory requirement for the Board to prescribe a system of prompt corrective action that is, among other things, comparable to the section of the Federal Deposit Insurance Act that established prompt corrective action requirements for banks.

That change applied to only the calculation of the net worth ratio and not to other requirements or calculations in the NCUA's regulations that depend on a credit union's total assets. At present, an FCU must report the value of all of its PPP loans in its Call Reports, whether the FCU originated the loans, purchased them in the secondary market, or has pledged them to the FRB Liquidity Facility.[21] The value of PPP loans reported in Call Reports could therefore increase the total asset amounts the NCUA uses to compute the annual operating fees due. Without a change to the NCUA's current operating fee regulation,[22] an FCU's PPP loans

[17] 85 FR 23212 (Apr. 27, 2020).
[18] The program was named as both the PPP Lending Facility and the PPP Liquidity Facility when the Board approved the interim final rule. It is now named the PPP Liquidity Facility in FRB documentation on the program.
[19] 85 FR 23212.
[20] 85 FR 20387 (Apr. 13, 2020).
[21] *See* SBA Procedural Notice, Guidance on Whole Loan Sales of Paycheck Protection Program Loans (May 1, 2020), *available at* https://www.sba.gov/sites/default/files/2020-05/5000-20024.pdf.
[22] 12 CFR 701.6(a).

could subject the FCU to a higher operating fee, and this could impose a burden for participation in the program, or a disincentive to participate now that the program has been extended. As the PPP serves an important public purpose, the Board believes PPP loans warrant exclusion from total assets when determining operating fees to avoid these harms.

Under the FCU Act, the Board considers, among other things, FCUs' ability to pay assessments.[23] The Board finds that an increase in an FCU's assets based on PPP loans—regardless of whether they are pledged to the PPP Liquidity Facility—poses no undue risk to the credit union's capital strength. Additionally, given the short-term and low-fee nature of PPP loans, FCUs that report increased total assets as a result of them are unlikely to have a corresponding increase in their ability to pay a higher assessment. Furthermore, excluding PPP loans from operating fee assessments makes the program more affordable to the participants and avoids imposing a burden based on participation in a program designed to provide an important public benefit. These benefits closely align with the mission of credit unions to support their member communities through trusted and affordable financial services. Accordingly, based on this statutory analysis and application, the NCUA's proposal had a broader scope of exclusion than the Board's April 27, 2020, interim final rule on PPP loans.[24]

In a separate *Federal Register* document,[25] the Board requested comment on the methodologies it uses to set the rate schedule for operating fees and how it determines the OTR.

[23] 12 U.S.C. 1755.
[24] 85 FR 23212 (Apr. 27, 2020).
[25] 85 FR 53854 (Aug. 31 2020).

Members of the public were encouraged to comment about these methodologies by responding to that *Federal Register* notice.

II. LEGAL AUTHORITY

The Board is issuing this final rule pursuant to its authority under the FCU Act.[26] The FCU Act grants the Board a broad mandate to issue regulations governing both FCUs and, more generally, all federally insured credit unions. For example, section 120 of the FCU Act is a general grant of regulatory authority and authorizes the Board to prescribe rules and regulations for the administration of the FCU Act.[27] Section 105 of the FCU Act requires FCUs to pay an annual operating fee to the NCUA.[28] In particular, section 105(b) provides that the fee assessed under this section 105 shall be determined according to a schedule, or schedules, or other method determined by the Board to be appropriate, which gives due consideration to the expenses of the Administration in carrying out its responsibilities under this chapter and to the ability of Federal credit unions to pay the fee.[29] Section 105(b) provides further that the Board shall, among other things, determine the periods for which the fee shall be assessed and the date or dates for the payment of the fee or increments thereof. [30]

Accordingly, the FCU Act provides the Board with broad discretion to decide how the amount of the operating fee is determined.

[26] 12 U.S.C. 1751 et seq.
[27] 12 U.S.C. 1766(a).
[28] 12 U.S.C. 1755(a).
[29] 12 U.S.C. 1755(b).
[30] *Id*.

III. SUMMARY OF THE PROPOSED RULE AND PUBLIC COMMENTS

At its July 30, 2020 meeting, the NCUA Board (Board) proposed amending the agency's regulation governing assessment of an annual operating fee to federal credit unions (FCUs). The proposal provided for a 60-day comment period, which ended on October 30, 2020. The NCUA received nine comment letters in response to the proposed rule. In general, all of the letters received from commenters—two from credit union trade associations and seven from state credit union leagues—expressed broad support for the proposal. A few of the commenters, however, did raise issues for the NCUA's consideration, which are discussed in more detail below.

The proposed rule would have amended § 701.6(a) by excluding PPP loans from FCUs' total assets for purposes of calculating its operating fee. In particular, the proposal would have amended current § 701.6(a) to provide, among other things, that the operating fee shall be based on the total assets of each FCU, less loans made under the PPP.[31] Under the proposed rule, participating FCUs would have continued to report their assets in the quarterly Call Report. For purposes of determining the operating fee, the NCUA would have excluded reported PPP loans in the calculation of total assets. The NCUA believed the change would ensure that FCUs interested in making PPP loans did not bear greater financial burdens for doing so. The Board proposed excluding PPP loans from the calculation of total assets even if the PPP loans were not pledged to the FRB PPP Liquidity Facility because PPP loans pose no undue risk to the FCU's capital strength and, due to their unique structure, do not increase an FCU's ability to pay a

[31] 15 U.S.C. 636(a)(36).

higher operating fee. Excluding all reported PPP loans when determining total assets would also ensure that FCUs that do not pledge their PPP loans to the FRB are treated consistently with those FCUs that do. Absent such consistent treatment, FCUs that do not pledge their PPP loans to the FRB's Liquidity Facility would bear a larger relative cost burden of the operating fee compared to those FCUs that do pledge their PPP loans.

Comments Received: None of the commenters objected to this change. All nine of the commenters stated that they supported excluding from total assets any loan an FCU reports under the PPP and agreed with the NCUA's rationale supporting this change. Four of the commenters specifically stated further that they supported excluding PPP loans from the calculation of total assets even if the PPP loans are not pledged to the Federal Reserve Board's (FRB) PPP Liquidity Facility.

Proposing to exclude PPP loans from the calculation of total assets was similar to the amendment the Board made to the calculation of total assets in a 2009 final rule to encourage FCU participation in the Credit Union System Investment Program (CU SIP) or the Credit Union Homeowners Affordability Relief Program (CU HARP).[32] Investments in those programs were excluded from the computation of total assets because the instruments were guaranteed by the Share Insurance Fund, posed no credit risk to the participating credit unions, and the exclusion was intended to encourage a greater participation rate in programs with a clear public benefit. The CU SIP ended in 2010. Similarly, CU HARP investments were issued by the U.S. Central Federal Credit Union and all of those investments matured prior to that credit union's liquidation

[32] 74 FR 29934 (June 24, 2009).

in 2012. Because these programs no longer exist and have no remaining investments, the Board proposed to amend current § 701.6(a) to delete references to them.

Comments Received: None of the commenters objected to this change. Two commenters expressly stated that they supported deleting references to the programs and agreed with the NCUA's rationale supporting this change.

Given the potential for additional programs similar to the PPP to arise in the near future or as a result of future economic crises, the Board proposed adding regulatory language that would allow for the exclusion of assets in the future under similar programs without requiring a reference to the specific program in the regulation. Under the proposed new language, the Board anticipated making exclusions of similar future programs by issuing an order, which could be published in a letter to FCUs or a similar notice.

Comments Received: None of commenters objected to the language, and eight of the commenters stated that they supported including the general language allowing the exclusion of such programs to be approved by the Board. One of the commenters, however, suggested that the NCUA also include provisions to exclude assets related to programs that provide relief during nationwide and regional crises; for example, disaster declarations and associated SBA disaster lending authorized as a result of hurricanes or other national disasters.

NCUA Response: In response to the comment suggesting the NCUA also exclude assets related to programs that provide relief during nationwide and regional crises, the agency has

decided not to make that change in the final rule. Such a change is beyond the scope of the proposal. The NCUA, however, does plan to evaluate the feasibility and impact of such exclusions in its next cyclical review of the operating fee rule. In particular, the NCUA plans to evaluate whether SBA disaster lending presents the same general low level of risk to credit unions' balance sheets, and whether excluding SBA disaster lending from total assets would have a material impact on the regional distribution of operating fees.

In addition, the Board proposed amending current § 701.6(a) to use the average of FCUs' four most-recently reported quarterly assets to calculate operating fees and to make conforming amendments to the regulatory text to ensure this same approach was applied to merged and recently converted FCUs. The Board proposed to use an average of total assets because it believed that doing so would reduce the effect of seasonal fluctuation in the total assets of FCUs, and would provide more certainty to FCUs about their operating fee charges for the forthcoming year. The change to a four-quarter average of reported assets would also reduce the risk that the Board would collect less in operating fee revenue than it requires if actual assets reported in FCUs' December Call Reports were below the asset growth assumption used to set the operating fee rates in the budget.

In particular, the proposed rule would have amended current § 701.6(a) to provide, among other things, that the operating fee shall be based on the average of total assets of each FCU based on data reported in the preceding four Call Reports (as reported on NCUA Form 5300 for natural person FCUs and Form 5310 for corporate FCUs), or as otherwise determined pursuant to paragraph (b) of § 701.6. When determining the operating fee rate and the invoice

amounts due under the proposal, the NCUA Board would have used the average of FCUs' four most-recent Call Reports available at the time the Board approved the budget for the forthcoming year.

The Board anticipated that the proposed change would have no impact on current billing practices for newly chartered FCUs because such credit unions do not receive an operating fee invoice until the second year after they are chartered. The Board proposed continuing its current practice of treating merged FCUs and conversions of non-FCUs into FCUs as a single entity for purposes of calculating the average total assets that are the basis for determining the amount of operating fees due. For purposes of calculating the average total assets of an FCU that converts from or merges with a federally insured, state-chartered credit union (FISCU), the Board proposed computing comparable quarterly total assets using the Call Report data in the agency's possession. For conversions to an FCU charter from entities not insured by the NCUA, the Board proposed to average assets based only on Call Reports filed by the time the Board finalized its budget because the NCUA cannot validate the accuracy or consistency of other data sources that may be similar to NCUA Call Reports.

Under the proposed rule, in circumstances in which a conversion to an FCU charter from an entity not insured by the NCUA occurs in the fourth quarter of the year before the operating fee is due, no Call Report data would have been available at the time the Board finalized its budget, and the converted entity would therefore pay no operating fee in the year following conversion. While this approach would have produced a different result based only on insured status prior to conversion for entities that are otherwise of the same FCU status after the

conversion, the Board believed its lack of access to verified Call Report data for non-NCUA insured entities supported the distinction. In addition, the Board expected such circumstances to be rare occurrences, with relatively small impacts, as the maximum amount of forgone revenue is one quarter of reported assets for which a converted entity could be exempt from paying an operating fee.

While this discrepancy could be avoided if the Board continued its current practice of estimating December Call Report data as the sole point of reference for determining total assets for the operating fee, the Board believed the four-quarter average was more equitable on the whole because it could account for seasonal share account fluctuations that some FCUs experience based on the characteristics and transaction patterns engaged in by their fields of membership. As discussed above, the proposed four-quarter average approach also would have eliminated the risk that the Board could over- or under-collect operating fees based on differences between its estimation of and actual December Call Report data.[33]

With respect to mergers in which an entity not insured by the NCUA merges into a continuing FCU, the same issue existed under the proposed rule with regard to the Board's access to data comparable to the Call Report for periods prior to the merger date. Here again, the proposed rule would have combined assets looking back four quarters for mergers involving two FCUs or where a FISCU merges into a continuing FCU. On the other hand, for mergers into FCUs of entities that are not insured by the NCUA, the proposed rule would not have required

[33] While the proposed regulatory language introducing § 701.6(b)(2)(i)(B) could be read to require an entity not insured by the NCUA that converts to a FCU charter in the fourth quarter to pay a fee in the year following conversion, the lack of available Call Report data prior to the date the Board adopts the budget would preclude a fee in that scenario.

the combination of assets prior to the merger date, because the NCUA does not collect asset data for entities it does not insure. Instead, the continuing FCU would have paid a fee based only on assets reported on its own Call Reports filed prior to the effective date of the merger. Depending on the specific timing of when the merger occurred, this could have resulted in multiple quarters where the assets acquired from the non-NCUA insured entity were not included in the calculated average assets used to bill the continuing FCU. For the same reasons expressed above with respect to conversions, the Board believed the benefits of the four-quarter average outweighed the different treatment for mergers with FISCUs compared to mergers with entities not insured by the NCUA.

With respect to purchase and assumption transactions, the regulation presently designates that such transactions will be treated as mergers in circumstances in which an FCU purchases all or essentially all of the assets of another credit union. Under the proposal, the Board retained that language, but requested comments on alternative approaches the Board may wish to consider. The Board acknowledged that, in some circumstances, determining whether a purchase and assumption included all or essentially all assets could be a difficult determination.

Comments Received: All nine commenters stated that they supported these change and generally agreed with the NCUA's rationale supporting this change. While all of the commenters supported this change, four of the commenters did ask that the NCUA also regularly review this change and its impact to ensure it does not cause any unintended consequences.

Although beyond the scope of this proposal, one commenter did suggested that the NCUA further amend § 701.6 to treat mergers into and conversions with federally insured, state-chartered credit unions (FISCUs) differently. The commenter stated that, while the current rule bars the payment of a fee refund when a conversion to or merger into a FISCU occurs, the NCUA should reconsider this issue since the resulting credit union's NCUSIF deposit will reflect the merger, unlike a combination with an entity that is not NCUSIF-insured, and the resulting entity is not an FCU. The commenter suggested that the NCUA provide pro rata fee refunds if an FCU converts to or merges into a FISCU.

NCUA Response: In response to the comment suggesting that the NCUA regularly review these changes and their impact, the NCUA reviews all of its existing regulations every three years. The NCUA's Office of General Counsel maintains a rolling review schedule that identifies one-third of the NCUA's existing regulations for review each year and provides notice to the public of those regulations under review so the public may have an opportunity to comment. The changes made by this final rule will be regularly reviewed as part of that process and the credit union industry and public will be given a regular opportunity to raise any concerns they may have.

In response to the comment suggesting that the NCUA issue a pro rata fee refund to an FCU that converts to or merges into a FISCU, the agency has made no changes in the final rule. Such a change would be outside the scope of the proposal. Moreover, the operating fees charged to FCUs are based on a detailed workload projection of the agency's examination program, which is used to inform the agency's annual budget formulation and calculation of operating fee

collections. The agency generally does not have insight into the future merger or charter conversion plans of a given FCU, and therefore must base its workload estimates on the population of FCUs that exist in the year before the budget is set and the fee is calculated. If the NCUA were to issue pro rata refunds to FCUs that subsequently merge with or convert to a FISCU, it would face continuing, unfunded liabilities for staff salaries and associated expenses that could not be recouped from other sources since the operating fee is billed only once annually. Similarly, the OTR share of the annual operating budget is determined in part based on the relative distribution of projected workload between FCUs and FISCUs in the year before the OTR is applied to actual operating expenses. Although the NCUA's actual workload may be marginally reduced if an FCU converts to or merges with a FISCU, such a change cannot be retroactively applied to the OTR used in a given year.

The Board also proposed some technical changes to existing rule language. First, the proposed rule clarified that the NCUA would not issue refunds of operating fees to FCUs that convert to any other type of charter, not just a state charter. The proposed rule was intended to ensure the same treatment for a conversion to a mutual savings bank or any other charter type. The Board also proposed removing the language "in the year in which the conversion takes place" from the provision, as a refund is never provided to any converting FCU, regardless of timing. The Board proposed the same changes to the rule text on refunds in the context of mergers.

Comments Received: The NCUA received no objections to this change.

In addition, the Board proposed to expand the situations expressly covered in the regulation to include conversions and mergers involving entities not insured by the NCUA. Such transactions could involve privately insured, state-chartered credit unions or banking institutions. To support this expansion, the proposed regulatory language introduced the phrase "entity not insured by the NCUA." In the language specifying that certain purchase and assumption transactions would be treated as mergers, the Board proposed changing the term "credit union" to "depository institution" to clarify that a purchase and assumption involving a bank, for example, would be treated in the same manner. Finally, the proposed rule would have divided paragraph (b) of the regulation into additional subparagraphs to improve readability.

Comments Received: The NCUA received no objections to this change.

III. SUMMARY OF THE FINAL RULE

For the reasons discussed above, the Board is issuing this final rule without change from the proposed rule. Revised § 701.6(a) provides that each calendar year, or as otherwise directed by the Board, each federal credit union shall pay an operating fee to the NCUA for the current fiscal year (January 1 to December 31) in accordance with a schedule fixed by the Board from time to time. New § 701.6(a)(1) provides that the operating fee shall be based on the average of total assets of each federal credit union based on data reported in NCUA Forms 5300 and 5310 from the four quarters immediately preceding the time the Board approves the agency's budget or as otherwise determined pursuant to paragraph (b) of this section. New § 701.6(a)(2) provides that for purposes of calculating the operating fee, total assets shall not include any loans on the books of a natural person federal credit union made under the Small Business Administration's

Paycheck Protection Program, 15 U.S.C. 636(a)(36), or any similar program approved for exclusion by the Board.

Revised § 701.6(b), Coverage, provides that the operating fee shall be paid by each federal credit union engaged in operations as of January 1 of each calendar year in accordance with paragraph (a), except as otherwise provided by this paragraph. Section 701.6(b)(1), New Charters, continues to provide that a newly chartered FCU will not pay an operating fee until the year following the first full calendar year after the date chartered. Revised § 701.6(b)(2), Coverage, continues to address coverage issues, but now includes several new subsections. New § 701.6(b)(2)(i)(A) provides that in the first calendar year following conversion: A FISCU that converts to an FCU charter must pay an operating fee based on the average assets reported in the year of conversion on NCUA Forms 5300 or 5310 from the four quarters immediately preceding the time the Board approves the agency's budget in the year of conversion. New § 701.6(b)(2)(i)(B) provides that in the first calendar year following conversion: An entity not insured by the NCUA that converts to an FCU charter must pay an operating fee based on the assets, or average thereof, reported on NCUA Forms 5300 or 5310 for any one or more quarters immediately preceding the time the Board approves the agency's budget in the year of conversion. New § 701.6(b)(2)(ii) provides that an FCU converting to a different charter will not receive a refund of any operating fees paid to the NCUA.

Revised § 701.6(b)(3), Mergers, continues to address merger issues, but now includes several new subsections. New § 701.6(b)(3)(i)(A) provides that in the first calendar year following merger: A continuing FCU that has merged with one or more federally insured credit

unions must pay an operating fee based on the average combined total assets of the FCU and any merged federally insured credit unions as reported on NCUA Forms 5300 or 5310 in the four quarters immediately preceding the time the Board approves the agency's budget in the merger year. New § 701.6(b)(3)(i)(B) provides that for purposes of paragraph (b)(3), a purchase and assumption transaction in which the continuing FCU purchases all or essentially all of the assets of another depository institution shall be deemed a merger. New § 701.6(b)(3)(ii) provides that an FCU that merges with a federal or state-chartered credit union, or an entity not insured by the NCUA, will not receive a refund of any operating fee paid to the NCUA.

Finally, § 701.6(b)(4), Liquidations, continues to provide that an FCU placed in liquidation will not pay any operating fee after the date of liquidation.

IV. REGULATORY PROCEDURES

A. Regulatory Flexibility Act

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

This final rule will make a technical change to the period for measuring total assets for calculating the Operating Fee. However, the Board does not believe the impact will disproportionally impact small credit unions such that a regulatory flexibility analysis is required. First, small credit unions are still required to report assets on a quarterly basis, and the regulation only increases the number of quarters the NCUA will consider in adjusting the operating fee. Nor does the exclusion of PPP loans from assets increase reporting requirements, as the NCUA already has the information necessary to make that exclusion. Finally, although exclusion of PPP loans will decrease fee amounts for some small credit unions, the Board does not believe the change will amount to a significant impact on a substantial number of small entities. Accordingly, the NCUA certifies that this final rule will not have a significant economic impact on a substantial number of small credit unions.

B. Paperwork Reduction Act

The Paperwork Reduction Act of 1995 (PRA) applies to rulemakings in which an agency creates a new or amends existing information collection requirements.[34] For the purpose of the PRA, an information collection requirement may take the form of a reporting, recordkeeping, or a third-party disclosure requirement. This final rule does not contain information collection requirements that require approval by OMB under the PRA.[35]

C. Small Business Regulatory Enforcement Fairness Act

[34] 44 U.S.C. 3507(d); 5 CFR part 1320.
[35] 44 U.S.C. Chap. 35.

The Small Business Regulatory Enforcement Fairness Act of 1996 (Pub. L. 104-121) (SBREFA) generally provides for congressional review of agency rules.[36] A reporting requirement is triggered in instances where the NCUA issues a final rule as defined by Section 551 of the APA.[37] An agency rule, in addition to being subject to congressional oversight, may also be subject to a delayed effective date if the rule is a "major rule."[38] The NCUA does not believe this rule is a "major rule" within the meaning of the relevant sections of SBREFA. As required by SBREFA, the NCUA will submit this final rule to OMB for it to determine if the final rule is a "major rule" for purposes of SBREFA. The NCUA also will file appropriate reports with Congress and the Government Accountability Office so this rule may be reviewed.

D. Executive Order 13132

Executive Order 13132 encourages independent regulatory agencies to consider the impact of their actions on state and local interests. In adherence to fundamental federalism principles, the NCUA, an independent regulatory agency as defined in 44 U.S.C. 3502(5), voluntarily complies with the Executive Order. This final rule will not have a substantial direct effect on the states, on the connection between the national government and the states, or on the distribution of power and responsibilities among the various levels of government. The NCUA has determined that this final rule does not constitute a policy that has federalism implications for purposes of the Executive Order.

[36] 5 U.S.C. 801-804.
[37] 5 U.S.C. 552.
[38] 5 U.S.C. 804(2).

D. Assessment of Federal Regulations and Policies on Families

The NCUA has determined that this final rule will not affect family well-being within the meaning of Section 654 of the Treasury and General Government Appropriations Act, 1999.[39]

List of Subjects in 12 CFR Part 701

Credit unions, Low income, Nonmember deposits, Secondary capital, Shares

By the National Credit Union Administration Board on December 17, 2020.

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Melane Conyers-Ausbrooks

Secretary of the Board

For the reasons discussed above, the Board amends 12 CFR part 701 as follows:

PART 701 – Organization and Operations of Federal Credit Unions

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

[39] Pub. L. 105–277, 112 Stat. 2681 (1998).

Authority: 12 U.S.C. 1752(5), 1755, 1756, 1757, 1758, 1759, 1761a, 1761b, 1766, 1767, 1782, 1784, 1785, 1786, 1787, 1788, 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. In § 701.6 revise paragraphs (a) and (b) to read as follows:

§ 701.6 Fees paid by Federal credit unions.

(a) *Basis for assessment.* Each calendar year, or as otherwise directed by the NCUA Board, each federal credit union shall pay an operating fee to the NCUA for the current fiscal year (January 1 to December 31) in accordance with a schedule fixed by the Board from time to time.

(1) *General*. The operating fee shall be based on the average of total assets of each federal credit union based on data reported in NCUA Forms 5300 and 5310 from the four quarters immediately preceding the time the Board approves the agency's budget or as otherwise determined pursuant to paragraph (b) of this section.

(2) *Exclusions from total assets*. For purposes of calculating the operating fee, total assets shall not include any loans on the books of a natural person federal credit union made under the Small Business Administration's Paycheck Protection Program, 15 U.S.C. 636(a)(36), or any similar program approved for exclusion by the NCUA Board.

(b) *Coverage.* The operating fee shall be paid by each federal credit union engaged in operations as of January 1 of each calendar year in accordance with paragraph (a), except as otherwise provided by this paragraph.

(1) *New charters*. A newly chartered federal credit union will not pay an operating fee until the year following the first full calendar year after the date chartered.

(2) *Conversions*.

(i) In the first calendar year following conversion:

(A) A federally insured state-chartered credit union that converts to a federal credit union charter must pay an operating fee based on the average assets reported in the year of conversion on NCUA Forms 5300 or 5310 from the four quarters immediately preceding the time the Board approves the agency's budget in the year of conversion.

(B) An entity not insured by the NCUA that converts to a federal credit union charter must pay an operating fee based on the assets, or average thereof, reported on NCUA Forms 5300 or 5310 for any one or more quarters immediately preceding the time the Board approves the agency's budget in the year of conversion.

(ii) A federal credit union converting to a different charter will not receive a refund of any operating fees paid to the NCUA.

(3) *Mergers*.

(i) In the first calendar year following merger:

(A) A continuing federal credit union that has merged with one or more federally insured credit unions must pay an operating fee based on the average combined total assets of the federal credit union and any merged federally insured credit unions as reported on NCUA Forms 5300 or 5310 in the four quarters immediately preceding the time the Board approves the agency's budget in the merger year.

(B) For purposes of this paragraph, a purchase and assumption transaction where the continuing federal credit union purchases all or essentially all of the assets of another depository institution shall be deemed a merger.

(ii) A federal credit union that merges with a federal or state-chartered credit union, or an entity not insured by the NCUA, will not receive a refund of any operating fee paid to the NCUA.

(4) *Liquidations*. A Federal credit union placed in liquidation will not pay any operating fee after the date of liquidation.

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