

related to an employee benefit. That language could arguably permit an FCU to make larger than necessary investments or hold investments longer than necessary to meet the employee benefit obligation, which would indicate an FCU was investing for its own account. The requirement in the regulation that investments must be directly related to the employee benefit obligation is intended to capture prior legal analysis and state simply and succinctly the requirements applicable to investments made to fund employee benefits.

While some commenters would like NCUA to specify the types of records or record keeping that would demonstrate that an investment is directly related to funding an employment benefit, NCUA is reluctant to impose specific requirements given the broad range of employee benefit plans and funding options that exist. NCUA believes that, if an FCU is holding an otherwise impermissible investment to fund an employee benefit, the FCU's records should reflect that the FCU purchased the investment exclusively for the purpose of funding the employee benefit obligation. Information in an FCU's records that would demonstrate this purpose might include: employee benefit plan documents, date or dates of investment purchases consistent with the assumption of the employee benefit obligation, anticipated maturity of the investment, and evidence that the FCU has calculated the amount of the investment and the anticipated return from the investment to match the FCU's obligation.

Defined Benefit Plans. Half of the commenters stated that prohibiting variable rate investments to fund defined benefit plans not subject to ERISA is too restrictive. About the same number also stated or implied NCUA has ample authority to regulate the safety and soundness of these investments through its examination and supervision program. Ten commenters contended that, if FCUs are subject to additional investment restrictions, they will have higher costs of funding employee benefits and will be at a disadvantage in competing for talented employees with state-chartered credit unions and other financial institutions.

The NCUA Board has decided not to distinguish between defined benefit and defined contribution plans in the final rule or place additional requirements on defined benefit plans not covered by ERISA. Thus, all employee benefit plans will be subject to the general requirements set out in both the first and second proposed rules, namely, that

an investment to fund an employee benefit must be directly related to the FCU's obligation, may only be held as long as the FCU is obligated, and the amount must be reasonable given the size and condition of the FCU. NCUA believes this approach will maximize investment flexibility and minimize confusion and competitive disadvantage for FCUs.

NCUA still believes, as noted in the second proposal, that defined benefit plans not subject to ERISA pose additional risks for FCUs and, for that reason, has included in the regulation guidance regarding diversification of investments. NCUA believes an FCU investing to fund a defined benefit plan not subject to ERISA should diversify its investment portfolio, which may include investments in insurance products, to minimize the risk of large losses, unless it is clearly prudent not to do so under the circumstances.

Regardless of what kind of investment plan is used, an FCU must comply with safety and soundness standards by ensuring that the kind and amount of employee benefits it offers are reasonable given its size, financial condition, and the duties of the employees. Furthermore, an FCU's authority to offer and fund an employee benefit plan does not guarantee the permissibility or treatment of the plan under other laws, such as ERISA and the Internal Revenue Code.

Finally, § 701.19(e) provides that an FCU acting as a fiduciary, as defined in ERISA, must obtain appropriate liability coverage as provided in § 410(b) of ERISA. NCUA wishes to clarify that § 410(b) of ERISA describes certain kinds of insurance coverage and permits certain parties to purchase that insurance, but does not require any party to purchase insurance. 29 U.S.C. 1110.

Regulatory Procedures

Regulatory Flexibility Act

The Regulatory Flexibility Act requires NCUA to prepare an analysis to describe any significant economic impact a proposed regulation may have on a substantial number of small entities (under \$1 million in assets). This rule clarifies that federal credit unions have additional options and flexibility to manage their employee benefit obligations without imposing any regulatory burden. The final amendments will not have a significant economic impact on a substantial number of small credit unions and, therefore, a regulatory flexibility analysis is not required.

Paperwork Reduction Act

NCUA has determined that the final rule would not increase paperwork requirements under the Paperwork Reduction Act of 1995 and regulations of the Office of Management and Budget.

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. The final rule would not have substantial direct effects 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 final rule does not constitute a policy that has federalism implications for purposes of the executive order.

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

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

Small Business Regulatory Enforcement Fairness Act

The Small Business Regulatory Enforcement Fairness Act of 1996 (Pub. L. 104-121) provides generally for congressional review of agency rules. A reporting requirement is triggered in instances where NCUA issues a final rule as defined by Section 551 of the Administrative Procedure Act. 5 U.S.C. 551. The Office of Management and Budget has determined that this rule is not a major rule for purposes of the Small Business Regulatory Enforcement Fairness Act of 1996.

List of Subjects in 12 CFR Part 701

Credit Unions.

By the National Credit Union Administration Board on April 24, 2003.

Becky Baker,

Secretary of the Board.

■ Accordingly, NCUA amends 12 CFR part 701 as follows: