

General Counsel, at the above address or telephone: (703) 518-6540.

SUPPLEMENTARY INFORMATION:

A. Background

Swaps are financial derivative transactions. NCUA's corporate rule permits corporate credit unions to engage in derivative transactions, including swaps, if specifically approved for such activity by the Board. 12 CFR part 704, Appendix B, part IV. NCUA's investment regulation generally prohibits natural person Federal credit unions from engaging in financial derivatives activities, but NCUA may approve a credit union for participation in an investment pilot program involving swaps and other derivatives. 12 CFR 703.110(a), 703.140. State chartered natural person credit unions that are Federally-insured may engage in swaps if permitted under their chartering statutes.

In 1989, Congress amended both the Federal Deposit Insurance Act (FDIA) and the Federal Credit Union Act (FCU Act) to add provisions concerning the treatment of QFCs in liquidation, receivership, or conservatorship. 12 U.S.C. 1821(e)(3), (8); 1787(c)(3), (8). Generally, these QFC provisions enable a QFC counterparty to exercise its contractual rights to terminate and net QFCs and protect itself against the selective assumption of QFCs by a liquidating agent, receiver, or conservator. QFC treatment limits counterparty exposure and preserves market stability when a bank or credit union with QFCs enters liquidation, receivership, or conservatorship.

The FDIA provides that "the term 'qualified financial contract' means any securities contract, commodities contract, forward contract, repurchase agreement, *swap agreement*, and any similar agreement that the [Federal Deposit Insurance] Corporation (FDIC) determines by regulation to be a qualified financial contract for purposes of this paragraph." 12 U.S.C. 1821(e)(8)(D)(i)(emphasis added). The FCU Act's QFC definition is very similar to the FDIA's definition and includes securities contracts, forward contracts, and repurchase agreements but omits swaps and commodities contracts. The FCU Act authorizes the NCUA Board, like the FDIA authorizes the FDIC, to add similar agreements to the definition of QFC by regulation. 12 U.S.C. 1787(c)(8)(D)(i).

The Board believes swaps are similar to those agreements enumerated in the FCU Act's definition and should be recognized as QFCs. See H.R. Rep. No. 101-484 at 1 (recognizing that swaps are "similar" to forward contracts,

securities contracts, and repurchase agreements), to accompany Pub. L. 101-311 (Bankruptcy: Swap Agreements and Forward Contracts), *reprinted in* 1990 U.S.C.C.A.N. 223. A Board determination that swaps receive QFC treatment will provide greater certainty about the treatment of swaps if a Federally-insured credit union is placed into involuntary liquidation or a conservatorship, will encourage counterparties to engage in swaps with credit unions, and will parallel the FDIA treatment of swaps involving banks.

Generally, NCUA provides a 60-day comment period on proposed rules. NCUA Interpretative Ruling and Policy Statement 87-2, Developing and Reviewing Government Regulations, III. The Board has determined that a 30-day comment period, rather than a 60-day comment period, is appropriate for this proposed rule. The proposed rule should not be controversial. Few credit unions are currently authorized to engage in swaps, and the treatment of swaps as QFCs would be beneficial to both credit unions and counterparties, including banks, that engage in swaps with credit unions.

Until a final rule is effective, the Board has determined that it will exercise its discretion as liquidating agent or conservator and provide swaps with QFC treatment if there is a liquidation or conservatorship involving swaps.

Regulatory Procedures

Regulatory Flexibility Act

The Regulatory Flexibility Act requires NCUA to prepare an analysis to describe any significant economic impact a proposed rule may have on a substantial number of small credit unions (those under one million dollars in assets). The Board believes it unlikely that any small Federally-insured credit unions engage in swaps. Accordingly, the Board believes that the proposed rule would 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 proposed 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 proposed 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 proposed 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 proposed 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).

Agency Regulatory Goal

NCUA's goal is to promulgate clear and understandable regulations that impose minimal regulatory burden. We request your comments on whether the proposed rule is understandable and minimally intrusive.

List of Subjects in 12 CFR Part 709

Credit unions, Liquidations.

By the National Credit Union Administration Board on February 20, 2003.

Becky Baker,

Secretary of the Board.

Accordingly, NCUA proposes to amend 12 CFR part 709 as follows:

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

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

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

2. Add § 709.13 to read as follows:

§ 709.13 Treatment of swap agreements in liquidation or conservatorship.

The Board has determined that a swap agreement, as defined in the Federal Deposit Insurance Act at 12 U.S.C. 1821(e)(8)(D)(vi), is a qualified financial contract for purposes of the special