

Public Document Room at One White Flint North, 11555 Rockville Pike (first floor), Rockville, Maryland. The Commission requests public comment on the regulatory analysis. Comments should be submitted to the NRC in accordance with the instructions in the **ADDRESSES** section of this notice.

### Regulatory Flexibility Certification

In accordance with the Regulatory Flexibility Act, as amended, 5 U.S.C. 605(b), the Commission certifies that this proposed rule would not, if adopted, have a significant economic impact on a substantial number of small entities. This proposed rule would affect only the renewal of nuclear power reactor licenses. The companies that own these reactors are not "small entities" as defined in the Regulatory Flexibility Act or the Size Standards established by the NRC (10 CFR 2.810).

### Backfit Analysis

The NRC has determined that the backfit rule does not apply to this proposed rule. The proposed rule would (1) permissively relax the current requirement in § 50.33(f) for submission of financial qualifications information by entities other than electric utilities seeking renewal of their nuclear power plant operating licenses, and (2) impose a new requirement for submission of financial information on electric utilities who hold operating licenses for nuclear power reactors, who cease to be electric utilities in a manner other than a license transfer under 10 CFR 50.80. Such information collection and reporting requirements do not constitute regulatory actions to which the backfit rule applies. In addition, with respect to the permissive relaxation in § 50.33(f), such relaxations do not "impose" a requirement, which is an essential element of "backfitting" as defined in § 50.109(a)(1).

Accordingly, the proposed rule's provisions do not constitute a backfit and a backfit analysis need not be performed. However, the staff has prepared a regulatory analysis that identifies the benefits and costs of the proposed rule and evaluates other options for addressing the identified issues. As such, the regulatory analysis constitutes a "disciplined approach" for evaluating the merits of the proposed rule and is consistent with the intent of the backfit rule.

### List of Subjects in 10 CFR Part 50

Antitrust, Classified information, Criminal penalties, Fire protection, Intergovernmental relations, Nuclear power plants and reactors, Radiation protection, Reactor siting criteria,

Reporting and recordkeeping requirements.

For the reasons set forth in the preamble and under the authority of the Atomic Energy Act of 1954, as amended; the Energy Reorganization Act of 1974, as amended; and 5 U.S.C. 553, the NRC is proposing to adopt the following amendments to 10 CFR part 50.

### PART 50—DOMESTIC LICENSING OF PRODUCTION AND UTILIZATION FACILITIES

1. The authority citation for part 50 continues to read as follows:

**Authority:** Secs. 102, 103, 104, 105, 161, 182, 183, 186, 189, 68 Stat. 936, 938, 948, 953, 954, 955, 956, as amended, sec. 234, 83 Stat. 444, as amended (42 U.S.C. 2132, 2133, 2134, 2135, 2201, 2232, 2233, 2239, 2282); secs. 201, as amended, 202, 206, 88 Stat. 1242, as amended, 1244, 1246 (42 U.S.C. 5841, 5842, 5846).

Section 50.7 also issued under Pub. L. 95–601, sec. 10, 92 Stat. 2951, as amended by Pub. L. 102–486, sec. 2902, 106 Stat. 3123 (42 U.S.C. 5851). Section 50.10 also issued under secs. 101, 185, 68 Stat. 936, 955, as amended (42 U.S.C. 2131, 2235); sec. 102, Pub. L. 91–190, 83 Stat. 853 (42 U.S.C. 4332). Sections 50.13, 50.54(dd), and 50.103 also issued under sec. 108, 68 Stat. 939, as amended (42 U.S.C. 2138). Sections 50.23, 50.35, 50.55, and 50.56 also issued under sec. 185, 68 Stat. 955 (42 U.S.C. 2235). Sections 50.33a, 50.55a, and Appendix Q also issued under sec. 102, Pub. L. 91–190, 83 Stat. 853 (42 U.S.C. 4332). Sections 50.34 and 50.54 also issued under Pub. L. 97–415, 96 Stat. 2073 (42 U.S.C. 2239). Section 50.78 also issued under sec. 122, 68 Stat. 939 (42 U.S.C. 2152). Sections 50.80 and 50.81 also issued under sec. 184, 68 Stat. 954, as amended (42 U.S.C. 2234). Appendix F also issued under sec. 187, 68 Stat. 955 (42 U.S.C. 2237).

2. In § 50.33, paragraph (f)(2) is revised to read as follows:

### § 50.33 Contents of applications; general information.

\* \* \* \* \*

(f) \* \* \*

(2) If the application is for an operating license, the applicant shall submit information that demonstrates the applicant possesses or has reasonable assurance of obtaining the funds necessary to cover estimated operation costs for the period of the license. The applicant shall submit estimates for total annual operating costs for each of the first five years of operation of the facility. The applicant shall also indicate the source(s) of funds to cover these costs. An applicant seeking to renew or extend the term of an operating license for a power reactor need not submit the financial information that is required in an application for an initial license. Applicants to renew or extend the term

of an operating license for a nonpower reactor shall include the financial information that is required in an application for an initial license.

\* \* \* \* \*

3. Section 50.76 is added to read as follows:

### § 50.76 Licensee's change of status; financial qualifications.

An electric utility licensee holding an operating license (including a renewed license) for a nuclear power reactor, no later than 75 days prior to ceasing to be an electric utility in any manner not involving a license transfer under § 50.80 of this part, shall provide the NRC with the financial qualifications information that would be required for obtaining an initial operating license as specified in § 50.33(f)(2). The financial qualifications information must address the first full five years of operation after the date the licensee ceases to be an electric utility.

Dated at Rockville, Maryland, this 29th day of May 2002.

For the Nuclear Regulatory Commission.

**Annette L. Vietti-Cook,**

*Secretary of the Commission.*

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### NATIONAL CREDIT UNION ADMINISTRATION

#### 12 CFR Parts 702, 741 and 747

#### Prompt Corrective Action

**AGENCY:** National Credit Union Administration (NCUA).

**ACTION:** Proposed rule.

**SUMMARY:** In 2000, the National Credit Union Administration (NCUA) adopted a comprehensive system of prompt corrective action consisting of minimum capital standards for federally-insured credit unions and corresponding remedies for restoring net worth. After six quarters of implementation experience, NCUA requests public comment on proposed revisions and adjustments intended to improve and simplify the system of prompt corrective action.

**DATES:** Comments must be received on or before August 5, 2002.

**ADDRESSES:** Direct comments to Becky Baker, Secretary of the Board. Mail or hand-deliver comments to: National Credit Union Administration, 1775 Duke Street, Alexandria, Virginia 22314–3428. *You are encouraged to fax comments to (703) 518–6319 or e-mail comments to [regcomments@ncua.gov](mailto:regcomments@ncua.gov)*

instead of hand-delivering them. Whichever method you choose, *please send comments by one method only.*

**FOR FURTHER INFORMATION CONTACT:**

*Technical:* Herbert S. Yolles, Deputy Director, Office of Examination and Insurance, at the above address or by telephone (703) 518-6360. *Legal:* Steven W. Widerman, Trial Attorney, Office of General Counsel, at the above address or by telephone (703) 518-6557.

**SUPPLEMENTARY INFORMATION:**

A. Background

1. Existing Part 702
2. Where Credit Unions Stand Today
3. Request for Comments

B. Section-by-Section Analysis of Proposed Revisions

1. Section 702.2—Definitions
2. Section 702.101—Measure and effective date of net worth classification
3. Section 702.107—Alternative component for loans sold with recourse
4. Section 702.108—Risk mitigation credit
5. Section 702.201—PCA for “Adequately Capitalized” credit unions.
6. Section 702.204—PCA for “Critically Undercapitalized” credit unions
7. Section 702.205—Consultation with State officials on proposed PCA.
8. Section 702.206—Net worth restoration plans
9. Section 702.303—PCA for “Adequately Capitalized” new credit unions
10. Section 702.304—PCA for “Moderately Capitalized,” “Marginally Capitalized” and “Minimally Capitalized” new credit unions
11. Section 702.305—PCA for “Uncapitalized” new credit unions
12. Section 702.306—Revised business plans for new credit unions
13. Section 702.401—Charges to the regular reserve
14. Section 702.403—Payment of dividends
15. Section 741.3—Adequacy of reserves
16. Section 747.2005—Enforcement of orders

The following acronyms are used throughout:

- CUMAA Credit Union Membership Access Act
- DSA Discretionary Supervisory Action
- MBL Member Business Loan

- MSA Mandatory Supervisory Action
- NWRP Net Worth Restoration Plan
- OCA Other Corrective Action
- PCA Prompt Corrective Action
- RBNW Risk-Based Net Worth
- RBP Revised Business Plan
- RMC Risk Mitigation Credit
- ROA Return on assets

Throughout the Supplementary Information section, citations to part 702 refer to the current version of 12 CFR 702 *et seq.* (2002) and are abbreviated to the section number only.

**A. Background**

*1. Existing Part 702*

In 1998, the Credit Union Membership Access Act (“CUMAA”), Pub. L. No. 105-219, 112 Stat. 913 (1998), amended the Federal Credit Union Act (“the Act”) to require NCUA to adopt by regulation a system of minimum capital standards for federally-insured “natural person” credit unions. 12 U.S.C. 1790d *et seq.* This system, known as “prompt corrective action” (“PCA”), is indexed to five statutory net worth categories.

In February 2000, the NCUA Board adopted part 702 and subpart L of part 747, establishing a comprehensive system of PCA. 65 FR 8560 (Feb. 18, 2000). Subpart A of part 702 consists of standards for calculating a credit union’s net worth and classifying it among the five statutory net worth categories. 12 CFR 702.101-108. Subpart B combines mandatory and discretionary supervisory actions indexed to the five categories, as well as PCA-based conservatorship and liquidation. §§ 702.201-206. Subpart C consists of a system of PCA for “new” credit unions. §§ 702.301-307. Subpart D prescribes reserve accounts, requirements for full and fair disclosure of financial condition, and prerequisites for paying dividends consistent with the earnings retention requirement in subpart B. §§ 702.401-403. In addition to these substantive provisions, subpart L of part 747 established an

independent review process allowing affected credit unions and officials to challenge PCA decisions. 12 CFR 747.2001 *et seq.* (2000).

In July 2000, the NCUA Board integrated a risk-based net worth (“RBNW”) component into part 702, as CUMAA mandated. 65 FR 44950 (July 20, 2000). The RBNW requirement applies to non-“new” credit unions, § 702.102(a)(1)-(2), that satisfy minimum RBNW and asset size requirements, § 702.103, and whose portfolios of assets and liabilities carry above average risk exposure. § 702.104. A credit union whose net worth ratio does not meet its RBNW requirement under any of three methods (standard calculation, alternative components, risk mitigation credit) is classified to the “undercapitalized” net worth category. 12 U.S.C. 1790d(c)(1)(C)(ii); § 702.102(a)(3).

Part 702 and subpart L of part 747 were effective August 7, 2000, and first applied to activity in the fourth quarter of 2000 as reflected in the Call Report for that period. The RBNW component of part 702 was effective January 1, 2001, and first applied (for quarterly Call Report filers) to activity in the first quarter of 2001 as reflected in the Call Report for that period.<sup>1</sup>

At the conclusion of the initial PCA rulemaking process, the NCUA Board directed the “PCA Oversight Task Force” (a working group consisting of NCUA staff and State regulators) to review at least a full year of PCA implementation and recommend necessary modifications. 65 FR at 44964. The proposed revisions presented below for comment are a product of that review.

*2. Where Credit Unions Stand Today*

a. Net worth classification

As of December 31, 2001, federally-insured credit unions are classified as follows within the PCA net worth categories:

TABLE A.—NET WORTH CLASSIFICATION OF NON-“NEW” FICUS

Net worth category	Net worth ratio	# of non-“new” FICUS	Percent of all non-“new” FICUS
“Well Capitalized” .....	7% or greater	9634	96.96%
“Adequately Capitalized” .....	6% to 6.99%	210	2.11%
“Undercapitalized” .....	4% to 5.99%	53	0.53%
“Significantly Undercapitalized” .....	2% to 3.99%	23	0.24%
“Critically Undercapitalized” .....	Less than 2%	15	0.15%

<sup>1</sup> Part 702 has since been amended twice—once to incorporate limited technical corrections, 65 FR 55439 (Sept. 14, 2000), and once to delete sections

made obsolete (§§ 702.101(c)(2)-(3) and 702.103(b)) by the recently adopted uniform quarterly schedule

for filing Call Reports regardless of asset size. 67 FR 12459 (March 19, 2002).

TABLE B.—NET WORTH CLASSIFICATION OF “NEW” FICUS

“New” net worth category	Net worth ratio	# of “new” FICUS	Percent of all “new” FICUS
“Well Capitalized”	7% or greater	0	0
“Adequately Capitalized”	6% to 6.99%	6	12.50%
“Moderately Capitalized”	3.5% to 5.99%	19	39.58%
“Marginally Capitalized”	2% to 3.49%	8	16.67%
“Minimally Capitalized”	0% to 1.99%	10	20.83%
“Uncapitalized”	Less than 0%	5	10.42%

#### b. RBNW requirement

As of December 31, 2001, 399 federally-insured credit unions—4 percent of the total—were required to meet an RBNW requirement. Of these, 393 met the requirement using the “standard calculation.” § 702.106. The six that failed under the “standard calculation” met their RBNW requirement using the “alternative components.” § 702.107. To date, no credit union has completely failed its RBNW requirement, and no credit union has applied for a “Risk Mitigation Credit.” § 702.108.

#### 3. Request for Comments

Through this notice, NCUA invites public comment on a series of proposed revisions to part 702 prompted by six quarters of experience implementing PCA. To facilitate consideration of the public’s views, we ask commenters to organize and identify their comments by corresponding part 702 section number and/or topic and to include general comments, if any, in a separate section at the end. Also, for purposes of this rulemaking, please confine your comments to the NCUA regulations that implement PCA—part 702 and subpart L of part 747.

In addressing the proposed revisions, we urge commenters to recognize that, while given substantial discretion in certain areas of PCA, NCUA lacks the authority to override or expand by regulation the requirements, limitations and definitions that CUMAA expressly prescribed. See 12 U.S.C. 1790d(n) (forbidding action “in derogation” of what CUMAA prescribes). For example, NCUA lacks the statutory authority to expand CUMAA’s express, limited definition of “net worth” for PCA purposes. 12 U.S.C. 1790d(o)(2)(A). This rulemaking will not address comments advocating modifications to part 702 that exceed the scope of NCUA’s statutory authority.

To ensure that the system of PCA for federally-insured credit unions is “workable, fair and effective in light of the cooperative character of credit unions,” S. Rep. No. 193, 105th Cong., 2d Sess. 14 (1998), the NCUA Board

welcomes broad public input addressing the revisions proposed below.

#### B. Section-by-Section Analysis of Proposed Revisions

##### PART 702—PROMPT CORRECTIVE ACTION

###### 1. Section 702.2—Definitions

a. *Dividend*. Subpart D of part 702 sets various restrictions and requirements regarding the payment of dividends to members. §§ 702.403, 702.401(d), 702.402(d)(5). However, that subpart overlooks the fact that many State-chartered credit unions pay interest on shares rather than dividends. To correct this oversight, the proposed rule adds to § 702.2 a new subsection (e) defining a “dividend” as “a distribution of earnings by a federally-insured credit union and a payment of interest on a deposit by a State-chartered credit union.”

b. *Senior executive officer*. The authority to dismiss a director or senior executive officer is a discretionary supervisory action (“DSA”) available when a credit union is classified “undercapitalized” or lower. §§ 702.202(b)(8), 702.203(b)(8), 702.204(b)(8). See also 12 CFR 747.2004(a) (review of dismissal of senior executive officer). The authority to order the hiring of a “qualified senior executive officer,” §§ 702.204(b)(9), and to limit the compensation paid to a senior executive officer, § 702.204(b)(10), are both DSAs available when a credit union is classified “critically undercapitalized.” However, none of these provisions defines who is a “senior executive officer.” To correct this oversight, the proposed rule adds a new subsection (j) to § 702.2, incorporating by reference the definition of a “senior executive officer” in 12 CFR 701.14(b)(2). That section defines a “senior executive officer” as “a credit union’s chief executive officer \* \* \*, any assistant chief executive officer (e.g., any assistant president, any assistant vice president or any assistant treasurer/manager) and the chief financial officer.”

c. *Total assets*. Among the methods available to measure a credit union’s total assets for PCA purposes is “[t]he average of quarter-end balances of the four most recent calendar quarters.” § 702.2(l)(1)(i). In practice, this has been a source of confusion to credit unions; some think “the four most recent calendar quarters” refers to the four consecutive quarters *preceding* the then-current quarter, while others think it means the then-current quarter *plus* the preceding three consecutive quarters. To end this confusion, the proposed rule redefines the “average quarterly balance” as the average of quarter-end balances of “the four most recent calendar quarters.”

Another of the methods available to measure a credit union’s total assets is the “quarter end balance of the calendar quarter as reported in the credit union’s Call Report, and for semi-annual filers as calculated for the quarters ending March 31 and September 30.” § 702.2(l)(1)(iv). The proposed rule deletes the exception for the two quarters in which Call Reports are not filed because semiannual Call Reporting has been abolished by the recently adopted uniform quarterly schedule for filing Call Reports regardless of asset size. 67 FR 12457 (March 19, 2002).

###### 2. Section 702.101—Measures and Effective Date of Net Worth Classification

On the effective date of a credit union’s net worth classification, it must begin to comply with the mandatory supervisory actions (“MSAs”), if any, applicable to its net worth category, e.g., § 702.202(a). The effective date also triggers part 702’s timetables for whatever further action is required in the case of a “critically undercapitalized” credit union. §§ 702.204(c)(1), 702.204(c)(3), 702.206(a)(1). Relying on the quarter-end calculation of net worth, the effective date of classification in nearly all cases is the “quarter-end effective date”—“the last day of the calendar month following the end of the calendar quarter.” § 702.101(b)(1). However, § 702.101(b)(2) presently allows for an

interim effective date between quarter-ends when “the credit union’s net worth ratio is recalculated by or as a result of its most recent final report of examination.”

An interim effective date has occasionally replaced the quarter-end effective date when an NCUA examination is conducted after the quarter-end effective date and it discloses not only that the credit union erred in calculating its net worth ratio, but that the corrected ratio puts it in a different net worth category. Classification to the proper net worth category is not retroactive to the prior quarter-end effective date. Rather, the date the credit union receives the final examination report becomes the new effective date of classification to the proper net worth category, triggering the corresponding MSAs.<sup>2</sup>

Section 702.101(b)(2) has been difficult to implement for several reasons. First, it lacks standards that limit recalculation of net worth to instances of error or misstatement, and that preclude recalculation based simply on changed data or conditions occurring since the last Call Report (which changes will be reflected in the next quarter’s Call Report). Second, experience shows that an error or misstatement in calculating net worth may emerge from a supervision contact other than an examination, yet notice to the credit union to correct its net worth ratio must await the “most recent report of final examination.” Third, postponing notice of the corrected net worth ratio until receipt of the final report of examination may deprive the credit union of the opportunity to take corrective action sooner. To rectify these flaws, subsection (b)(2) is revised to define the “corrected net worth category” as “the date the credit union receives subsequent written notice \* \* \* of a decline in net worth category due to correction of an error or misstatement in the credit union’s most recent Call Report.”

<sup>2</sup> A corrected net worth ratio that reduces a credit union to a lower worth category typically has the greatest impact when a “well capitalized” or “adequately capitalized” credit union declines to “undercapitalized” or lower (and must submit an NWRP for the first time) and when a credit union declines to “critically undercapitalized” from a higher net worth category (and becomes subject to mandatory liquidation of net worth fails to improve). In comparison, when an already “undercapitalized” credit union declines to “significantly undercapitalized,” the MSAs are the same in both categories and only the range of available DSAs expands.

### 3. Section 702.107—Alternative Component for Loans Sold With Recourse

Among the eight risk portfolios used to calculate an applicable RBNW requirement is the portfolio of “loans sold with recourse,” generally consisting of the outstanding balance of loans sold or swapped with full or *partial* recourse. § 702.104(f). In the “standard calculation” of the RBNW requirement, the entire balance of the “loans sold with recourse” risk portfolio is assigned a single, uniform risk-weighting of 6 percent, § 702.106(f), regardless whether it includes loans sold with only *partial* recourse against the seller. There is no “alternative component” for adjusting the risk-weighting of this portfolio to reflect the limited credit risk associated with loans sold with partial recourse.<sup>3</sup>

Since the adoption of part 702, recourse loan activity among credit unions has nearly doubled, and loan programs have emerged that allow a credit union that sells fixed-rate mortgage loans, for example, to contractually limit the extent of the purchaser’s recourse to the seller.<sup>4</sup> This enables credit unions to readily cap their credit risk exposure from the sale of recourse loans. In view of these developments, a single, uniform risk-weighting that assumes maximum credit risk exposure is inequitable.

Therefore, the NCUA Board proposes to add a fourth “alternative component” to § 702.107 that would allow variable risk-weighting that corresponds to the actual credit risk exposure of loans sold with a contractual recourse obligation of less than 6 percent. The “alternative component” proposed in new § 702.107(d) is the sum of two risk-weighted buckets. The first bucket consists of the amount of loans sold with contractual recourse obligations of six percent or greater and is risk-weighted at a uniform six percent. § 702.107(d)(1). The second bucket consists of the amount of loans sold with contractual recourse obligations of less than six percent and is risk-weighted according to the weighted average recourse percent of its contents,

<sup>3</sup> Currently, the RBNW requirement can be reduced to reflect *partial* recourse only when a credit union that initially fails its RBNW requirement applies for and receives a “risk mitigation credit” based upon proof of mitigation of credit risk. § 702.108(a)(1); 65 FR at 44963.

<sup>4</sup> For example, documentation for the loan sale transaction may provide for recourse in the form of a contractually-spaced recourse obligation measured either by a designated dollar amount that is fixed for the life of the loan, or by a designated percentage of the unpaid balance of a pool of loans.

as computed by the credit union.<sup>5</sup> § 702.107(d)(2); see new Table 5(a) and new Appendixes F and G in rule text below. Like the existing “alternative components,” if the “alternative component” proposed for loans sold with recourse reduces the RBNW requirement initially determined under the “standard calculation,” the credit union could then substitute it for the corresponding “standard component.” § 702.106(f).

### 4. Section 702.108—Risk Mitigation Credit

a. *Who may apply.* Section 702.108(a) presently permits a credit union that fails an applicable RBNW requirement to apply for a “risk mitigation credit” (“RMC”) that, if granted, will reduce the RBNW requirement it must meet.<sup>6</sup> But NCUA will not consider an application for this relief until *after* the effective date that a credit union fails under both the “standard calculation” and the “alternative components.” *Submission Guidelines* § I.3. In practice, this “fail first” prerequisite forces a failing credit union to remain classified “undercapitalized” while its RMC application is pending. *Id.* §§ I.4, I.8. This is true even when a credit union reasonably anticipates failing an RBNW requirement because, in a preceding quarter, it either failed or barely passed.

To spare credit unions that are genuinely in danger of failing an RBNW requirement from this “fail first” prerequisite, the NCUA Board proposes to allow them to apply for an RMC preemptively—that is, to apply in advance of the quarter-end so that the credit union receives any RMC for which it qualifies *before* the approaching effective date when it would fail its RBNW requirement. To that end, the proposed rule revises § 702.108 to allow a credit union to apply for an RMC at any time before the next quarter-end effective date if on any of the current or three preceding effective dates of classification it has either failed an applicable RBNW requirement, or met it by less than 100

<sup>5</sup> To calculate the “weighted average recourse percent” of the bucket of loans sold with recourse <6%, multiply each percentage of contractual recourse obligation by the corresponding balance of loans sold with that recourse to derive the dollar weighted percent. Divide the total dollar weighted percent by the total dollar balance of loans with <6% recourse to derive the alternative risk weighting. See Appendix G in rule text below.

<sup>6</sup> To aid credit unions seeking a “Risk Mitigation Credit,” NCUA has released two publications: *Guidelines for Submission of an Application for PCA “Risk Mitigation Credit”* (NCUA form 8507) (“*Submission Guidelines*”) and *Guidelines for Evaluation of an Application for PCA “Risk Mitigation Credit”* (NCUA form 8508).

basis points. The *Submission Guidelines* would be modified accordingly.

A credit union that has met its RBNW requirement by more than 100 basis points in each of the preceding four quarters would not be able to apply for an RMC until it subsequently fails its RBNW requirement or meets it by less than 100 basis points. The proposed revision will enable credit unions that are genuinely at risk of failing an RBNW requirement to preemptively qualify for and timely receive an RMC that may permit them to seamlessly maintain their initial classification as either "adequately capitalized" or "well capitalized."

b. *Recognizing "call" feature of loans.* The RBNW calculation features both a "standard component" and an "alternative component" for long-term real estate loans and for member business loans outstanding.

§§ 702.106(a)–(b), 702.107(a)–(b). The longer the maturity of the loan, the greater the interest rate risk and credit risk exposure, justifying a commensurately higher risk-weighting. See 65 FR at 44960–44961. The components for both types of loans schedule them by contractual maturity date regardless whether a loan has a call feature permitting the lender to redeem it before the maturity date. A few credit unions contend that permitting them to schedule such "callable" loans by call date, rather than by maturity date, may reduce their RBNW requirement.

The NCUA Board declines for the following reasons to schedule "callable" loans by call date for purposes of calculating the RBNW requirement. First, the call feature is not a contractual requirement, but rather an option that credit unions may be reluctant to exercise in periods of rising interest rates, when members may lack the capacity to repay or refinance loans at a higher rate. Second, allowing reliance on the call date would be an incentive for credit unions to include a call feature in their loans solely to reduce the RBNW requirement, and with no good faith intention of exercising the option. Third, allowing reliance on the call date would be an incentive to use a call feature as a pretext for refinancing a loan on substantially the same terms except with a later maturity, to circumvent statutory maturity limits. 12 U.S.C. 1757(5).

Without modifying the present RBNW components, however, an RMC is perfectly suited to recognize mitigation of risk when, in practice, a call feature truly reduces a loan's maturity or resets its interest rate. When a credit union's RMC application demonstrates a program and history of efficiently

exercising call options on its loans, NCUA staff will evaluate the interplay between credit risk and interest rate risk—something that the simple structure of the "standard calculation" and the "alternative components" is not well suited to address. An RMC reflecting the true risk mitigation impact of a call feature may be granted to offset a credit union's RBNW requirement as calculated in the absence of an RMC.

#### 5. Section 702.201—PCA for "Adequately Capitalized" Credit Unions

a. *Earnings retention.* CUMAA requires credit unions having a net worth ratio of less than 7 percent to "annually set aside as net worth an amount equal to not less than 0.4 percent of its total assets." 12 U.S.C. 1790d(e)(1). To implement this statutory "earnings retention requirement," credit unions classified "adequately capitalized" or lower are generally required to increase their net worth quarterly by an amount *equivalent* to 0.1 percent of total assets and to transfer that amount to the regular reserve account until the credit union becomes "well capitalized." § 702.201(a).

In practice, some credit unions have not understood that it is the dollar amount of net worth that they must increase by the equivalent of 0.1 percent of assets per quarter, not the net worth ratio itself. Changes in the dollar amount of net worth will not match changes in the net worth ratio unless net worth and total assets were to increase or decrease by exactly the same percentage. Other credit unions are making earnings transfers to the regular reserve in the absence of increases in net worth. Still others have pointed out that, as presently written, § 702.201 prevents them from meeting the statutory annual minimum of 0.4 percent of total assets on an average basis over four quarters. Instead, it requires that the *equivalent* of 0.1 percent of assets be set aside in each and every quarter of the year, regardless whether the credit union has set aside more than the quarterly minimum in prior quarters. To clarify how the earnings retention requirement operates, the proposed rule revises subsection (a) in two ways. First, it indicates that it is the "the dollar amount" of net worth that must be increased, and permits the minimum increase to be made "either in the current quarter, or on average over the current and three preceding quarters."

b. *Decrease in retention.* As CUMAA directs, NCUA may, on a case-by-case basis, permit a credit union to increase net worth by an amount that is less than the quarterly minimum (0.1 percent of

assets) when necessary to avoid a significant redemption of shares and to further the purpose of PCA. 12 U.S.C. 1790d(e)(2); § 702.201(b). In some cases, credit unions have decreased their quarterly earnings retention, in violation of the earnings retention requirement, in order to pay dividends as they deem necessary, either without seeking NCUA's permission at all or prior to seeking NCUA's permission. Once earnings that should have been retained to build net worth have been paid out in dividends, they cannot be recovered. The proposed rule addresses this problem by revising subsection (b) to provide that NCUA will consider requests to decrease earnings retention only if they are submitted in writing no later than 14 days before the quarter end. NCUA will be under no obligation to grant applications submitted after the 14-day deadline or after the quarter-end. Furthermore, NCUA is entitled to take supervisory or other enforcement action against credit unions that either decrease their earnings retention without permission, or persist in failing to timely apply for permission.

c. *Decrease by FISCO.* NCUA is generally required to consult with the appropriate State official on PCA decisions affecting State-chartered credit unions. 12 U.S.C. 1790d(l). The requirement to "consult and seek to work cooperatively" with State officials when deciding whether a State-chartered credit union may decrease its earnings retention was previously located in § 702.205(c), where it was misidentified as a DSA. The proposed rule inserts the "consult and work cooperatively" requirement into a new subsection (c) of § 702.201.

d. *Periodic review.* CUMAA requires the NCUA Board to "periodically review" any decision permitting a decrease in earnings retention. 12 U.S.C. 1790d(e)(2)(B). Section 702.201, which implements that requirement, states that such decisions are "subject to review and revocation no less frequently than quarterly." § 702.201(b). The "no less frequently than quarterly" timetable is flawed because it simply is too vague to indicate when a decision permitting a decrease must be reviewed. Since part 702 operates almost completely on a quarterly timetable (coinciding with the quarterly Call Reporting schedule), proposed new subsection (d) specifies that "a decision . . . to permit a credit union to decrease its earnings retention is subject to quarterly review and revocation."

For "adequately capitalized" credit unions (for whom earnings retention is the only MSA), quarterly review will be implicit because their requests to

decrease earnings retention are decided on a quarter-by-quarter basis. However, for credit unions classified “undercapitalized” or lower, it is difficult to reconcile periodic review with CUMAA’s and part 702’s reliance on net worth restoration plans (“NWRPs”). To be approved, an NWRP must prescribe “a quarterly timetable of steps the credit union will take to increase its net worth ratio.”

§ 702.206(c)(1)(i). It also must project the amount of earnings retention, decreased as permitted by NCUA, for each quarter of the term of the NWRP. § 702.206(c)(1)(ii). Typically, approved plans permit decreases in earnings retention extending for successive quarters over the term of the plan.

Independently of the review requirement in § 702.201, these decreases in earnings retention are effectively subject to quarterly review and revocation as a function of the NWRP. A credit union that falls to a lower net worth category because it failed to implement the steps or to meet the quarterly net worth targets in its NWRP may be required to file a new NWRP, § 702.206(a)(3), thereby revoking the then-current NWRP approving future decreases in earnings retention. *See also* 12 CFR 747.2005(b)(3) (civil money penalty for failure to implement NWRP). In contrast, when a credit union is implementing the prescribed steps and meeting its net worth targets, there would be no reason to discontinue the decreased earnings retention approved in its NWRP. Because quarterly review is effectively built-in to the NWRP component of PCA, § 702.201’s quarterly review requirement is redundant when applied to credit unions operating under an NWRP. For that reason, the proposed rule exempts such credit unions from the quarterly review that § 702.201 imposes on “adequately capitalized” credit unions.

#### 6. Section 702.204—PCA for “Critically Undercapitalized” Credit Unions.

a. “Other corrective action”. When a credit union becomes “critically undercapitalized” (net worth ratio <2%), part 702 gives the NCUA Board 90 days in which to either place the credit union into conservatorship, liquidate it, or impose “other corrective action \* \* \* to better achieve the purpose of [PCA].” 12 U.S.C. 1790d(i)(1); § 702.204(c)(1). NCUA so far has interpreted the option to impose “other corrective action” (“OCA”) as requiring some further action in addition to complying with the steps prescribed in an approved NWRP for meeting quarterly net worth targets. Some further action would seem

appropriate when a credit union either is not complying with its approved NWRP, or is implementing the prescribed action steps but still failing to achieve its quarterly net worth targets. In contrast, demanding further action is superfluous, if not punitive, when a credit union is both implementing the steps in its NWRP and timely achieving its net worth targets. NCUA has found it difficult to fashion OCA that is more than a makeweight in these situations.

Congress left it entirely to the NCUA Board to “take such other action” in lieu of conservatorship and liquidation “as the Board determines would better achieve the purpose of [PCA], after documenting why the action would better achieve that purpose.” 12 U.S.C. 1790d(i)(1)(b). *See also* S. Rep. at 15. The NCUA Board has determined that the purpose of PCA—building net worth to minimize share insurance losses—is not compromised by declining to impose OCA when it is documented that a credit union already is achieving the purpose of PCA by complying with an approved NWRP and achieving its prescribed net worth targets. In other words, there is no reason to demand more than complete success from a credit union that, so far, is completely successful in building net worth.

To implement a more flexible approach to imposing OCA in lieu of conservatorship and liquidation, the proposed rule provides that “[OCA] may consist, in whole or in part, of complying with the timetable of quarterly steps and meeting quarterly net worth targets prescribed in an approved [NWRP].” § 702.204(c)(1)(iii). This permits, but does not require, NCUA to limit OCA to directing a credit union that already is in compliance with its approved NWRP to simply continue to comply, without undertaking any further action beyond what the NWRP already requires.

b. *10-day appeal period*. The NCUA Board’s authority to decide whether to conserve a “critically undercapitalized” credit union, liquidate it, or allow OCA may be delegated only in the case of credit unions having assets of less than \$5 million. 12 U.S.C. 1790d(i)(4); § 702.204(c)(4). In such cases, the credit union has a statutory “right of direct appeal to the NCUA Board of any decision made by delegated authority.” *Id.* However, neither the FCUA nor part 747 sets a deadline by which a credit union must appeal a delegated decision to the NCUA Board.

The NCUA Board has in fact delegated to its Regional Directors the authority to impose and renew OCA for credit unions having assets of less than \$5 million. *See* Delegation of Authority

SUP-32. However, the lack of a deadline for exercising the right to appeal delegated decisions to the NCUA Board gives “critically undercapitalized” credit unions at least the appearance of an unlimited opportunity to challenge a Regional Director’s decision. The Act itself generally limits credit unions to a 10-day window in which to seek judicial review of any NCUA Board decision to conserve or liquidate. 12 U.S.C. 1786(h)(3), 1787(a)(1)(B). To impose reasonable finality upon the unfolding timetable of decisions the Act requires when a credit union becomes “critically undercapitalized,” the proposed rule likewise sets a deadline of ten calendar days in which to appeal a delegated decision to the NCUA Board.

c. *Insolvent FCU*. The NCUA Board generally must liquidate a credit union eventually if it remains “critically undercapitalized.” § 702.204(c). Independently of PCA, however, the Act directs that “[u]pon its finding that a Federal credit union . . . is insolvent, the Board shall close such credit union for liquidation.” 12 U.S.C. 1787(a)(1)(A). Therefore, in the case of a “critically undercapitalized” federal credit union that is insolvent (*i.e.*, has a net worth ratio of less than zero), NCUA has two separate statutory liquidation options—a PCA-based liquidation, as described in the preceding section, or an insolvency-based liquidation. To clarify that insolvency-based liquidation is an option, the proposed rule adds a new subsection (d) to § 702.204 clarifying that “a ‘critically undercapitalized’ federal credit union that has a net worth ratio of less than zero percent (0%) may be placed into liquidation on grounds of insolvency pursuant to [§ 1787(a)(1)(A)].”

#### 7. Section 702.205—Consultation with State Officials on Proposed PCA

NCUA is generally required to consult with the appropriate State official before imposing a PCA remedy on a State-chartered credit union. 12 U.S.C. 1790d(l). Subsection (c) of § 702.205 requires NCUA to “consult and seek to work cooperatively with the appropriate State official” before imposing a DSA upon a State-chartered credit union classified “undercapitalized” or lower. However, this provision misidentifies as a DSA the decision whether to permit a decrease in the quarterly earnings retention. § 702.201(b). The proposed rule deletes this erroneous reference to § 702.201(b) and inserts in § 702.201 the requirement for NCUA to consult the appropriate State official before decreasing a State-chartered credit union’s earnings retention.

### 8. Section 702.206—Net Worth Restoration Plans

a. *Contents of NWRP.* Section 702.206 prescribes the contents of an NWRP that must be submitted for approval by credit unions classified

“undercapitalized” or lower. Among the items an NWRP must address is how the credit union will comply with MSAs and DSAs. § 702.206(c)(1)(iii). As presently drafted, § 702.206(c)(1)(iii) has been misinterpreted as a demand to either consent to, or prospectively explain how the credit union *would* comply with, DSAs in the event the NCUA Board were to impose any. The proposed rule revises this section to clarify that an NWRP need only address whatever DSAs, if any, the NCUA Board *already* has imposed on the credit union.

b. *Publication of NWRP.* Publication of an NWRP is not a prerequisite to enforcing its provisions as authorized in 12 CFR 747.2005, but this fact is not expressly stated in § 702.206 itself. The omission has led to the misimpression that an NWRP, like a “Letter of Understanding and Agreement,” must be published in order to subsequently be enforceable. The Act mandates that a “written agreement or other written statement” must be published in order for a violation to be enforceable “unless the Board, in its discretion, determines that publication would be contrary to the public interest.” 12 U.S.C. 1786(s)(1)(A). To the extent an NWRP qualifies as a “written agreement or other written statement” under § 1786(s)(1)(A), the NCUA Board does not intend to publish NWRPs because it believes that publication would expose the credit union to reputation risk that would be contrary to the public interest. Therefore, the proposed rule adds new subsection (i) to § 702.206, clarifying that “An NWRP need not be published to be enforceable because publication would be contrary to the public interest.”

c. *“Safe harbor” approval of NWRP.* To assist credit unions that fall marginally below “adequately capitalized” primarily because asset growth outstrips income growth, the NCUA Board is seeking comment on the concept of “safe harbor” approval of an NWRP—that is, notice of certain criteria established by regulation that, when met, will ensure approval. Only credit unions above a certain minimum net worth ratio (*i.e.*, maximum number of basis points short of being “adequately capitalized”) would be eligible. Under the concept of “safe harbor” approval, an eligible credit union would agree in its NWRP to achieve a minimum

quarterly return on assets (“ROA”)—to be set by regulation according to the number of basis points needed to attain a 6 percent net worth ratio—that would offset abundant asset growth sufficiently to improve its net worth ratio quarterly over the term of the plan. The NWRP must specify the means by which the credit union plans to achieve the minimum quarterly ROA while controlling exposure to interest rate risk and credit risk. As CUMAA requires, NCUA would evaluate those plans to determine whether they are “based on realistic assumptions and [are] likely to succeed in restoring the net worth of the credit union.” 12 U.S.C. 1790d(f)(5). An NWRP determined by NCUA to satisfy this criterion would be assured of approval.<sup>7</sup> That approval would be revoked automatically if and when the credit union failed either to achieve its quarterly minimum ROA or to improve its net worth ratio, as pledged in the NWRP. Public comment will help the NCUA Board decide whether to pursue the concept of “safe harbor” approval of an NWRP for credit unions that become marginally “undercapitalized” primarily due to asset growth.

### 9. Section 702.303—PCA for “Adequately Capitalized” New Credit Unions

Under the alternative system of PCA for new credit unions, a credit union that manages to become “adequately capitalized” while still new must comply with the same minimum earnings retention that applies to non-new credit unions that are “adequately capitalized.”<sup>8</sup> § 702.201(a). In contrast, “new” credit unions that stay classified below “adequately capitalized” are not subject to minimum earnings retention; they must quarterly increase net worth only “by an amount reflected in the credit union’s approved initial or revised business plan.” § 702.304(a)(1). This creates a disincentive for “new” credit unions to become “adequately capitalized” because the reward for maintaining a net worth ratio below 6 percent is that they are relieved from

<sup>7</sup> “Safe harbor” approval would not exempt a credit union from the statutory requirement to comply with the three other MSAs—earnings retention, the freeze on assets, and the freeze on MBLs, 12 U.S.C. 1790d(e) and (g)—nor from any otherwise applicable DSAs. *E.g.*, § 702.202(c). The asset freeze would end only when the NWRP is approved. 12 U.S.C. 1790d(g)(1)(A).

<sup>8</sup> The proposed rule corrects the wording of current § 702.303, which inadvertently applied that section to “new” credit unions classified lower than “adequately capitalized.” In fact, §§ 702.304 and 702.305 prescribe PCA for new credit unions classified lower than “adequately capitalized.”

complying with a minimum earnings retention amount.

To eliminate the disincentive, the proposed rule revises § 702.303 to put all “new” credit unions having a net worth lower than 7 percent in parity for purposes of earnings retention. An “adequately capitalized” new credit union would no longer be subject to minimum earnings retention as non-new credit unions. Instead, like new credit unions in lower categories, it would be required to increase net worth quarterly by “an amount reflected in its approved initial or revised business plan” until it becomes “well capitalized.” In the absence of such a plan, however, the credit union would remain subject to the same quarterly minimum earnings retention as non-“new” credit unions.

### 10. Section 702.304—PCA for “Moderately Capitalized,” “Marginally Capitalized” and “Minimally Capitalized” New Credit Unions

As explained above, § 702.201(a) was modified to specify that earnings retention must increase “the dollar amount” of net worth, not simply the net worth ratio itself. To conform to that modification, the proposed rule revises § 702.304(a)(1) accordingly.

### 11. Section 702.305—PCA for “Uncapitalized” New Credit Unions

a. *Member business loan restriction.* An “uncapitalized” new credit union presently enjoys full relief from all MSAs while it is operating within the period allowed by its initial business plan to have no net worth. An unintended consequence of this forbearance is that “uncapitalized” credit unions are free of the MSA restricting member business loans (“MBLs”); the restriction is triggered only when a credit union manages to attain some net worth and rise to the “minimally capitalized” net worth category.<sup>9</sup> Yet a “minimally capitalized” credit union arguably is better suited to expand its MBL portfolio than one that remains “uncapitalized.” Moreover, making PCA *more* demanding as a credit union’s net worth and category classification improve, rather than relaxing it, is contrary to the purpose of PCA. To rectify this unintended consequence, the proposed rule treats all “uncapitalized” new credit unions equally, so that the MBL restriction applies regardless whether a new credit union is operating with no net worth as

<sup>9</sup> The earnings retention requirement, § 702.305(a)(1), is ineffective against an “uncapitalized” credit union because a credit union that has an undivided earnings deficit has no net worth to retain.

permitted by its initial business plan or has declined to “uncapitalized” from a higher net worth category.

b. *Filing of revised business plan.* Subsection (a)(2) generally requires an “uncapitalized” new credit union to submit a revised business plan (“RBP”) within 90 days following either of two events—expiration of the period that the credit union’s initial business plan allows it to operate with no net worth, or the effective date that it declined to “uncapitalized” from a higher net worth category. This contrasts with the 30-day period that “moderately capitalized,” “marginally capitalized” and “minimally capitalized” credit unions are given to file an RBP. § 702.306(a)(1). Ninety days is, in and of itself, an unduly long filing period given that an “uncapitalized” credit union faces mandatory conservatorship or liquidation if it fails to generate some net worth. Furthermore, it is counterintuitive to give a credit union that has a net worth deficit three times as long to devise a plan for generating positive earnings than is given to credit unions that already have net worth.

The proposed rule puts all new credit unions that must file an RBP in parity. First, it deletes the 90-day filing window for “uncapitalized” credit unions, thereby limiting them to the general 30-day window, once they are required to file an RBP. Second, it reorganizes § 702.305(a)(2) to parallel the conditions that trigger other less than “adequately capitalized” new credit unions to revise their business plans, § 702.304(a)(2), even though only “uncapitalized” credit unions are initially allowed to operate with no net worth. To that end, the proposed rule requires an “uncapitalized” credit union to submit an RBP if it either: fails to increase net worth (*i.e.*, reduce its earnings deficit) as its existing business plan provides; has no approved business plan; or has violated the MSA restricting MBLs.

c. *Liquidation or conservatorship if “uncapitalized” after 120 days.* Section 702.305(c)(2) generally requires the NCUA Board to conserve or liquidate an “uncapitalized” new credit union that remains “uncapitalized” 90 days after its RBP is approved. It is silent, however, regarding conservatorship or liquidation of a credit union whose RBP is rejected. To correct this oversight, the proposed rule mandates conservatorship or liquidation of an “uncapitalized” new credit union after a 120-day period regardless whether an RBP has been approved or rejected. This period combines the 30-day window for submitting an RBP, § 702.306(a)(1), and the original 90-day period allowed for

the credit union to avoid conservatorship and liquidation by developing positive earnings. The 120-day period runs from the later of either the effective date of classification as “uncapitalized” or, if a credit union is operating with no net worth in the period prescribed by its initial business plan, the last day of the calendar month after expiration of that period. Because the period for operating with no net worth typically runs on a quarterly basis, the last day of the calendar month after it expires parallels the calendar month that separates the quarter-end and the effective date of classification as “undercapitalized.” Finally, a new subsection (c)(3) is added to preserve the exception to mandatory conservatorship or liquidation for a credit union that is able to demonstrate that it is viable and has a reasonable prospect of becoming “adequately capitalized.”

d. *“Uncapitalized” new FCU.* As explained above in reference to the new subsection (d) proposed for § 702.204, there are two options for liquidating a federal credit union that has no net worth—a PCA-based liquidation, 12 U.S.C. 1787(a)(3)(A)(ii), or an insolvency-based liquidation, 12 U.S.C. 1787(a)(1)(A). Both are available when a new federal credit union either fails to timely submit an RBP, § 702.305(c)(1), or remains “uncapitalized” 120 days after the effective date of classification, § 702.305(c)(2). The proposed rule adds a new subsection (d) to § 702.305 to clarify that “an ‘uncapitalized’ federal credit union may be placed into liquidation on grounds of insolvency pursuant to [§ 1787(a)(1)(A)].”

#### 12. Section 702.306—Revised Business Plans for New Credit Unions

a. *Filing schedule.* Section 702.306(a)(1) presently requires “moderately capitalized,” “marginally capitalized” and “minimally capitalized” credit unions to file an RBP within 30 days after failing to meet a quarterly net worth target prescribed in an existing business plan. As discussed above, the proposed rule eliminates the 90-day filing window for “uncapitalized” credit unions. § 702.305(a)(2). To conform to that modification, this section is revised to apply the 30-day filing window uniformly to all new credit unions classified less than “adequately capitalized” or that have violated the MSA restricting MBLs. §§ 702.304(a)(3), 702.305(a)(3).

The current rule’s 30-day filing period runs from “the effective date (per § 702.101(b)) of the credit union’s failure to meet a quarterly net worth

target prescribed in its then-present business plan.” § 702.306(a)(1). However, § 702.101(b) addresses the effective date of classification among the net worth categories; it says nothing to determine when a quarterly net worth target is met. The subtlety of this distinction may confuse credit unions that have no then-present approved business plan or have violated the MSA restricting MBLs. Therefore, the proposed rule revises subsection (a)(1) to effectively give new credit unions that fail to meet a quarterly target 60 days following the quarter-end to file an RBP. § 702.306(a)(1)(i). The 60-day period combines the calendar month that separates the quarter-end from the effective date of classification, with the uniform 30-day filing period that commences on the effective date. The proposed rule further clarifies that, for new credit unions that either have no approved business plan or that have violated the MBL restriction, the effective date of classification as less than “adequately capitalized” triggers the 30-day window for filing an RBP. § 702.306(a)(1)(ii)–(iii).

b. *Timetable of net worth targets.* Section 702.306(b)(2) prescribes the contents of an RBP, which must include a timetable of quarterly net worth targets extending for the term of the plan “so that the credit union becomes ‘adequately capitalized’ and remains so for four consecutive quarters.” It also warns that a “complex” new credit union that is subject to an RBNW requirement may need to attain a net worth ratio higher than 6 percent to become “adequately capitalized.” The proposed rule rectifies two flaws in this section. First, in contrast to an NWRP, the objective of an RBP is to build net worth so that a new credit union becomes “adequately capitalized” by the time it no longer is “new,” not by the end of the term of the plan. 65 FR at 8578; 64 FR 27090, 27099 (May 18, 1999) (chart). A credit union remains “new” as long as it is in operation less than 10 years or has assets of \$10 million or less. § 702.301(b). The proposed rule revises subsection (b)(2) so that an RBP’s net worth targets ensure the new credit union will become “adequately capitalized” by the time it no longer qualifies as “new.” Second, under part 702 new credit unions cannot be “complex” nor subject to an RBNW requirement because, by definition, they do not meet the \$10 million asset minimum, § 702.103(a)(1). Therefore, the proposed rule deletes the warning to new credit unions that are “complex.”

c. *Publication of RBP.* As explained above in proposing to add a new

subsection (i) to § 702.206, publication of an NWRP is not a prerequisite to enforcing its provisions as authorized in 12 CFR 747.2005. The same is true of an RBP, but this fact was similarly omitted from § 702.306. To the extent an RBP qualifies as a “written agreement or other written statement” under § 1786(s)(1)(A), the NCUA Board does not intend to publish RBPs because it believes that publication would expose the credit union to reputation risk that would be contrary to the public interest. Therefore, the proposed rule adds new subsection (h) to § 702.306, clarifying that “An RBP need not be published to be enforceable because publication would be contrary to the public interest.”

### 13. Section 702.401—Charges to Regular Reserve

The board of directors of a federally-insured credit union that has depleted the balance of its undivided earnings and other reserves may authorize losses to be charged to the regular reserve account without regulatory approval so long as the charges do not reduce the credit union’s net worth classification below “well capitalized” (*i.e.*, net worth ratio of 7 percent or greater). § 702.401(c)(1). That net worth category was established as the minimum for charging losses without regulatory approval because the categories below “well capitalized” trigger MSAs. The proposed rule lowers the minimum category to “adequately capitalized” (*e.g.*, 6 percent net worth ratio), giving credit unions the flexibility to decide whether charging losses is worth triggering the single MSA that applies to that category—the quarterly earnings retention. § 702.201(a). In addition, the proposed rule expressly reminds credit unions that they must deplete their undivided earnings balance before making any charge to the regular reserve.

Subsection (c)(2) presently requires the prior approval of the “appropriate State official,” but not the approval of the “appropriate Regional Director,” when a State-chartered credit union seeks to charge losses that would cause it to decline below the minimum category. Omitting the approval of NCUA Regional Directors is inconsistent with the protocol applied elsewhere in part 702 requiring joint State and Federal approval of PCA decisions affecting State-chartered credit unions, *e.g.*, §§ 702.206(a)(1), 702.306(a)(1). To correct this inconsistency, the proposed rule modifies § 702.401(c)(2) to require the concurrence of both the “appropriate State official” and “the appropriate Regional Director” for a

State-chartered credit union to charge losses to the regular reserve. In addition, the proposed rule clarifies that written approval may consist of an approved NWRP that allows such charges.

### 14. Section 702.403—Payment of Dividends

Section 702.403 presently allows the board of directors of a federally-insured credit union that has depleted the balance of undivided earnings to pay dividends out of the regular reserve account without regulatory approval so long as it does not cause the credit union to decline below “well capitalized.” § 702.403(b)(1). As explained in the preceding section regarding approval to charge losses to the regular reserve under § 702.401, the proposed rule lowers to “adequately capitalized” the minimum net worth category in which credit unions may pay dividends out of the regular reserve without regulatory approval. This will give credit unions that have depleted undivided earnings the flexibility to decide whether drawing down the regular reserve to pay dividends is worth triggering the quarterly earnings retention requirement that applies to “adequately capitalized” credit unions. § 702.201(a).

Like § 702.401(c)(2), subsection (b)(2) presently requires the prior approval of the “appropriate State official,” but not the approval of the “appropriate Regional Director,” when paying dividends out of the regular reserve would cause a State-chartered credit union to decline below the minimum net worth category. In addition, omitting Regional Director approval may suggest, incorrectly, that a State official’s approval to pay dividends from the regular reserve under § 702.401(b) overrides the need to independently obtain both the State official’s and the Regional Director’s approval under § 702.201(b) for a State-chartered credit union to decrease its earnings retention in order to pay dividends. For this reason and the reason explained in the preceding section, the proposed rule corrects this omission by revising subsection (b)(2) to require the concurrence of both the “appropriate State official” and “the appropriate Regional Director” for a State-chartered credit union to pay dividends out of its regular reserve. Finally, the proposed rule clarifies that written approval may consist of an approved NWRP that allows such dividend payments.

## Subpart A of Part 741—Requirements for Insurance

### 15. Section 741.3—Adequacy of Reserves

Part 741 presently allows State-chartered credit unions to charge losses other than loan losses to the regular reserve in accordance with State law or procedures, but without regulatory approval, provided that the charges do not cause the credit union to decline below “well capitalized.” 12 CFR 741.3(a)(2). The subsection that precedes it already incorporates by reference all of part 702 as a prerequisite for insurability of State-chartered credit unions. As discussed above, § 702.401(c) already imposes on State-chartered credit unions the same conditions for regulatory approval that § 741.3(a)(2) prescribes for an insured credit union seeking to charge losses to the regular reserve. For this reason, § 741.3(a)(2) is redundant and the proposed rule eliminates it.

The absence of § 741.3(a)(2) does not mean that § 702.401(c) would preempt “either state law or procedures established by the appropriate State official” that restrict a State-chartered credit union’s ability to charge losses to the regular reserve. On the contrary, such charges would independently remain subject to applicable State laws and procedures. Moreover, an appropriate State official would retain complete discretion to withhold approval, under § 702.401(c)(2), of such charges on grounds that they would violate State law or procedures.

## Subpart L of Part 747—Issuance, Review and Enforcement of Orders Imposing PCA

### 16. Section 747.2005—Enforcement of Orders

The NCUA Board is authorized to “assess a civil money penalty against a credit union which fails to implement a net worth restoration plan \* \* \* or a revised business plan under \* \* \* part 702.” 12 CFR 747.2005(b)(2). Publication of either type of plan is not a prerequisite to seeking a civil money penalty against an offending credit union, but this fact is not expressly stated in § 747.2005. The NCUA Board has determined that it is not in the public interest to require publication of an NWRP or an RBP in order for either to be enforceable and, as explained above, proposes to modify §§ 702.206 and 702.306 accordingly. To conform to those modifications, the proposed rule revises § 747.2005(b)(2) to provide that a civil money penalty may be assessed for failure to implement a plan

“regardless whether the plan was published.”

**Regulatory Procedures**

*Regulatory Flexibility Act*

The Regulatory Flexibility Act requires NCUA to prepare an analysis describing any significant economic impact a proposed regulation may have on a substantial number of small credit unions (primarily those under \$1 million in assets). The proposed rule improves and simplifies the existing system of PCA mandated by Congress. 12 U.S.C. 1790d. The NCUA Board has determined and certifies that the proposed rule, if adopted, will not have a significant economic impact on a substantial number of small credit unions. Thus, 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. Control number 3133-0161 has been issued for part 702 and will be displayed in the table at 12 CFR part 795.

*Executive Order 13132*

Executive Order 13132 encourages independent regulatory agencies to consider the impact of their regulatory actions on State and local interests. NCUA, an independent regulatory agency as defined in 44 U.S.C. 3502(5), voluntarily adheres to the fundamental federalism principles addressed by the executive order. This proposed rule will apply to all federally-insured credit unions, including State-chartered credit unions. Accordingly, it may have a direct effect on the States, on the relationship between the national government and the States, or on the distribution of power and responsibilities among the various levels of government. This impact is an unavoidable consequence of carrying out the statutory mandate to adopt a system of prompt corrective action to apply to all federally-insured credit unions. NCUA staff has consulted with a committee of representative State regulators regarding the impact of the proposed revisions on State-chartered credit unions. Their comments and

suggestions are reflected in the proposed rule.

*Treasury and General Government Appropriations Act, 1999*

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

*Agency Regulatory Goal*

NCUA’s goal is clear, understandable regulations that impose a minimal regulatory burden. A purpose of the proposed rule is to improve and simplify the existing system of PCA. We request your comments on whether the proposed rule is understandable and minimally intrusive if implemented as proposed.

**List of Subjects**

*12 CFR Parts 702 and 741*

Credit unions, Reporting and recordkeeping requirements.

*12 CFR Part 747*

Administrative practices and procedures, Credit unions.

By the National Credit Union Administration Board on May 16, 2002.

**Becky Baker,**

*Secretary of the Board.*

For the reasons set forth above, 12 CFR parts 702, 741 and 747 are proposed to be amended as follows:

**PART 702—PROMPT CORRECTIVE ACTION**

1. The authority citation for part 702 continues to read as follows:

**Authority:** 12 U.S.C. 1766(a), 1790d.

2. Amend § 702.2 as follows:

a. Redesignate current paragraphs (i) through (k) as new paragraphs (k) through (m) respectively, and redesignate current paragraphs (e) through (h) as new paragraphs (f) through (i) respectively.

b. Add new paragraphs (e) and (j) to read as set forth below;

c. Revise newly designated paragraph (l)(1)(i) to read as set forth below; and

d. Revise newly designated paragraph (l)(1)(iv) to read as set forth below.

**§ 702.2 Definitions.**

\* \* \* \* \*

(e) *Dividend* means a dividend paid by a federal credit union and interest paid by a State-chartered credit union.

\* \* \* \* \*

(j) *Senior executive officer* means a senior executive officer as defined by 12 CFR 701.14(b)(2).

\* \* \* \* \*

(l) *Total assets.* (1) \* \* \*

(i) *Average quarterly balance.* The average of quarter-end balances of the current and three preceding calendar quarters; or

\* \* \* \* \*

(iv) *Quarter-end balance.* The quarter-end balance of the calendar quarter as reported on the credit union’s Call Report.

\* \* \* \* \*

3. Amend § 702.101 as follows:

a. Add a heading to paragraph (b)(1) to read as set forth below;

b. Revise paragraph (b)(2) to read as set forth below;

c. Add a heading to paragraph (b)(3) to read as set forth below; and

d. Revise the heading of paragraph (c), and paragraph (c)(1), to read as follows:

**§ 702.101 Measures and effective date of net worth classification.**

\* \* \* \* \*

(b) \* \* \*

(1) *Quarter-end effective date.* \* \* \*

(2) *Corrected net worth category.* The date the credit union received subsequent written notice from NCUA or, if State-chartered, from the appropriate State official, of a decline in net worth category due to correction of an error or misstatement in the credit union’s most recent Call Report; or

(3) *Reclassification to lower category.* \* \* \*

(c) *Notice to NCUA by filing Call Report.* (1) Other than by filing a Call Report, a federally-insured credit union need not notify the NCUA Board of a change in its net worth ratio that places the credit union in a lower net worth category;

\* \* \* \* \*

4. Amend § 702.102 by revising Table 1 immediately preceding paragraph (b) to read as follows:

**§ 702.102 Statutory net worth categories.**

\* \* \* \* \*

TABLE 1.—STATUTORY NET WORTH CATEGORY CLASSIFICATION

A credit union's net worth category is—	If its net worth ratio is—	And subject to the following condition(s)—
Well Capitalized” .....	7% or above .....	Meets applicable risk-based net worth (RBNW) requirement.
Adequately Capitalized” .....	6% to 6.99% .....	Meets applicable RBNW requirement.

TABLE 1.—STATUTORY NET WORTH CATEGORY CLASSIFICATION—Continued

A credit union's net worth category is—	If its net worth ratio is—	And subject to the following condition(s)—
Undercapitalized” .....	4% to 5.99% .....	Or fails applicable RBNW requirement.
Significantly Undercapitalized”	2% to 3.99% .....	Or if “undercapitalized” at <5% net worth ratio and fails to timely submit or materially implement Net Worth Restoration Plan.
Critically Undercapitalized” .....	Less than 2% ...	None.

- \* \* \* \* \*
5. Amend § 702.103 as follows:
    - a. Remove the heading from paragraph (a);
    - b. Remove paragraph (b);
    - c. Redesignate current paragraph (a) introductory text as the sectional introductory text, and paragraphs (a)(1) and (a)(2) as (a) and (b), respectively.
  6. Amend § 702.104 as follows:
    - a. Remove the number “1” from the parenthetical “(Table 1)” in the introductory text and add in its place the number “2”; and
    - d. Redesignate Table 1 immediately following paragraph (h) as Table 2.
  7. Amend § 702.105 as follows:
    - e. Remove the number “2” from the parenthetical “(Table 2)” in the introductory text and add in its place the number “3”;

- f. Remove the citation “§ 702.2(k)” in the introductory text and add in its place the citation “§ 702.2(m)”;
- g. Redesignate Table 2 immediately following paragraph (h) as Table 3.
8. Amend § 702.106 as follows:
  - a. Remove the number “3” from the parenthetical “(Table 3)” in the introductory text and add in its place the number “4”;
  - b. Redesignate Table 3 immediately following paragraph (h) as Table 4.
9. Amend § 702.107 as follows:
  - a. Remove the number “4” from the parenthetical “(Table 4)” in the introductory text and adding in its place the number “5”;
  - b. Add new paragraph (d) to read as set forth below;

- c. Redesignate Table 4 immediately following new paragraph (d) as Table 5; and
- d. Add new section (d) to Table 5 as follows:

**§ 702.107 Alternative Components for Standard Calculation.**

- \* \* \* \* \*
- (d) *Loans sold with recourse.* The alternative component is the sum of:
- (1) Six percent (6%) of the amount of loans sold with contractual recourse obligations of six percent (6%) or greater; and
  - (2) The weighted average recourse percent of the amount of loans sold with contractual recourse obligations of less than six percent (6%), as computed by the credit union.

TABLE 5.—§ 702.107 ALTERNATIVE COMPONENTS FOR STANDARD CALCULATION

\* \* \* \* \*

*(d) Loans Sold With Recourse*

<i>Amount of loans by recourse</i>	<i>Alternative risk weighting</i>
Recourse 6% or greater	.06
Recourse <6%	Weighted average recourse percent

The “alternative component” is the sum of each amount of the “loans sold with recourse” risk portfolio by level of recourse (as a percent of quarter-end total assets) times its alternative factor. The alternative factor for loans sold with recourse of less than 6% is equal to the weighted average recourse percent on such loans. A credit union must compute the weighted average recourse percent for its loans sold with recourse of less than six percent (6%). Substitute for corresponding standard component if smaller.

10. Amend § 702.108 as follows:
  - a. Revise the section heading to read as set forth below;
  - b. Redesignate current paragraphs (a) and (b) as paragraphs (b) and (c), respectively;
  - c. Add a new paragraph (a) as set forth below; and
  - d. Revise newly designated paragraph (b) to read as set forth below.

**§ 702.108 Risk mitigation credit.**

(a) *Who may apply.* A credit union may apply for a risk mitigation credit if

on any of the current or three preceding effective dates of classification it either failed an applicable RBNW requirement or met it by less than 100 basis points.

(b) *Application for credit.* Upon application pursuant to guidelines duly adopted by the NCUA Board, the NCUA Board may in its discretion grant a credit to reduce a risk-based net worth requirement under §§ 702.106 and 702.107 upon proof of mitigation of:

- (1) Credit risk; or

(2) Interest rate risk as demonstrated by economic value exposure measures.

\* \* \* \* \*

11. Revise the heading of Appendixes A–F to Subpart A of Part 702 to read as follows:

**Appendixes A–H to Subpart A of Part 702**

12. Redesignate Appendix F to Subpart A as Appendix H;
13. Add new Appendixes F and G to Subpart A as follows:

APPENDIX F—EXAMPLE LOANS SOLD WITH RECOURSE ALTERNATIVE COMPONENT, § 702.107(D)  
 [Example calculation in bold]

Percent of contractual recourse obligation	Dollar balance of loans sold with recourse	Percent of total assets (percent)	Alternative risk weighting	Alternative component (percent)
Recourse 6% or greater .....	5,000,000	2.5000	.06	0.1500
Recourse <6% .....	35,000,000	17.5000	<sup>a</sup> .05	0.8750
Sum of above equals Alternative component* .....				1.03

\*Substitute for corresponding standard component if lower.

<sup>a</sup>The credit union must calculate this alternative risk weighting for loans sold with recourse of less than 6%. For an example computation, see worksheet in Appendix G below.

APPENDIX G—WORKSHEET FOR ALTERNATIVE RISK WEIGHTING OF LOANS SOLD WITH CONTRACTUAL RECOURSE OBLIGATIONS OF LESS THAN 6%

[Example Calculation in Bold]

Percent of contractual recourse obligation less than 6%	Dollar balance of loans sold with recourse	Dollars of recourse	Alternative risk weighting (percent)
5.50% .....	5,000,000	275,000	.....
5.00% .....	25,000,000	1,250,000	.....
4.50% .....	5,000,000	2,250,000	.....
Sum of above equals .....	35,000,000	1,750,000	.....
Dollar of recourse divided by dollar balance equals (expressed as %) .....			5.00

14. Revise newly designated Appendix H to Subpart A to read as follows:

APPENDIX H—EXAMPLE RBNW REQUIREMENT USING ALTERNATIVE COMPONENTS

[Example Calculation in Bold]

Risk portfolio	Standard component (percent)	Alternative component (percent)	Lower of standard or alternative component (percent)
(a) Long-term real estate loans .....	2.20	2.85	2.20
(b) MBLs outstanding .....	0.77	0.95	0.77
(c) Investments .....	1.51	1.37	
(f) Loans sold with recourse .....	1.20	1.03	1.03
			Standard component
(d) Low-risk assets .....			0
(e) Average-risk assets .....			1.83
(g) Unused MBL commitments .....			0.15
(h) Allowance .....			(1.02)
RBNW requirement*—Compare to Net Worth Ratio .....			6.33

\*A credit union is “undercapitalized” if its net worth ratio is less than its applicable RBNW requirement.

15. Revise § 702.201 to read as follows:

**§ 702.201 Prompt corrective action for “adequately capitalized” credit unions.**

(a) *Earnings retention.* Beginning the effective date of classification as

“adequately capitalized” or lower, a federally-insured credit union must increase the dollar amount of its net worth quarterly either in the current quarter, or on average over the current and three preceding quarters, by an amount equivalent to at least 1/10th percent (0.1%) of its total assets, and

must quarterly transfer that amount (or more by choice) from undivided earnings to its regular reserve account until it is “well capitalized.”

(b) *Decrease in retention.* Upon written application received no later than 14 days before the quarter end, the NCUA Board, on a case-by-case basis, may permit a credit union to increase the dollar amount of its net worth and quarterly transfer an amount that is less than the amount required under paragraph (a) of this section, to the extent the NCUA Board determines that such lesser amount—

(1) Is necessary to avoid a significant redemption of shares; and

(2) Would further the purpose of this part.

(c) *Decrease by FISCOU.* The NCUA Board shall consult and seek to work cooperatively with the appropriate State official before permitting a federally-insured State-chartered credit union to decrease its earnings retention under paragraph (b) of this section.

(d) *Periodic review.* A decision under paragraph (b) of this section to permit a credit union to decrease its earnings retention is subject to quarterly review

and revocation except when the credit union is operating under an approved net worth restoration plan that provides for decreasing its earnings retention as provided under paragraph (b).

16. Amend § 702.202 by removing the word "transfer" from the heading of paragraph (a)(1) and adding in its place the word "retention."

17. Amend § 702.203 by removing the word "transfer" from the heading of paragraph (a)(1) and adding in its place the word "retention."

18. Amend § 702.204 as follows:

- a. Revise the heading of paragraph (a)(1) to read as set forth below;
- b. Revise paragraph (c)(1)(iii) to read as set forth below;
- c. Revise paragraph (c)(4) to read as set forth below; and
- d. Add new paragraph (d) to read as follows:

**§ 702.204 Prompt corrective action for "critically undercapitalized" credit unions.**

- (a) \* \* \*
- (1) *Earnings retention.* \* \* \*
- (c) \* \* \*
- (1) \* \* \*
- (iii) *Other corrective action.* Take other corrective action, in lieu of conservatorship or liquidation, to better achieve the purpose of this part, provided that the NCUA Board documents why such action in lieu of conservatorship or liquidation would do so, *provided however*, that other corrective action may consist, in whole or in part, of complying with the quarterly timetable of steps and meeting the quarterly net worth targets prescribed in an approved net worth restoration plan. \* \* \*

(4) *Nondelegation.* The NCUA Board may not delegate its authority under paragraph (c) of this section, unless the credit union has less than \$5,000,000 in total assets. A credit union shall have a right of direct appeal to the NCUA Board of any decision made by delegated authority under this section within ten (10) calendar days of the date of that decision.

(d) *Mandatory liquidation of insolvent federal credit union.* In lieu of paragraph (c) of this section, a "critically undercapitalized" federal credit union that has a net worth ratio of less than zero percent (0%) may be placed into liquidation on grounds of

insolvency pursuant to 12 U.S.C. 1787(a)(1)(A).

19. Amend § 702.205 by removing from paragraph (c) the citation "702.201(b)".

20. Amend § 702.206 as follows:

- a. Revise paragraph (c)(1)(ii) to read as set forth below;
- b. Revise paragraph (c)(1)(iii) to read as set forth below; and
- c. Add new paragraph (i) to read as follows:

**§ 702.206 Net worth restoration plans.**

- (c) \* \* \*
- (1) \* \* \*
- (ii) The projected amount of earnings to be transferred to the regular reserve account in each quarter of the term of the NWRP as required under § 702.201(a), or as permitted under § 702.201(b);
- (iii) How the credit union will comply with the mandatory and any discretionary supervisory actions imposed on it by the NCUA Board under this subpart;

(i) *Publication.* An NWRP need not be published to be enforceable because publication would be contrary to the public interest.

- 21. Amend § 702.302 as follows:
  - a. Remove the number "2" from the parenthetical "table 2" in the introductory text of paragraph (c) and add in its place the number "6";
  - b. Revise the table immediately preceding paragraph (d) to read as set forth below; and
  - c. Revise paragraph (d) to read as follows:

**§ 702.302 Net worth categories for new credit unions.**

\* \* \* \* \*

**TABLE 6.—NET WORTH CATEGORY CLASSIFICATION FOR "NEW" CREDIT UNIONS**

A "new" credit union's net worth category is . . .	if its net worth ratio is . . .
"Well Capitalized" .....	7% or above
"Adequately Capitalized" ...	6% to 6.99%
"Moderately Capitalized" ...	3.5% to 5.99%
"Marginally Capitalized" ....	2% to 3.49%
"Minimally Capitalized" .....	0% to 1.99%
"Uncapitalized" .....	Less than 0%

(d) *Reclassification based on supervisory criteria other than net worth.* Subject to § 702.102(b) and (c), the NCUA Board may reclassify a "well capitalized," "adequately capitalized" or "moderately capitalized" new credit union to the next lower net worth category (each of such actions is hereinafter referred to generally as "reclassification") in either of the circumstances prescribed in § 702.102(b).

\* \* \* \* \*

22. Revise § 702.303 to read as follows:

**§ 702.303 Prompt corrective action for "adequately capitalized" new credit unions.**

Beginning on the effective date of classification, an "adequately capitalized" new credit union must increase the dollar amount of its net worth by the amount reflected in its approved initial or revised business plan in accordance with § 702.304(a)(2), or in the absence of such a plan, in accordance with § 702.201, and quarterly transfer that amount from undivided earnings to its regular reserve account, until it is "well capitalized."

23. Amend § 702.304 by revising paragraph (a) to read as follows:

**§ 702.304 Prompt corrective action for "moderately capitalized," "marginally capitalized" and "minimally capitalized" new credit unions.**

(a) *Mandatory supervisory actions by new credit union.* Beginning on the date of classification, "moderately capitalized," "marginally capitalized" or "minimally capitalized" (including by reclassification under § 702.302(d)), a new credit union must—

(1) *Earnings retention.* Increase the dollar amount of its net worth by the amount reflected in its approved initial or revised business plan and quarterly transfer that amount from undivided earnings to its regular reserve account;

(2) *Submit revised business plan.* Submit a revised business plan within the time provided by § 702.306 if the credit union either:

- (i) Has not increased its net worth ratio consistent with its then-present approved business plan;
- (ii) Has no then-present approved business plan; or

(iii) Has failed to comply with paragraph (a)(3) of this section; and  
(3) *Restrict member business loans.* Not increase the total dollar amount of member business loans (defined as loans outstanding and unused commitments to lend) as of the preceding quarter-end unless it is granted an exception under 12 U.S.C. 1757a(b).

\* \* \* \* \*

- 24. Amend § 702.305 as follows:  
a. Revise paragraph (a) as set forth below;  
b. Revise paragraph (c)(2) as set forth below; and  
c. Add new paragraph (d) as follows:

**§ 702.305 Prompt corrective action for “uncapitalized” new credit unions.**

(a) *Mandatory supervisory actions by new credit union.* Beginning on the effective date of classification as “uncapitalized,” a new credit union must—

- (1) *Earnings retention.* Increase the dollar amount of its net worth by the amount reflected in the credit union’s approved initial or revised business plan;
- (2) *Submit revised business plan.* Submit a revised business plan within the time provided by § 702.306, providing for alternative means of funding the credit union’s earnings deficit, if the credit union either:

- (i) Has not increased its net worth ratio consistent with its then-present approved business plan;
  - (ii) Has no then-present approved business plan; or
  - (iii) Has failed to comply with paragraph (a)(3) of this section; and
- (3) *Restrict member business loans.* Not increase the total dollar amount of member business loans as provided in § 702.304(a)(3).

\* \* \* \* \*

(c) \* \* \*  
(2) *Plan rejected, approved, implemented.* Except as provided in paragraph (c)(3) of this section, must place into liquidation pursuant to 12 U.S.C. 1787(a)(3)(A)(ii), or conservatorship pursuant to 12 U.S.C. 1786(h)(1)(F), an “uncapitalized” new credit union that remains “uncapitalized” one hundred twenty (120) calendar days after the later of:  
(i) The effective date of classification as “uncapitalized”; or  
(ii) The last day of the calendar month following expiration of the time period provided in the credit union’s initial business plan (approved at the time its charter was granted) to remain “uncapitalized,” regardless whether a revised business plan was rejected, approved or implemented.

(3) *Exception.* The NCUA Board may decline to place a new credit union into liquidation or conservatorship as provided in paragraph (c)(2) of this section if the credit union documents to the NCUA Board why it is viable and has a reasonable prospect of becoming “adequately capitalized.”

(d) *Mandatory liquidation of “uncapitalized” federal credit union.* In lieu of paragraph (c) of this section, an “uncapitalized” federal credit union may be placed into liquidation on grounds of insolvency pursuant to 12 U.S.C. 1787(a)(1)(A).

- 25. Amend § 702.306 as follows:  
a. Revise paragraph (a) to read as set forth below;  
b. Revise paragraph (b)(2) to read as set forth below; and  
c. Add new paragraph (h) to read as follows:

**§ 702.306 Revised business plans for new credit unions.**

(a) *Schedule for filing.* (1) *Generally.* Except as provided in paragraph (a)(2) of this section, a new credit union classified “moderately capitalized” or lower must file a written revised business plan (RBP) with the appropriate Regional Director and, if State-chartered, with the appropriate State official, within 30 calendar days of either:

- (i) The last of the calendar month following the end of the calendar quarter that the credit union’s net worth ratio has not increased consistent with its the-present approved business plan;
- (ii) The effective date of classification as less than “adequately capitalized” if the credit union has no then-present approved business plan; or
- (iii) The effective date of classification as less than “adequately capitalized” if the credit union has increased the total amount of member business loans in violation of § 702.304(a)(3).

(2) *Exception.* The NCUA Board may notify the credit union in writing that its RBP is to be filed within a different period or that it is not necessary to file an RBP.

(3) *Failure to timely file plan.* When a new credit union fails to file an RBP as provided under paragraphs (a)(1) or (a)(2) of this section, the NCUA Board shall promptly notify the credit union that it has failed to file an RBP and that it has 15 calendar days from receipt of that notice within which to do so.

(b) \* \* \*

(2) Establish a timetable of quarterly targets for net worth during each year in which the RBP is in effect so that the credit union becomes “adequately

capitalized” by the time it no longer qualifies as “new” per § 702.310(b);  
\* \* \* \* \*

(h) *Publication.* An RBP need not be published to be enforceable because publication would be contrary to the public interest.

26. Amend § 702.401 by revising paragraph (c) to read as follows:

**§ 702.401 Reserves.**

\* \* \* \* \*

(c) *Charges to regular reserve after depleting undivided earnings.* The board of directors of a federally-insured credit union may authorize losses to be charged to the regular reserve after first depleting the balance of the undivided earnings account and other reserves, provided that the authorization states the amount and provides an explanation of the need for the charge, and either—

- (1) The charge will not cause the credit union’s net worth classification to fall below “adequately capitalized” under subparts B or C of this part; or
- (2) If the charge will cause the net worth classification to fall below “adequately capitalized,” the appropriate Regional Director and, if State-chartered, the appropriate State official, have given written approval (in an NWRP or otherwise) for the charge.

\* \* \* \* \*

27. Amend § 702.403 by revising paragraph (b) to read as follows:

**§ 702.403 Payment of dividends.**

\* \* \* \* \*

(b) *Payment of dividends if undivided earnings depleted.* The board of directors of a “well capitalized” federally-insured credit union that has depleted the balance of its undivided earnings account may authorize a transfer of funds from the credit union’s regular reserve account to undivided earnings to pay dividends, provided that either—

- (1) The payment of dividends will not cause the credit union’s net worth classification to fall below “adequately capitalized” under subpart B or C of this part; or
- (2) If the payment of dividends will cause the net worth classification to fall below “adequately capitalized,” the appropriate Regional Director and, if State-chartered, the appropriate State official, have given prior written approval (in an NWRP or otherwise) to pay a dividend.

**PART 741—REQUIREMENTS FOR INSURANCE**

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

**Authority:** 12 U.S.C. 1757, 1766, 1781–1790, and 1790d. Section 741.4 is also authorized by 31 U.S.C. 3717.

2. Amend § 741.3 as follows:
  - a. Remove from the heading of paragraph (a) the words “Adequacy of”.
  - b. Remove paragraph (a)(2); and
  - c. Redesignate current paragraph (a)(3) as paragraph (a)(2).

#### **PART 747—ADMINISTRATIVE ACTIONS, ADJUDICATIVE HEARINGS, RULES OF PRACTICE AND PROCEDURE, AND INVESTIGATIONS**

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

**Authority:** 12 U.S.C. 1766, 1786, 1784, 1787, 1790d and 4806(a); and 42 U.S.C. 4012a.

2. Amend § 747.2005 of subpart L by revising paragraph (b)(2) to read as follows:

#### **§ 747.2005 Enforcement of orders.**

\* \* \* \* \*

(b) \* \* \*

(2) *Failure to implement plan.*

Pursuant to 12 U.S.C. 1786(k)(2)(A), the NCUA Board may assess a civil money penalty against a credit union which fails to implement a net worth restoration plan under subpart B of part 702 of this chapter or a revised business plan under subpart C of part 702, regardless whether the plan was published.

\* \* \* \* \*

[FR Doc. 02–13931 Filed 6–3–02; 8:45 am]

BILLING CODE 7535–01–P

## **DEPARTMENT OF COMMERCE**

### **Bureau of the Census**

#### **15 CFR Part 50**

[Docket Number 020509117–2117–01]

RIN Number 0607–AA36

#### **Bureau of the Census Certification Process**

**AGENCY:** Bureau of the Census, Department of Commerce.

**ACTION:** Notice of proposed rulemaking and request for comments.

**SUMMARY:** The Bureau of the Census (Census Bureau) proposes to establish the process for requesting certification of Census Bureau documents (*i.e.*, tables, maps, reports, *etc.*) and the pricing structure for that service. A certification confirms that a product is a true and accurate copy of a Census Bureau document. The Census Bureau is proposing this rule to create a

centralized system for certifying Census Bureau documents and to accurately reflect the true costs associated with certification.

**DATES:** Written comments must be submitted on or before July 5, 2002.

**ADDRESSES:** Please direct all written comments on this proposed program to the Director, U.S. Census Bureau, Room 2049, Federal Building 3, Washington, DC 20233.

#### **FOR FURTHER INFORMATION CONTACT:**

Requests for additional information on this proposed rule should be directed to Les Solomon, Chief, Customer Services Center, Marketing Services Office, U.S. Census Bureau, Room 1585, Federal Building 3, Washington, DC 20233, (301) 763–5377 or by fax (301) 457–4714.

#### **SUPPLEMENTARY INFORMATION:**

##### **Background**

At this time, there are no standard procedures or pricing policies in place regarding the certification process at the Census Bureau. Certifications are currently handled by individual divisions at the Census Bureau, and the prices charged do not reflect the full cost of the work involved.

Over the years, the volume of requests for certified Census Bureau documents has steadily increased. Title 13, section 8, allows the Census Bureau to provide certain statistical materials upon payment of costs for this service. With the release of Census 2000 data, the volume of requests for certified documents is expected to continue increasing. Substantial resources will be necessary to meet this demand. The proposed price structure reflects the cost of the resources used in fulfilling the expected requests, according to the kind of certification requested. Also reflected in the price is the level of difficulty (easy, moderate, or difficult) and time involved in compiling the certification. The two types of certification available are (1) “Impressed,” that is, impressing the Census Bureau seal on a document; and (2) “Attestation,” a signed statement by Census Bureau officials, attesting to the authenticity, accompanying a document onto which the Census Bureau seal has been impressed. Customers are to be charged a preset fee, as well as the standard cost of the data product (*e.g.*, report or map).

A certification may be needed for many reasons. For example, parties in a legal proceeding may wish to obtain a copy of a Census Bureau table or map that they wish to introduce into evidence, or local governments may

need official certification of census counts and boundary changes.

In order to create consistent certification rules, the Census Bureau proposes the following amendment to title 15, Code of Federal Regulations (CFR), part 50:

- Add new section, 50.50, containing the Census Bureau’s certification process.

- Establish a consistent pricing structure.

- Require requests for certifications to contain information on Form BC–1868(EF), Request for Official Certification. (See the Census Bureau’s Web site, <<http://www.census.gov/mso/www/certification/>>.)

#### **Administrative Procedure and Regulatory Flexibility Act**

A notice of proposed rulemaking is not required by Title 5, United States Code (U.S.C.), section 553, or any other law, because this rule is procedural in nature and involves a matter relating to public property, loans, grants, benefits or contracts. Accordingly, it is exempt from the notice and comment provisions of the Administrative Procedure Act under 5 U.S.C. 553(a)(2) and 5 U.S.C. (b)(A). Therefore, the analytical requirements of the Regulatory Flexibility Act are not applicable (5 U.S.C. 601, *et seq.*). As a result, a Regulatory Flexibility Analysis is not required and none has been prepared.

#### **Executive Orders**

This rule has been determined to be not significant for purposes of Executive Order 12866. This rule does not contain policies with federalism implications sufficient to warrant preparation of a federalism assessment under Executive Order 12612.

#### **Paperwork Reduction Act**

Notwithstanding any other provision of law, no person is required to respond to, nor shall a person be subject to a penalty for failure to comply with, a collection of information subject to the requirements of the Paperwork Reduction Act (PRA), Title 44, U.S.C., Chapter 35, unless that collection of information displays a current Office of Management and Budget control number. This notice does not represent a collection of information and is not subject to the PRA’s requirements. The form referenced in the rule, Form BC–1868(EF), will collect only information necessary to process a certification request. As such, it is not subject to the PRA’s requirements (5 CFR 1320.3(h)(1)).