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FEDERAL HOUSING FINANCE AGENCY

12 CFR Part 1263

RIN 2590-AA85

Federal Home Loan Bank Membership for Non-Federally-Insured Credit Unions

AGENCY: Federal Housing Finance Agency.

ACTION: Notice of proposed rulemaking; request for comments.

SUMMARY: The Federal Housing Finance Agency (FHFA or Agency) is proposing to amend its regulations governing Federal Home Loan Bank (Bank) membership to implement section 82001 of the Fixing America's Surface Transportation Act, which amended section 4(a) of the Federal Home Loan Bank Act (Bank Act) to authorize certain credit unions without Federal share insurance to become Bank members. This proposed rule also would make appropriate conforming changes to FHFA's membership regulations.

DATES: Written comments must be received on or before [INSERT DATE 60 DAYS AFTER DATE OF PUBLICATION IN THE FEDERAL REGISTER].

ADDRESSES: You may submit your comments, identified by Regulatory Information Number (RIN) 2590–AA85, by any of the following methods:

- Agency Web site: www.fhfa.gov/open-for-comment-or-input.
- Federal eRulemaking Portal: http://www.regulations.gov. Follow the instructions for submitting comments. If you submit your comment to the Federal eRulemaking Portal, please also send it by email to FHFA at RegComments@fhfa.gov to

ensure timely receipt by the agency. Please include Comments/RIN 2590–AA85 in the subject line of the message.

• Courier/Hand Delivery: The hand delivery address is: Alfred M. Pollard, General Counsel, Attention: Comments/RIN 2590–AA85, Federal Housing Finance Agency, 400 Seventh Street SW., Eighth Floor, Washington, DC 20219. Deliver the package to the Seventh Street entrance Guard Desk, First Floor, on business days between 9 a.m. to 5 p.m.

• U.S. Mail, United Parcel Service, Federal Express or Other Mail Service: The mailing address for comments is: Alfred M. Pollard, General Counsel, Attention: Comments/RIN 2590–AA85, Federal Housing Finance Agency, 400 Seventh Street SW., Eighth Floor, Washington, DC 20219.

FOR FURTHER INFORMATION CONTACT: Eric M. Raudenbush, Associate General Counsel, Office of General Counsel, Eric.Raudenbush@fhfa.gov, (202) 649-3084; or Julie Paller, Senior Financial Analyst, Division of Bank Regulation, Julie.Paller@fhfa.gov, (202) 649-3201 (not toll-free numbers), Federal Housing Finance Agency, 400 Seventh Street SW., Washington, DC 20219. The telephone number for the Telecommunications Device for the Hearing Impaired is (800) 877-8339.

SUPPLEMENTARY INFORMATION:

I. Comments

FHFA invites comments on all aspects of the proposed rule and will take all comments into consideration before issuing a final rule. All comments received will be posted without change on the FHFA web site at http://www.fhfa.gov, and will include any personal information provided, such as name, address (mailing and email), and

telephone numbers. In addition, copies of all comments received will be available without change for public inspection on business days between the hours of l0 a.m. and 3 p.m., at the Federal Housing Finance Agency, 400 Seventh Street SW., Washington, DC 20219. To make an appointment to inspect comments, please call the Office of General Counsel at (202) 649-3804.

II. Background

Under the Bank Act, federally insured depository institutions, including state- and federally chartered credit unions whose member accounts are insured by the National Credit Union Share Insurance Fund (NCUSIF), have been eligible for Bank membership since 1989. Until recently, however, state-chartered credit unions without Federal share insurance were ineligible for Bank membership, except to the limited extent that a credit union certified as a "community development financial institution" (CDFI) could meet the eligibility requirements applicable to CDFIs. In December 2015, Congress amended the Bank Act to authorize the Banks to consider applications for membership from state-chartered credit unions without Federal share insurance and to approve such applicants for Bank membership (irrespective of their CDFI status), provided that certain prerequisites have been met.[1] This proposed rule would implement those statutory amendments.

A. Amendment of the Bank Act to Authorize Membership for Non-Federally-Insured Credit Unions

Section 4 of the Bank Act specifies the types of institutions that may be eligible for membership in one of the eleven district Banks and establishes requirements that each

[1] Fixing America's Surface Transportation Act (FAST), Pub. L. No. 114-94, section 82001(a), 129 Stat. 1795 (2015), codified at 12 U.S.C. 1424(a)(5)(A) and (B).

of those types of institutions must meet in order to be eligible for Bank membership.[1] When enacted as part of the original Bank Act in 1932, section 4 authorized thrift institutions of various types, as well as insurance companies, to become Bank members, provided that the institution met the applicable eligibility requirements. At that time and for many decades afterward, the statute did not permit credit unions to become Bank members. This changed in 1989, when Congress amended section 4 to add "insured depository institution[s]" to the list of entities that may be eligible for Bank membership and defined that term to include any depository institution the accounts of which are insured by the Federal Deposit Insurance Corporation (FDIC) or by the NCUSIF.[2] In effect, those amendments authorized federally insured commercial banks and credit unions to become Bank members for the first time. Commercial banks without Federal deposit insurance and credit unions without Federal share insurance remained ineligible for Bank membership even after the 1989 amendments.

In 2008, Congress amended the Bank Act to authorize entities certified as CDFIs by the CFDI Fund of the United States Department of the Treasury to become Bank members, provided the CDFI meets the membership eligibility requirements established for such entities. By law, credit unions—including state-chartered credit unions without Federal share insurance—may be certified as CDFIs.[3] Thus, since the adoption of the 2008 statutory amendments, a credit union that would otherwise have been ineligible for Bank membership due to a lack of Federal share insurance may nonetheless be eligible for membership if it is certified as a CDFI and meets the eligibility requirements

[1] See 12 U.S.C. 1424.
[2] See Financial Institutions Reform, Recovery, and Enforcement Act of 1989 (FIRREA), Pub. L. No. 101-73, section 704, 103 Stat. 183, 415 (1989).
[3] See 12 U.S.C. 4701-4719; 12 CFR part 1805.

applicable to CDFIs.

To implement those statutory amendments, FHFA in January 2010 adopted amendments to part 1263 to address membership eligibility and application requirements for CDFIs and to clarify the types of entities to be treated as CDFIs for membership purposes.[4] That rule defined "CDFI" to mean any entity that the CDFI Fund has certified as a community development financial institution, with the exception of federally insured banks, thrifts, and credit unions.[5] As insured depository institutions under the Bank Act, the latter types of entities had already been eligible for Bank membership prior to the enactment of the statutory provisions authorizing membership for CDFIs. By excluding federally insured depositories from the definition of "CDFI," FHFA effectively required that they continue to be treated solely as insured depository institutions under the membership regulation, even in cases where the institution has been certified as a CDFI. In explaining its decision, the Agency cited its conclusion that, while Congress adopted the 2008 amendments to provide a new avenue to membership for CDFIs that had not previously been eligible, it did not intend to provide an additional avenue to membership for federally insured depository institutions that had already been eligible under the prior law.[6]

While it effectively required that a federally insured credit union certified as a CDFI be treated as an insured depository institution for Bank membership purposes, the 2010 rule mandated different treatment for state-chartered credit unions without Federal share insurance that have been certified as a CDFI—a type of entity that the rule termed a

[4] 75 FR 678 (Jan. 5, 2010).
[5] See 12 CFR 1263.1.
[6] 75 FR at 681.

"CDFI credit union." As amended by the 2010 rule, the membership regulation treats CDFI credit unions as a type of CDFI and generally subjects them to the same standards that apply to non-depository CDFIs, with the exception of those that must be met in order for an applicant to be deemed in compliance with the statutory eligibility requirement that an institution's financial condition be "such that advances may be safely made to it."[7] With respect to the latter requirement, the regulation requires that CDFI credit unions demonstrate compliance in a manner similar to that which had already been required of all other types of depository institution applicants prior to the 2010 rulemaking.[8] For non-depository CDFIs, such as loan funds and venture capital funds, the 2010 final rule established separate financial condition requirements that were tailored to the unique structure and business of those entities.[9]

In December 2015, Congress again amended section 4 of the Bank Act, in this case to permit state-chartered credit unions without Federal share insurance to be approved for Bank membership (irrespective of their CDFI status) where the credit union meets the membership eligibility requirements applicable to insured depository institutions and has taken enumerated steps to demonstrate that it meets the requirements for Federal share insurance, notwithstanding that it is not actually federally insured.[10] Specifically, new section 4(a)(5) states that a credit union lacking Federal share insurance that has applied to become a member of a Bank shall be treated as an insured depository institution for purposes of determining its eligibility for Bank membership, provided that its state credit union regulator has first determined that the institution met the

[7] See 12 U.S.C. 1424(a)(2)(B).
[8] See 12 CFR 1263.11(b).
[9] See 12 CFR 1263.16(b).
[10] Pub. L. No. 114-94, section 82001(a), 129 Stat. 1795 (2015).

requirements for Federal share insurance as of the date of its application for membership.[11] However, the new provision also provides that if the state regulator for such an applicant fails to make a determination as to whether the applicant met the requirements for Federal share insurance before the expiration of the six-month period that begins on the date of its application for membership, then the credit union applicant shall be deemed to have met those requirements.[12]

Consistent with the regulatory definitions that would be in effect under the proposed rule, this Supplementary Information refers to credit unions without Federal share insurance that are not certified as CDFIs as "non-federally-insured credit unions" or "NFICUs" and to credit unions without Federal share insurance that are certified as CDFIs as "CDFI credit unions." As discussed below, under the proposed rule, CDFI credit unions would continue to be treated as they are under the existing regulation and would not be subject to the new regulatory provisions governing NFICUs.

B. Letters to Banks Providing Guidance on the Treatment of NFICUs Under the 2015 Statutory Amendments

On April 12, 2016, in response to requests from several Banks for guidance addressing the manner in which they may accept and process membership applications from NFICUs that are newly eligible under the recent statutory amendments, FHFA sent a letter to each Bank describing how it should comply with the new statutory provisions. The guidance letters addressed the substantive requirements of the statutory amendments,

[11] 12 U.S.C. 1424(a)(5). Although the statutory text actually refers several times to "Federal deposit insurance," FHFA construes those references to mean the federal share insurance that is provided to credit unions by the NCUSIF, in light of the evident purpose for which Congress adopted the NFICU amendments.
[12] 12 U.S.C. 1424(a)(5)(B)(ii).

the procedures each Bank should follow in processing applications, and the actions the Bank should take to document compliance with the new eligibility requirements. The letters also noted the Agency's intent to initiate a rulemaking to codify the substance of the guidance and advised each Bank to process membership applications from NFICUs in accordance with the guidance until FHFA adopts a final rule implementing the new statutory provisions.

The amended statute provides that an NFICU may be eligible for Bank membership only if its state regulator has determined that it meets all the requirements for Federal share insurance "as of the date of the application for membership."[13] With respect to the nature of this determination, the guidance letters expressed FHFA's view that the statute requires that the state regulator of an NFICU applicant determine that the applicant actually satisfies all of the applicable eligibility requirements for NCUSIF share insurance under the Federal Credit Union Act[14] and the implementing regulations of the NCUA.[15] In response to specific questions FHFA had received, the guidance clarified that a determination by a state regulator that a particular NFICU applicant is "eligible to apply" for NCUA insurance or is operating and in good standing under state law is not sufficient to satisfy the statutory requirement.

The guidance also addressed the meaning of the term "date of the application for membership," which Congress designated as the date as of which the state regulator is to determine whether an NFICU meets the eligibility requirements for Federal share insurance and on which begins the statutory six-month period after which an NFICU

[13] 12 U.S.C. 1424(a)(5)(B)(i).
[14] 12 U.S.C. 1751 et seq.
[15] 12 CFR part 745.

shall be deemed to meet those requirements if its state regulator fails to act. Because Congress did not specify precisely what constitutes the "date of the application," FHFA construed the term consistently with similar language in the existing membership regulation. The guidance explained that the "date of the application" should be the date on which an NFICU has provided to a Bank a "complete" membership application—i.e., an application that includes all information that is required to assess the applicant's compliance with the applicable statutory and regulatory membership eligibility requirements, as well as any other information the Bank deems necessary to act on an application. The existing membership regulation uses this concept of a "complete" application to establish the starting point of the 60-day period during which a Bank is generally required to make a determination on a membership application.[16]

The guidance stated that a Bank generally should process a membership application from an NFICU in the same manner it would process a membership application from a federally insured credit union, up to the point when the Bank determines that the NFICU has provided all information required to assess its compliance with the applicable membership eligibility requirements. The existing membership regulation requires that, once a Bank makes such a determination with respect to the application of a federally insured credit union (or that of any other type of applicant), it must inform the applicant that the application is "complete" and generally must act on the application within 60 days. The guidance, however, advised that, when a Bank has made such a determination with respect to the application of an NFICU, the Bank should instead inform the NFICU that its application is "provisionally complete" and that it must

[16] See 12 CFR 1263.3(c).

take further steps before the application may be deemed fully complete and ready to be acted upon. Under the guidance, a Bank is to regard an NFICU's application to be only "provisionally" complete at that point because it would not include the documentation that the NFICU's state regulator either has determined that the applicant satisfied the requirements for Federal share insurance as of the date of the application or has failed to make that determination within six months. The guidance advised that, when informing an NFICU applicant that its application is provisionally complete, a Bank should instruct it to make a written request of its state regulator for a determination that the NFICU satisfied all of the eligibility requirements for Federal share insurance as of the date of that request, and to provide a copy of that request to the Bank on the same day it transmits the request to the regulator.[17]

With respect to the completion of the membership application, the guidance advised that a Bank should act on an NFICU's application only after having received one of the following three items: (1) an affirmative written response from the regulator that the NFICU meets the eligibility requirements for Federal share insurance; (2) a written statement from the regulator that it cannot or will not make any determination regarding the NFICU's eligibility for Federal share insurance; or (3) a written statement from the NFICU applicant that six months have expired from the date of the membership application without the state regulator providing any response to the NFICU's request. Items (1) and (3) above closely track the statutory requirements. Regarding item (2),

[17] The guidance letters also included an example of a statement that an applicant could include in the request to its supervisor, which was intended to provide clarity as to the required nature of the request. The letters also noted that, in the event that a state supervisor were unable or unwilling to provide an affirmative response to the NFICU, then the applicant may ask the supervisor to provide a written statement to that effect.

FHFA concluded that, although the statute does not address the possibility that a state regulator may expressly decline to make a determination (as opposed to merely failing to respond to a request), it is permissible to consider such a written statement as the substantive equivalent of a failure to respond within six months. The Agency noted that the statutory six-month review period appeared to be intended to ensure that a state credit union regulator would have a sufficient amount of time to determine whether a particular credit union satisfied the requirements for Federal share insurance. The guidance reflected FHFA's belief that, in the event that a state regulator were to conclude that it could not make such a determination for any credit union due to a lack of familiarity with the NCUA underwriting process or for other reasons, receipt of a written statement to that effect will suffice to allow a Bank to approve an NFICU's membership application without waiting for the six-month period to expire.[18] The guidance advised the Banks to retain in each NFICU applicant's membership file copies of the relevant documents, including the applicant's request to its state regulator and any response from the regulator or statement from the applicant that the regulator had not responded, as part of its required records for all membership applications.

Finally, the guidance letters addressed the possibility that an existing Bank member that is a state-chartered federally insured credit union might voluntarily cancel its Federal share insurance, thus becoming an NFICU—a scenario that the new statutory provisions do not explicitly address. The guidance made clear that such a credit union may voluntarily surrender its Federal share insurance without jeopardizing its status as a

[18] FHFA is aware of one instance in which a state credit union regulator has advised a Bank that it could not make a determination regarding a state credit union's eligibility for federal share insurance because the state regulator was not familiar with the specific underwriting and related processes employed by NCUA when acting on applications for federal share insurance.

Bank member and without having to request from its state regulator the type of determination that the statute requires to be made with respect to NFICU applicants. The guidance letters reasoned that NCUA's prior approval of the credit union for Federal share insurance is dispositive as to the key issue under the statutory amendments—i.e., whether the institution satisfies the eligibility requirements for Federal share insurance—thus obviating any need for the member's state regulator to make that same decision.

III. The Proposed Rule

The proposed rule would codify into part 1263 of FHFA's regulations the core concepts of the guidance letters. The principal regulatory provisions regarding NFICUs would be located in a new § 1263.19 (a reserved section number under the existing regulation), which would set forth the prerequisites that an NFICU must meet in order to be treated as an insured depository institution for purposes of determining its eligibility for membership. As described in more detail below, the proposed rule would also make a number of conforming revisions to other sections of the regulation.

A. Primary Revisions

1. Definitions of NFICU and Insured Depository Institution—§ 1263.1

The proposed rule would define "non-federally-insured credit union" to mean a "State-chartered credit union that does not have Federal share insurance and that has not been certified as a CDFI by the CDFI Fund." The proposed rule would not include CDFI credit unions within this definition, notwithstanding that they are also state-chartered credit unions that do not have Federal share insurance. The existing regulation generally requires CDFI credit unions to comply with the membership eligibility requirements that are applicable to CDFIs generally, rather than those applicable to depository institutions,

with the exception of provisions relating to the applicant's financial condition. The proposed rule would make no substantive changes to any of the provisions that currently apply to CDFI credit unions and would treat them separately from NFICUs for membership purposes.

The definition of "insured depository institution" in the existing membership regulation follows the Bank Act definition of that term and includes any federally insured bank, savings association, or credit union. The proposed rule would revise the regulatory definition of "insured depository institution" to include, in addition to federally insured depository institutions, NFICUs meeting the prerequisites of proposed § 1263.19. As an "insured depository institution" under the revised regulation, any qualifying NFICU applying for Bank membership would be subject to all of the provisions of the membership regulation that apply to insured depository institutions generally, except where otherwise provided. Thus, a qualifying NFICU applicant would be eligible for membership only if: it is duly organized under Federal or State law; it is subject to inspection and regulation under Federal or State banking laws, or similar laws; it makes long-term home mortgage loans; its financial condition is such that advances may be safely made to it (hereinafter the "financial condition" requirement); its management and its home financing policy are both consistent with sound and economical home financing;[19] and it has at least 10 percent of its assets in "residential mortgage loans" (hereinafter the "10 percent" requirement).[20] With the exception of the financial

[19] 12 CFR 1263.6(a).

[20] 12 CFR 1263.6(b). The Bank Act exempts certain smaller depository institutions—"community financial institutions" (CFIs)—from the 10 percent requirement, but defines CFI to include only institutions the deposits of which are insured under the Federal Deposit Insurance Act (FDIA) that have total assets

condition requirement, an NFICU applicant would be required to demonstrate compliance with each of those eligibility requirements in the same manner that is required of insured depository institutions generally. As discussed below, the proposed rule would require an NFICU applicant to demonstrate compliance with the financial condition requirement in the same manner as a CDFI credit union.[21]

2. Prerequisites For an NFICU To Be Treated As an Insured Depository Institution—§ 1263.19

The proposed rule would add to the membership regulation a new § 1263.19, which would set forth the prerequisites that an NFICU must meet in order to be treated as an insured depository institution for purposes of determining its eligibility for membership. The substantive and procedural requirements set forth in proposed § 1263.19 are, in all material respects, identical to those set forth in the guidance letters, although the proposed rule would provide additional clarification on certain points. As described below, paragraph (a) of the new section would address the treatment of NFICUs that are applying for Bank membership, while paragraph (b) would address the status of any credit union that already is a Bank member but that opts to become an NFICU by canceling its Federal share insurance.

NFICUs Applying For Bank Membership

Section 126319(a) addresses the prerequisites that must be met before a Bank may approve an NFICU applicant for membership. In parallel with the inclusion of qualifying NFICUs within the regulatory definition of "insured depository institution," the

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below a certain threshold amount. 12 U.S.C. 1422(10)A)(i), 1424(a)(4). Because a credit union cannot obtain deposit insurance under the FDIA, it cannot qualify as a CFI regardless of its level of total assets.

[21] See 12 CFR 1263.11(b).

introductory clause to this provision provides that an NFICU applicant shall be treated as an insured depository institution for purposes of determining its eligibility for membership, provided that it complies with all of the requirements of § 1263.19(a).

The proposed rule would first require that a Bank obtain from an NFICU applicant all of the information that the Bank generally requires to process membership applications from federally insured depository institutions, including all of the information needed to demonstrate compliance with the eligibility requirements described above. Once a Bank has obtained that information, the rule would require that the Bank notify the NFICU that its application is provisionally complete and that the NFICU should request from its state regulator a determination that it satisfies the requirements for obtaining Federal share insurance as of the date of the request.[22] The notice must also inform the NFICU that its application will not be deemed to be complete until the Bank has received acceptable documentation pertaining to the regulator's response to the NFICU applicant's request.

Proposed § 1263.19(a)(3) would require a Bank to deem an NFICU's application to be complete after it has received any one of the following items: (1) a written statement from the regulator confirming that the NFICU satisfies the requirements for Federal share insurance; (2) a written statement from the regulator that it is unable to make that determination; or (3) a written statement from the NFICU that it has not received a response from the state regulator within the statutory six-month period, and

[22] The NFICU must simultaneously provide to the Bank a copy of its request to the state regulator. The guidance letters had included an example of language that an NFICU could use in its request to its state regulator, but the proposed rule would not do so. A number of NFICUs have since been admitted to membership, and appear to have encountered no difficulties in obtaining a response from the state regulators, which suggests that there is no need for the regulation to address this topic. Banks may continue to use the sample language if they choose to do so.

that the regulator has not determined that the NFICU does not meet the requirements for Federal share insurance. Once a Bank has received one of those three items and has deemed the NFICU's application to be complete, the proposed rule would require that the Bank act upon the application in accordance with § 1263.3(c). That existing provision requires that a Bank notify an applicant when it deems the application to be complete and (with certain exceptions) either approve or deny the application within 60 calendar days of the date it made that determination.[23] The cross-reference to § 1263.3(c) is intended to make clear that a Bank would be permitted the same amount of time to act upon a fully complete NFICU application as it has to act upon a complete application from any other type of eligible institution. However, given that an NFICU's application should already include all of the information needed to determine whether it meets the applicable membership eligibility requirements at the time it sends the request to its regulator, FHFA anticipates that in many cases Banks would be prepared to act upon an NFICU application shortly after receiving the required documentation regarding the response of the state regulator, especially when the regulator fails to respond within six months or does not provide a response until the end of that timeframe.

A Credit Union That Becomes an NFICU When Already a Member

While proposed § 1263.19(a) addresses the treatment of NFICUs applying to become a Bank member, § 1263.19(b) addresses the status of any existing credit union Bank member that opts to become an NFICU by canceling its Federal share insurance. The guidance letters made clear that any such credit union may voluntarily surrender its

[23] The regulation allows a Bank to suspend the 60-day review period if it subsequently determines that it does not in fact have all of the information that is required to process the application. In such cases, a Bank may require that the applicant provide additional information, but must resume the 60-day review period when the applicant supplies the requested information. 12 CFR 1263.3(c).

Federal share insurance without affecting its status as a Bank member. Consistent with that position, proposed § 1263.19(b) would explicitly authorize such a credit union to remain a member without requiring it to request a determination of its state regulator as to whether it meets the requirements for Federal share insurance. The proposed rule would require that the Bank determine that the member has canceled its Federal share insurance voluntarily—i.e., that NCUA has approved the credit union's request to terminate its Federal share insurance.[24] The Banks could make this determination by obtaining a copy of NCUA's approval of the credit union's request to terminate its Federal insurance. Upon converting to an NFICU, the credit union would remain subject to all regulatory provisions that apply to insured depository institution members.

The recent statutory amendments focus on state-chartered credit unions that have not previously been eligible for Bank membership due to their lack of Federal share insurance; the amendments do not address whether all of the requirements that apply to NFICU applicants should also apply to existing Bank members that wish to surrender their Federal share insurance while remaining as members. As FHFA noted in the guidance letters, the key question with respect to whether any particular NFICU may be eligible for Bank membership under the statutory amendments is whether the institution actually meets all of the requirements for Federal share insurance. In the case of an existing Bank member that is a federally insured state-chartered credit union, NCUA has already definitively answered that question by having previously approved the credit union for Federal share insurance and having continued to provide that insurance up until the time the credit union voluntarily canceled it. For that reason, nothing would be

[24] See 12 U.S.C. 1786(a) (voluntary termination of federal share insurance); 12 CFR 708b.201(d) (termination of federal share insurance requires prior approval of NCUA).

gained by construing the statute as requiring existing credit union Bank members that voluntarily cancel their Federal share insurance to seek that same determination from their state regulators in order to remain a member as an NFICU.

Requiring a Bank to confirm that the cancelation of a member's Federal share insurance was voluntary would provide reasonable assurance that the member satisfies the requirements for Federal share insurance and, thus, remains eligible for membership as an NFICU despite no longer being a federally insured depository institution. As noted above, the core requirement for NFICUs under the statutory amendments is a determination that the NFICU satisfies the requirements for Federal share insurance, and the best evidence that a newly converted NFICU satisfies those requirements would be that it had remained federally insured until voluntarily relinquishing the insurance. It is also possible, however, that a federally insured credit union could lose its Federal share insurance through an involuntary termination for cause by NCUA. If NCUA were to terminate a Bank member's share insurance involuntarily, then that institution would cease to be eligible for Bank membership because NCUA's action would demonstrate that the institution could not meet the prerequisites for membership as an NFICU and, without Federal share insurance, it would no longer be eligible for membership as a federally insured depository institution. In such a case, a Bank likely would be required to terminate the credit union's membership because, unless the credit union happened to be certified as a CDFI, it would no longer satisfy any of the provisions under which credit unions may eligible for membership.

B. Conforming Amendments

The proposed rule would also make a number of conforming revisions to part

1263, which are discussed below.

1. Definitions—§ 1263.1

In addition to the substantive revisions to § 1263.1 that are discussed above, the proposed rule would make a number of non-substantive revisions to that section. First, the rule would add a definition of "Federal share insurance" and define that term to mean "insurance coverage of credit union member accounts provided by the National Credit Union Share Insurance Fund under title II of the Federal Credit Union Act (12 U.S.C. 1781 et seq.)."

The rule would also revise the definition of "CDFI credit union," which is currently defined to mean "a State-chartered credit union that has been certified as a CDFI by the CDFI Fund and that does not have Federal share insurance," to reverse the order of the two clauses so that it would instead refer to "a State-chartered credit union that does not have Federal share insurance and that has been certified as a CDFI by the CDFI Fund." FHFA is proposing to make this minor change so that the definition of "CDFI credit union" will be structured in parallel with the definition of "non-federally-insured credit union." The intent of this is to make clear that the amended regulation would address two types of state-chartered credit unions without Federal share insurance—those that are not certified as a CDFI (non-federally-insured credit unions) and those that are certified as a CDFI (CDFI credit unions)—and would subject them to different membership requirements.

In the definition of "community development financial institution or CDFI," the proposed rule would revise the reference to "a credit union insured under the Federal Credit Union Act (12 U.S.C. 1751 et seq.)" to refer instead to "a credit union that has

Federal share insurance." FHFA is proposing this minor non-substantive change so that the terminology used in the definition of "CDFI" will be consistent with that in the proposed definitions of "non-federally-insured credit union" and "CDFI credit union," both of which would employ the newly-defined term "Federal share insurance" to refer to insurance obtained under the Federal Credit Union Act.

Finally, the proposed rule would revise the definition of "regulatory financial report," which currently refers to a financial report that an "applicant" is required to file with its regulator, to refer instead to a financial report that an "institution" is required to file with its regulator. In addition to requiring a Bank to obtain information from applicants' regulatory financial reports for many purposes, FHFA's regulations also require that a Bank obtain information from members' regulatory financial reports in some circumstances. The proposed revision would make clear that the term "regulatory financial report" refers to the reports of both applicants and members.

2. Membership Application Requirements—§ 1263.2

Section 1263.2(b) of the existing regulation requires a Bank to prepare for each applicant a written membership application digest addressing whether or not the applicant meets each of the applicable requirements for membership under the regulation. The proposed rule would revise that provision to require expressly that a Bank include in the application digest for each NFICU applicant a written summary of the manner in which the applicant has complied with the requirements of proposed § 1263.19(a). FHFA would expect a Bank to note in the digest the date on which the NFICU applicant transmitted to its state regulator the request required under proposed § 1263.19(a)(2), as well as the date on which the Bank received the written statement addressing the results

of that request required under proposed § 1263.19(a)(3). The Agency would also expect the Bank to describe in the digest which of the three types of written statements that are permissible under § 1263.19(a)(3) was used to satisfy the requirement of that provision.

The proposed rule would also revise § 1263.2(c), which requires a Bank to maintain a membership file for each applicant, to make clear that a Bank should include in the file for an NFICU applicant any documents required under proposed § 1263.19.

3. Compliance With the Financial Condition Requirement—§ 1263.11

Existing § 1263.11 governs the manner in which Banks are to determine whether depository institution applicants, including insured depository institutions and CDFI credit unions, are in compliance with the statutory "financial condition" eligibility requirement. Paragraph (a) requires that a Bank review a number of different items regarding the financial condition of depository institution applicants, including: (1) regulatory financial reports the applicant filed with its regulator for the last six calendar quarters and three year-ends; (2) the applicant's most recent audited financial statements; (3) the applicant's most recent regulatory examination report; (4) a written description of any outstanding enforcement actions against the applicant; and (5) any other relevant document or information concerning the financial condition of the applicant that comes to the Bank's attention.

In its 2010 final rule amending part 1263 to implement the statutory amendments that authorized Bank membership for CDFIs, FHFA revised § 1263.11(a) to make clear that the review requirement applies to CDFI credit unions, in addition to other types of depository institutions. In explaining its decision to make that revision, the Agency explained that "[a]lthough CDFI credit unions do not file regulatory financial reports with

the NCUA, they do file comparable reports with their appropriate state regulator, and FHFA believes that those documents may be used to assess the financial condition of the CDFI credit unions."[25] Similarly, Banks can and should use financial reports filed by NFICU applicants with their state regulators to assess the applicants' financial condition. Although the proposed rule would not revise § 1263.11(a) to refer expressly to NFICUs, the review requirements of that provision would nonetheless apply in the case of NFICU applicants, given that NFICUs meeting the prerequisites of § 1263.19 would generally be treated as insured depository institutions for purposes of determining their eligibility for membership under the amended regulation.

Existing § 1263.11(b) establishes three standards that a depository institution applicant must meet to be deemed in compliance with the "financial condition" requirement: (1) it must have received a composite regulatory examination rating from its state regulator within the preceding two years; (2) it must meet all of its minimum statutory and regulatory capital requirements; and (3) it must meet the "minimum performance standard" described in § 1263.11(b)(3). The latter provision deems any applicant that received a composite rating of "1" on its most recent regulatory examination, except for a CDFI credit union, to be automatically in compliance with the "minimum performance standard."[26] That provision requires that any non-CDFI depository institution with an examination rating of "2" or "3," as well as any CDFI credit union regardless of its examination rating, satisfy performance trend criteria relating to its (A) earnings (the applicant must have positive income in four of the six most recent quarters), (B) nonperforming assets (nonperforming loans and leases plus

[25] 75 FR at 684.
[26] 12 CFR 1263.11(b)(3)(i), (iii).

other real estate owned must not exceed 10 percent of total loans and leases plus other real estate owned in the most recent quarter), and (C) allowance for loan and lease losses (the ratio must have been 60 percent or greater during four of the six most recent quarters) in order to meet the "minimum performance standard."[27]

In adopting its final rule on membership for CDFIs in 2010, FHFA decided to require all CDFI credit union applicants—including those with a current state examination rating of "1"—to demonstrate compliance with the performance trend criteria specified in § 1263.11(b)(3), while continuing to exempt other types of depository institutions having a "1" rating from that requirement. In the Supplemental Information to the 2010 final rule, FHFA described its decision to require that even the most highly rated CDFI credit unions satisfy the performance trend criteria as "prudent." The Agency noted that, because such institutions are not subject to oversight by the NCUA and because they had not previously been eligible for membership, the Banks were likely to be less familiar with the state examination processes and ratings systems to which they are subject than with those that apply to federally insured depository institutions.[28]

For similar reasons, the proposed rule would revise § 1263.11(b)(3)(iii) to require that NFICUs meet the minimum performance standard in the same way that CDFI credit unions must under the existing provision—that is, by having received a "1," "2," or "3" composite rating in its most recent regulatory examination and by meeting the performance trend criteria for earnings, nonperforming assets, and allowance for loan and lease losses. FHFA believes that, given the Banks' lack of experience with non-federally-insured credit unions, it is also prudent to require all NFICUs to meet the

[27] 12 CFR 1263.11(b)(3)(i).
[28] 75 FR at 684-685.

performance trend criteria as part of satisfying the "financial condition" eligibility requirement. Despite the fact that a subset of credit unions without Federal share insurance—i.e., CDFI credit unions—have been permitted to become Bank members since 2010, it does not appear that the Banks have approved any such institutions for membership to date. Consequently, the safety and soundness concerns arising from the Banks' relative lack of familiarity with the regimes that apply to credit unions that are subject to regulation and supervision only at the state level continue to exist and apply with equal validity to both CDFI credit unions and NFICUs.[29]

The Bank Act requires that the primary Federal banking regulators make available to the Banks, in confidence, reports of condition and other information relating to the condition of any Bank member or other institution with which a Bank contemplates having transactions authorized by the Bank Act, such as applicants for membership.[30] That provision, however, does not apply to state banking regulators and the supervisory reports that they prepare relating to depository institutions organized under state law. Although many Banks have arrangements with state banking regulators, including state credit union regulators, under which those regulators provide the Banks with access to confidential supervisory information, including reports of examination, for the institutions they regulate, that may not be the case for every state. This raises a question as to whether a Bank may approve an application for membership received from an NFICU whose state regulator declines to provide the Bank with access to the reports of examination for its regulated entities or to allow the credit unions it regulates to disclose

[29] The proposed rule would differ from the guidance letters in making clear that the exemption that applies generally to depository institutions that have received a composite rating of "1" does not apply to NFICUs. The guidance letters did not address this point directly.
[30] 12 U.S.C. 1442(a)(1).

the composite rating derived from those examinations.

Under the existing membership regulation, compliance with § 1263.11 creates a presumption that a depository institution applicant meets the statutory "financial condition" requirement. While failure to comply with § 1263.11 creates a presumption that a depository institution applicant does not meet the "financial condition" requirement, that presumption of noncompliance may be rebutted. Section 1263.17(d) provides that, if a depository institution applicant does not have a composite regulatory examination rating, does not have the minimum rating required by the regulations, or does not meet the performance trend criteria, the applicant may still meet the "financial condition" requirement if it or the Bank prepares a written justification providing substantial evidence that is acceptable to the Bank that it is in a sound financial condition, notwithstanding its failure to meet one or more of the requirements of § 1263.11.[31] Although FHFA encourages all of the Banks to reach agreements with the appropriate state regulators to allow them to review the reports of examination for all state-chartered depository institutions, a Bank may rely on the alternative provisions of § 1263.17(d) to rebut any presumption of noncompliance with the "financial condition" requirement that arises from a state credit union regulator's decision not to provide a Bank with access to the reports of examination for its regulated entities.

4. Reports and Examinations—§ 1261.31

Existing § 1263.31 sets forth a number of stipulations to which each Bank member is deemed to have agreed as a condition precedent to becoming a Bank member. Under paragraph (b) of this section, each institution admitted to Bank membership agrees

[31] 12 CFR 1263.17(d).

that reports of examination by local, state or Federal agencies, or institutions may be furnished by those authorities to the Bank or to FHFA upon request. The proposed rule would revise § 1263.31(b) to specify that, with respect to any member that is an NFICU or CDFI credit union, the member also agrees that reports of examination by any private entity that provides it with share insurance may be furnished to the Bank or to FHFA. To the best of FHFA's knowledge, there is only one insurance company in the United States currently providing private share insurance for state-chartered credit unions.

Under existing § 1263.31(e), each institution also agrees, as a condition of Bank membership, that it will provide to the Bank, within 20 days of filing, copies of reports of condition and operations filed with its appropriate Federal banking agency. The proposed rule would revise that provision to state that each member also agrees to provide any reports of condition and operations it may be required to file with its appropriate state regulator and that each member that is an NFICU or a CDFI credit union agrees to provide any such reports it may be required to file with a private entity providing it with share insurance.

IV. Consideration of Differences Between the Banks and the Enterprises

Section 1313(f) of the Safety and Soundness Act requires the Director of FHFA, when promulgating regulations relating to the Banks, to consider the differences between the Banks and the Enterprises (Fannie Mae and Freddie Mac) as they relate to: the Banks' cooperative ownership structure; the mission of providing liquidity to members; the affordable housing and community development mission; their capital structure; and their joint and several liability on consolidated obligations.[32] The Director also may

[32] 12 U.S.C. 4513(f).

consider any other differences that are deemed appropriate. In preparing this proposed rule, the Director considered the differences between the Banks and the Enterprises as they relate to the above factors, and determined that the rule is appropriate. FHFA requests comments regarding whether differences related to those factors should result in any revisions to the proposed rule.

V. Paperwork Reduction Act

The Paperwork Reduction Act of 1995 (PRA) requires that FHFA consider the impact of paperwork and other information collection burdens imposed on the public.[33] Under the PRA and the implementing regulations of the Office of Management and Budget (OMB), an agency may not collect or sponsor the collection of information, nor may it impose an information collection requirement unless it displays a currently valid control number assigned by OMB.[34] FHFA's regulation "Members of the Federal Home Loan Banks," located at 12 CFR part 1263, contains several collections of information that OMB has approved under control number 2590-0003, which is due to expire on December 31, 2016. The proposed rule would not make any revisions that would affect the burden estimates for those collections of information. Therefore, FHFA has not submitted any materials to OMB for review.

VI. Regulatory Flexibility Act

The Regulatory Flexibility Act[35] (RFA) requires that a regulation that has a significant economic impact on a substantial number of small entities, small businesses, or small organizations must include an initial regulatory flexibility analysis describing the

[33] See 44 U.S.C. 3507(a) and (d).
[34] See 44 U.S.C. 3512(a); 5 CFR 1320.8(b)(3)(vi).
[35] 5 U.S.C. 601, et seq.

regulation's impact on small entities. Such an analysis need not be undertaken if the agency has certified that the regulation will not have a significant economic impact on a substantial number of small entities.[36] FHFA has considered the impact of the proposed rule under the RFA. The General Counsel of FHFA certifies that the proposed rule, if adopted as a final rule, is not likely to have a significant economic impact on a substantial number of small entities because the regulation applies only to the Banks, which are not small entities for purposes of the RFA.

List of Subjects in 12 CFR Part 1263

Federal home loan banks, Reporting and recordkeeping requirements.

Authority and Issuance

For the reasons stated in the **SUPPLEMENTARY INFORMATION**, and under the authority of 12 U.S.C. 4511, 4513, and 4526, FHFA proposes to amend part 1263 of subchapter D of chapter XII of title 12 of the Code of Federal Regulations as follows:

PART 1263—MEMBERS OF THE BANKS

1. The authority citation for part 1263 continues to read as follows:

Authority: 12 U.S.C. 1422, 1423, 1424, 1426, 1430, 1442, 4511, 4513.

2. Amend § 1263.1 as follows:

a. Revise the definitions of "CDFI credit union" and "Community development financial institution or CDFI";

b. Add, in alphabetical order, a definition for "Federal share insurance";

c. Revise the definition of "Insured depository institution";

[36] See 5 U.S.C. 605(b).

d. Add, in alphabetical order, a definition for "Non-federally-insured credit union"; and

e. Revise the definition of "Regulatory financial report".

The revisions and additions read as follows:

§ 1263.1 Definitions

* * * * *

CDFI credit union means a State-chartered credit union that does not have Federal share insurance and that has been certified as a CDFI by the CDFI Fund.

* * * * *

Community development financial institution or CDFI means an institution that is certified as a community development financial institution by the CDFI Fund under the Community Development Banking and Financial Institutions Act of 1994 (12 U.S.C. 4701 et seq.), other than a bank or savings association insured under the Federal Deposit Insurance Act (12 U.S.C. 1811 et seq.), a holding company for such a bank or savings association, or a credit union that has Federal share insurance.

* * * * *

Federal share insurance means insurance coverage of credit union member accounts provided by the National Credit Union Share Insurance Fund under subchapter II of the Federal Credit Union Act (12 U.S.C. 1781 et seq.).

* * * * *

Insured depository institution means:

(1) An insured depository institution as defined in section 2(9) of the Bank Act, as amended (12 U.S.C. 1422(9)); and

(2) To the extent provided under § 1263.19, a non-federally-insured credit union.

* * * * *

Non-federally-insured credit union means a State-chartered credit union that does not have Federal share insurance and that has not been certified as a CDFI by the CDFI Fund.

* * * * *

Regulatory financial report means a financial report that an institution is required to file with its appropriate regulator on a specific periodic basis, including the quarterly call report for commercial banks and savings associations, quarterly or semi-annual call report for credit unions, NAIC's annual or quarterly statement for insurance companies, or other similar report, including such report maintained by the appropriate regulator in an electronic database.

* * * * *

§ 1263.2 [Amended]

3. Amend § 1263.2:

a. By removing the word "1263.18" wherever it appears and, in its place, adding the word "1263.19"; and

b. In paragraph (b), by adding after the final period the words "In preparing a digest for a non-federally-insured credit union applicant, the Bank shall summarize the manner in which the applicant has complied with the requirements of § 1263.19(a).".

§ 1263.3 [Amended]

4. Amend § 1263.3, in paragraph (c), by removing from the second sentence the words "a Bank" and adding in their place the words "the Bank".

§ 1263.11 [Amended]

5. Amend § 1263.11, in paragraph (b)(3)(iii), by removing the words "A CDFI credit union applicant" and adding in their place the words "An applicant that is a CDFI credit union or a non-federally-insured credit union".

Subpart C —Eligibility Requirements

6. Add § 1263.19 and move it from subpart D to subpart C.

The addition reads as follows:

§ 1263.19 Non-federally-insured credit unions.

(a) Applicants. Except where otherwise provided, a non-federally-insured credit union applying to become a member of a Bank shall be treated as an insured depository institution for purposes of determining its eligibility for membership under this part, provided that all of the following requirements have been met:

(1) Provisional completion of application. After a non-federally-insured credit union initiates the application process, the Bank shall obtain from the applicant all information required by this part, and any other information the Bank deems necessary, to process the application, except for the items required under paragraphs (a)(2) and (3) of this section. Upon obtaining all such information, the Bank shall notify the applicant in writing that its application is provisionally complete and that, in order to complete the application process, it must comply with paragraph (a)(2) of this section and subsequently provide one of the items listed in paragraph (a)(3) of this section.

(2) Request to regulator. After receipt of the notice required under paragraph (a)(1) of this section, the applicant shall send to its appropriate State regulator a written request for a determination that the applicant meets all requirements for Federal share

insurance as of the date of the request. The applicant shall provide to the Bank a copy of that request simultaneously with its transmittal to the regulator.

(3) Final completion of application. The Bank shall deem an application to be complete, and shall act upon the application in accordance with § 1263.3(c), upon obtaining from the applicant any one of the following items:

(i) A written statement from the applicant's appropriate State regulator that the applicant met all of the eligibility requirements for Federal share insurance as of the date of the request sent pursuant to paragraph (a)(2) of this section;

(ii) A written statement from the applicant's appropriate State regulator that it cannot or will not make a determination regarding the applicant's eligibility for Federal share insurance; or

(iii) A written statement from the applicant, prepared no earlier than the end of the six-month period beginning on the date of the request sent pursuant to paragraph (a)(2) of this section, certifying that the applicant did not receive from its appropriate State regulator within that six-month period either a response as described in paragraph (a)(3)(i) or (ii) or a response stating that that the applicant did not meet all of the eligibility requirements for Federal share insurance as of the date of the request sent pursuant to paragraph (a)(2) of this section.

(b) Members canceling Federal share insurance. A Bank member that is a federally insured credit union and that subsequently cancels its Federal share insurance may remain a member of the Bank, subject to all regulatory provisions applicable to insured depository institution members, provided that the Bank has determined that the institution has canceled its Federal share insurance voluntarily.

Subpart E—Withdrawal, Termination, and Readmission

7. Revise the heading of subpart E to read as set out above.

8. Amend § 1263.31 by revising paragraphs (b) and (e) to read as follows:

§ 1263.31 Reports and examinations.

* * * * *

(b) Agrees that reports of examination by local, State, or Federal agencies or institutions, or by any private entity providing share insurance to a member that is a non-federally-insured credit union or a CDFI credit union, may be furnished by such authorities or entities to the Bank or FHFA upon request;

* * * * *

(e) To the extent applicable, agrees to provide to the Bank, within 20 days of filing, copies of reports of condition and operations required to be filed with:

(1) The member's appropriate Federal banking agency;

(2) The member's appropriate State regulator; or

(3) Any private entity providing share insurance to a member that is a non-federally-insured credit union or a CDFI credit union.

Dated: September 22, 2016.

Melvin L. Watt,
Director, Federal Housing Finance Agency.

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