Proposed Rules

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This section of the FEDERAL REGISTER contains notices to the public of the proposed issuance of rules and regulations. The purpose of these notices is to give interested persons an opportunity to participate in the rule making prior to the adoption of the final rules.

NATIONAL CREDIT UNION ADMINISTRATION

12 CFR Parts 701, 741,746, 748, and 752

[NCUA–2023–0023]

RIN: 3133–AF55

Fair Hiring in Banking

AGENCY: National Credit Union Administration (NCUA).

ACTION: Notice of proposed rulemaking.

SUMMARY: The NCUA Board (Board) proposes to incorporate its ''Second Chance'' Interpretive Ruling and Policy Statement 19–1 (IRPS 19–1) and the Fair Hiring in Banking Act (FHBA) into its regulations. The Federal Credit Union Act prohibits, except with the Board's prior written consent, any person who has been convicted of certain criminal offenses involving dishonesty or breach of trust (a covered offense), or who has entered into a pretrial diversion or similar program in connection with a prosecution for such offense (program entry), from participating in the conduct of the affairs of an insured credit union.

DATES: Comments must be received by January 8, 2024.

ADDRESSES: You may submit written comments, identified by RIN 3133–AF55, by any of the following methods (Please send comments by one method only):

- *Federal eRulemaking Portal: https://www.regulations.gov.* The docket number for this proposed rule is NCUA–2023–0023. Follow the instructions for submitting comments. A plain language summary of the proposed rule is also available on the docket website.
- *Mail:* Address to Melane Conyers-Ausbrooks, Secretary of the Board, National Credit Union Administration, 1775 Duke Street, Alexandria, Virginia 22314–3428.
- *Hand Delivery/Courier*: Same as mailing address.

Public inspection: You may view all public comments on the Federal eRulemaking Portal at *https://www.regulations.gov,* as submitted, except for those we cannot post for technical reasons. The NCUA will not edit or remove any identifying or contact information from the public comments submitted. If you are unable to access public comments on the internet, you may contact the NCUA for alternative access by calling (703) 518–6540 or emailing *OGCMail@ncua.gov.*

FOR FURTHER INFORMATION CONTACT: Rachel Ackmann, Senior Staff Attorney, Office of General Counsel, and Pamela Yu, Special Counsel to the General Counsel, Office of General Counsel, at the above address or telephone (703) 518–6540.

SUPPLEMENTARY INFORMATION:

I. Background

Section 205(d) of the Federal Credit Union Act (Section 205(d))

Prior to December 23, 2022, section 205(d)(1) of the Federal Credit Union Act (FCU Act) provided that, except with the prior written consent of the Board, a person who has been convicted of any criminal offense involving dishonesty or breach of trust, or has agreed to enter into a pretrial diversion or similar program in connection with a prosecution for such offense, may not:

- Become, or continue as, an institution-affiliated party (IAP) with respect to any insured credit union; or
- Otherwise participate, directly or indirectly, in the conduct of the affairs of any insured credit union.[1]

Section 205(d)(1)(B) further provides that an insured credit union may not allow any person described above to participate in the conduct of the affairs of the credit union without Board consent. Section 205(d)(2) restricts the Board from approving a consent application related to a person convicted of certain crimes enumerated in Title 18 of the United States Code for 10 years, absent a motion by the Board and approval by the sentencing court. Finally, section 205(d)(3) states that ''whoever knowingly violates'' section (d)(1)(A) or (d)(1)(B) commits a felony, punishable by up to 5 years in prison or a fine of up to $1,000,000 a day, or both. Section 205(d) prohibitions have existed in some form since 1970, and since then federally insured credit unions have been required to make a diligent inquiry as to whether prospective employees or IAPs [2] are subject to a section 205(d) prohibition.[3]

In 2008, the Board adopted Interpretive Rule and Policy Statement 08–1 (IRPS 08–1) to provide direction and guidance to federally insured credit unions and those persons who may be affected by section 205(d).[4] The Board specifically sought comments as to whether the format of the guidance as an IRPS was appropriate or whether a regulation would be more suitable.[5] The Board received some comments supporting guidance in the form of an IRPS and others supporting a regulation, but ultimately chose to issue the guidance through an IRPS.[6]

IRPS 08–1 outlined the actions prohibited under the FCU Act and the procedures for applying the Board's consent on a case-by-case basis. Recognizing that certain offenses are so minor and dated that they would not presently pose a substantial risk to the insured credit union, IRPS 08–1 excluded certain *de minimis* offenses that met specified requirements and juvenile offenses from the need to

[1] 12 U.S.C. 1785(d)(1).

[2] The NCUA has made its administrative orders against IAPs available in a searchable database on the agency's website. *See https://ncua.gov/news/enforcement-actions/administrative-orders.*

[3] 73 FR 48399, 48401 (Aug. 19, 2008).

[4] *Id.*

[5] The Board had not previously adopted any policies or regulations on section 205(d), as the statute at that time imposed no guidance or limitations on the information that the Board may consider, and the Board received a limited number of applications under section 205(d). However, due to an increasing number of applications requesting the Board's consent under section 205(d), the Board believed it was appropriate to issue guidance on the topic.

[6] Two commenters believed that a regulation was the more appropriate format for the guidance. One of the commenters who favored a regulation thought a regulation provided greater protection to a credit union that might be challenged by a prospective employee. Another commenter believed a regulation was preferable because it would help reinforce a credit union's right to appeal an adverse decision and subject future changes to public notice and comment. The Board concluded that the source of the requirement stems from federal statute, namely section 205(d). Therefore, the Board believed that the need to comply with federal law, as augmented by guidance in the form of an IRPS, was sufficient to protect a credit union. The Board believed that credit union officials should be able to adequately understand and apply the guidance styled as an IRPS and that the right to request a hearing contained in the IRPS provided a credit union a sufficient right to appeal a denial of consent by the Board. Additionally, the Board noted that it would not amend its IRPS without providing the public notice and an opportunity to comment. For all these reasons, the Board believed it appropriate to issue the final guidance in the form of an IRPS.

request consent from the Board. In effect, the IRPS gave automatic consent for these offenses without requiring a consent application or any notice.

In 2019, the Board rescinded IRPS 08–1 and issued IRPS 19–1, a revised and updated IRPS to reduce regulatory burden (also known as the Second Chance IRPS).[7] IRPS 19–1 amended IRPS 08–1 to expand the definition of *de minimis* offenses to reduce the scope and number of offenses that would require submission of a consent application to the Board. Specifically, the IRPS did not require a consent application for convictions involving insufficient funds checks of moderate aggregate value, small-dollar simple theft, false identification, simple drug possession, and isolated minor offenses committed by covered persons as young adults. The Board recognized that many Americans faced hiring barriers due to a criminal record, a great number of whom are not violent or career criminals, but rather people who made poor choices early in life who have since paid their debt to society. The Board found that offering second chances to those who are truly penitent was consistent with our nation's shared values of forgiveness and redemption. In keeping with this spirit of clemency, the Board expanded career opportunities for those who had demonstrated remorse and responsibility for past indiscretions and who wished to set forth on a path to productive living.

On December 23, 2022, Congress passed the National Defense Authorization Act for Fiscal Year 2023 (NDAA), which amended section 205(d).[8] The NDAA included the FHBA—which became immediately effective on December 23, 2022. The FHBA amends section 205(d) to expand employment opportunities for those with a previous minor or older criminal offense, among other provisions. Generally, the amendments codify a number of elements already contained in the NCUA's current policy regarding section 205(d) but also extend greater relief than what is currently available to certain individuals with prior convictions seeking employment with an insured credit union, particularly individuals with older convictions, expunged convictions, or prior convictions for a misdemeanor, any drug-related possession offense, or certain designated ''lesser offenses.'' The FHBA also clarifies several definitions and the procedures for processing a consent application. The specific provisions of the FHBA are discussed in detail later in this preamble.

Section 19 of the Federal Deposit Insurance Act

Section 19 of the Federal Deposit Insurance Act (FDI Act) (section 19) contains a prohibition provision similar to section 205(d) of the FCU Act.[9] Before 2020, the Federal Deposit Insurance Corporation (FDIC) provided the public with guidance relating to section 19 and the FDIC's application thereof through a Statement of Policy similar to the NCUA's IRPS 19–1.[10] Similar to the NCUA's IRPS, the FDIC's Statement of Policy, among other things, instituted a set of criteria to provide for blanket approval of certain low-risk crimes and for persons convicted of such *de minimis* crimes to forgo filing a section 19 consent application.

In 2020, the FDIC revised and incorporated its then existing Statement of Policy into its regulations to, among other purposes, provide for greater transparency as to its section 19 application, provide greater certainty as to the FDIC's application process, and to assist both insured depository institutions and individuals who may be affected by section 19 with understanding its impact and potentially seek relief from its provisions.[11]

In December 2022, the FHBA made amendments to section 19 that are comparable to the amendments made in section 205(d). The FDIC proposed to implement these changes through a notice-and-comment rulemaking in October 2023.

Coordination With the FDIC

In the past, the NCUA has drawn extensively on the FDIC's guidance related to section 19 due to the FDIC's greater experience processing section 19 consent applications. Further, in the Board's view it is beneficial to both insured financial institutions and covered individuals for the NCUA's section 205(d) related requirements to be consistent, to the extent possible, with the FDIC's section 19 requirements. Consistent guidelines between the two agencies with respect to these parallel statutory provisions help streamline the consent application process, particularly for those individuals seeking consent from both the NCUA and the FDIC to allow for potential employment at federally insured financial institutions. The FHBA formalizes the expectation that the agencies implement these comparable statutory provisions similarly and requires the NCUA and the FDIC to consult and coordinate to promote consistent procedures, where appropriate.[12] The Board finds that adopting similar definitions, terminology, and procedures in all aspects of this proposed rule will promote consistent implementation of consent applications because even those provisions that fall outside the scope of consent applications are likely to affect how the agency administers those applications. Staffs of the NCUA and the FDIC have consulted and coordinated on this proposed rulemaking as directed by the FHBA.

Additionally, in developing this proposed rule, NCUA staff has consulted with staffs at the Board of Governors of the Federal Reserve Board and the Office of the Comptroller of the Currency.

II. The Proposed Rule

Section-by-Section Analysis

The Board is now issuing a proposed rule to codify IRPS 19–1, along with significant changes that are consistent with the FHBA amendments to section 205(d) and the FDIC's comparable implementing regulations.[13] The proposed rule would address, among other topics, the individuals and types of offenses covered by section 205(d), as well as the NCUA's procedures for reviewing a consent application. The proposed rule would add new part 752 to Chapter VII of Title 12 of the U.S. Code of Federal Regulations. A section-by-section analysis of the proposed rule follows.

1. Section 752.1—What is section 205(d) of the FCU Act?

This section sets out the scope of proposed new part 752. Paragraph (a) would generally describe the requirements of section 205(d).

Paragraph (b) would set out insured credit unions' obligations under section 205(d), including that insured credit unions would be required to make a reasonable inquiry regarding an applicant's history to ensure that a

[7] 84 FR 65907 (Dec. 2, 2019).

[8] Public Law 117–263 (Dec. 23, 2022).

[9] 12 U.S.C. 1829(a).

[10] *See* 84 FR 68353 (Dec. 16, 2019).

[11] *Id.;* 85 FR 51312 (Aug. 20, 2020) (FDIC 2020 final rule).

[12] 12 U.S.C. 1785(d)(5)(I), and 12 U.S.C. 1829(f)(9).

[13] The NCUA is issuing a proposed rule to codify its policy regarding section 205(d) consent applications due to the FDIC's recent codification of its similar section 19 Statement of Policy. The NCUA believes codifying IRPS 19–1 will provide for greater transparency as to its application, provide greater certainty as to the NCUA's application process, and help both credit unions and individuals who may be affected by section 205(d) to understand its impact and potentially seek relief from its provisions.

person who is subject to the prohibition provision of section 205(d) is not hired or permitted to participate in the conduct of credit unions' affairs without the written consent of the NCUA. Paragraph (b) also would set out that insured credit unions would be permitted to make conditional offers of employment to prospective applicants.

Paragraph (c) would address the need for a consent application and establishes the standard for an application's approval. The NCUA would evaluate a consent application to determine if a person is fit to participate in the conduct of the affairs of an insured credit union without posing a risk to its safety and soundness or impairing public confidence in that credit union. The burden is upon the applicant to establish that the application warrants approval. Section 752.1 includes no substantive changes as compared to IRPS 19–1.

2. Section 752.2—Who is covered by section 205(d)?

This section identifies who is covered by section 205(d). Paragraph (a) would state that IAPs, as defined by 12 U.S.C. 1786(r), would be covered. Similar to IRPS 19–1, volunteer and *de facto* employees would be deemed covered under section 205(d) as well.

Whether other persons who are not IAPs, such as certain independent contractors, are covered depends upon their degree of influence or control over the management or affairs of an insured credit union. Those who exercise major policymaking functions of an insured credit union are deemed to be covered by section 205(d). The proposed rule includes less detail than IRPS 19–1 regarding how the NCUA would determine whether a person participates in the conduct of the affairs of an insured credit union. For example, the proposed rule would not state that the NCUA would analyze each individual's conduct on a case-by-case basis and make a determination or that agency and court decisions will provide the guide as to what standards will be applied. The Board does not intend any substantive changes by these omissions. Instead, the proposed rule includes more streamlined language regarding persons who participate in the conduct of the affairs of an insured credit union, consistent with the FDIC's comparable part 303. The NCUA intends to publish guidance that further clarifies its intent about other persons who are not IAPs. The guidance would include language similar to IRPS 19–1.

The proposed rule would also state directors and officers of affiliates, or joint ventures of an insured credit union, would be covered if they participate in the conduct of affairs of the insured credit union or are in a position to influence or control the management or affairs of the insured credit union. IRPS 19–1 does not specifically state these persons would be covered if they participate in the conduct of affairs of the insured credit union; however, this is not a policy change because these persons would have been covered under the IRPS if they participated in the conduct of affairs of the credit union.

Paragraph (b) would define the term ''person'' for the purposes of section 205(d) as an individual only and not a legal entity.

3. Section 752.3—Which offenses qualify as ''Covered Offenses'' under section 205(d)?

This section addresses what constitutes a covered offense under section 205(d).[14] Paragraph (a) would state that a conviction or program entry must have been for a criminal offense involving dishonesty or breach of trust. The paragraph would define criminal offenses involving dishonesty and breach of trust. The FHBA defines ''criminal offense involving dishonesty'' as ''an offense under which an individual, directly or indirectly, cheats or defrauds or wrongfully takes property belonging to another in violation of a criminal statute.'' The FHBA further provides that the term includes an offense that federal, state, or local law defines as dishonest or for which dishonesty is an element of the offense. However, the term does not include a misdemeanor criminal offense committed more than 1 year before the date on which an individual files a consent application, excluding any period of incarceration, or an offense involving the possession of controlled substances.

The FHBA does not define breach of trust. Under the proposed rule, breach of trust would mean a wrongful act, use, misappropriation, or omission with respect to any property or fund that has been committed to a person in a fiduciary or official capacity, or the misuse of one's official or fiduciary position to engage in a wrongful act, use, misappropriation, or omission. This definition is identical to the definition in IRPS 19–1.

As discussed previously, the FHBA excludes from the scope of such offenses ''an offense involving the possession of controlled substances.'' The Board interprets this phrase concerning controlled substances to exclude from the scope of the prohibition, at a minimum, criminal offenses involving the simple possession of controlled substances and possession with intent to distribute a controlled substance. This exclusion may also apply to other drug-related offenses depending on the statutory elements of the offenses or court determinations that the statutory provisions of the offenses involve dishonesty or breach of trust, as noted in paragraph (b) of proposed § 752.3. The Board notes that in processing other applications, such as change in official or senior executive officer in credit unions that are newly chartered or are in troubled condition, the NCUA may still consider excluded offenses as appropriate. For example, an offense that is not covered under section 205(d) may bear on an individual's competence, experience, character, or integrity under 12 U.S.C. 1790a and 12 CFR 701.14.

Potential applicants may contact their appropriate NCUA Regional Office or the Office of National Examinations and Supervision (ONES) if they have questions about whether their offenses are covered under section 205(d).

This language marks a shift from IRPS 19–1, which requires consent applications for certain simple misdemeanor drug possession offenses. Under IRPS 19–1, a consent application for a simple misdemeanor drug possession offense is required except if the conviction or program entry was classified as a misdemeanor at the time of conviction or program entry, the person had no other conviction or program entry described in section 205(d), and it had been 5 years since the conviction or program entry (or 30 months in the case of a person 21 years or younger at the time of the conviction or program entry), and the conviction did not involve the illegal distribution (including an intent to distribute), sale, trafficking, or manufacture of a controlled substance or other related offense. The Board believes that the proposed revision is consistent with the text and purposes of the FHBA, would align the Board's interpretation of section 205(d) as to offenses involving controlled substances more closely with other federal banking regulators, and would continue to recognize that a drug-

[14] The Board notes that the approach to criminal offenses mandated by the statute and rulemaking would not have an impact on other processes related to criminal convictions. For example, the NCUA may consider a more expansive scope of convictions related to controlled substances under section 212 of the Federal Credit Union Act in disapproving directors, committee members, and senior executive officers of troubled or newly chartered insured credit unions. *See* 12 CFR 701.14 for the NCUA's implementation of this provision, also addressed elsewhere in this proposed rule.

related offense could potentially involve dishonesty or breach of trust.[15] The Board also notes that this proposed provision would *not* affect its ability to consider drug-related offenses as they pertain to the suitability of an individual under other statutory provisions, including section 212 of the FCU Act.[16]

Paragraph (b) would require that, to determine if the criminal offense is one of dishonesty or breach of trust, the NCUA would look to the statutory elements of the criminal offense or to court decisions in the relevant jurisdiction that have interpreted these statutory elements. This policy is similar to IRPS 19–1.

Paragraph (c) would include new language reflecting the FHBA's exclusion of certain older offenses from the scope of section 205(d).[17] The FHBA provides that individuals are not subject to a prohibition under section 205(d) if they committed a covered offense and it has been 7 years or more since the offense occurred; or if the individual was incarcerated with respect to the offense, it has been 5 years or more since the individual was released from incarceration; or the individual committed the offense when they were 21 years of age or younger, and it has been more than 30 months since the sentencing occurred.[18]

The Board considers the phrases ''offense committed''—noted previously—and ''offense occurred'' to be substantially similar. Accordingly, the Board interprets the term ''offense occurred'' to mean the ''last date of the underlying misconduct.'' In instances with multiple offenses, ''offense occurred'' means the last date of any of the underlying offenses.

Paragraph (c) would track the FHBA's language concerning offenses committed by individuals 21 years of age or younger. The FHBA states that, for individuals who committed an offense when the individual was 21 years of age or younger, section 205(d) shall not apply to the offense if it has been more than 30 months since the sentencing occurred.[19] The Board interprets ''sentencing occurred'' to mean the date on which a court imposed the sentence, not the date on which all conditions of sentencing were completed. Moreover, paragraph (c) notes that its exclusions—which are derived from the FHBA—do not apply to the enumerated offenses described under 12 U.S.C. 1785(d)(2).

The FHBA also excludes designated lesser offenses, including the use of fake identification, shoplifting, trespass, fare evasion, driving with an expired license or tag (and such other low-risk offenses as the NCUA may designate), if 1 year or more has passed since the applicable conviction or program entry. Paragraph (d) would exclude these ''designated lesser offenses'' to reflect the revised statutory language.

Paragraph (e) would add language that reflects the FDIC's long-held position that individuals who are convicted of or enter into a pretrial diversion program for a criminal offense involving dishonesty or breach of trust in foreign jurisdictions are subject to section 19, unless the offense is otherwise excluded by 12 CFR 303, subpart L, as stated in the FDIC's parallel proposed rule. The Board has not previously had a position on foreign offenses; however, given the congressional mandate to consult and coordinate to promote consistent implementation on consent application procedures where appropriate, the Board is proposing to adopt the FDIC's interpretation. Under the proposed rule, for example, if an insured credit union has operations outside the United States, the credit union could conduct a reasonable, documented inquiry to verify an applicant's history by inquiring about potential covered offenses that may have occurred in that foreign country (or countries) in which the credit union conducts operations, as well as the United States. As another example of such an inquiry, if an insured credit union plans to hire someone in the United States who is from a foreign country, the credit union could inquire about potential covered offenses that may have occurred in the United States and in that foreign country.

4. Section 752.4—What constitutes a conviction under section 205(d)?

Paragraph (a) would state that there must have been a conviction of record for section 205(d) to apply, and that section 205(d) would not apply to arrests, pending cases not brought to trial (unless the person has a program entry as set out in § 752.5), or any conviction reversed on appeal unless the reversal was for the purpose of re-sentencing. The Board notes, however, that covered offenses that have been pardoned—and which are not otherwise excluded by § 752.8—would still require a consent application. Paragraph (a) is substantively similar to IRPS 19–1.

Paragraph (b) would clarify that, absent a program entry, when an individual is charged with a covered offense but is subsequently convicted of an offense that is not a covered offense, that conviction is not subject to section 205(d). IRPS 19–1 does not have this clarification; however, it is included in the FDIC's current part 303. The NCUA's provision would merely clarify that the conviction, not the originally charged offense, is relevant under section 205(d).

Paragraph (c) would exclude covered offenses that have been expunged or sealed by a court of competent jurisdiction or by operation of law. Under IRPS 19–1, a conviction that has been completely expunged is not considered a conviction of record and does not require a consent application. However, IRPS 19–1 further noted that where an order of expungement has been issued and is intended to be a complete expungement, the jurisdiction cannot allow the conviction or program entry to be used for any subsequent purpose including, but not limited to, an evaluation of a person's fitness or character. Also, the failure to destroy or seal the records will not prevent the expungement from being considered complete for the purposes of section 205(d). This caveat to the general premise that an expunged conviction is not considered a conviction of record is not included in the FDIC's current part 303.

The FHBA provides a two-pronged test to determine whether a covered offense should be considered expunged, dismissed, or sealed and therefore excluded from the scope of section 205(d). First, there must be an ''order of expungement, sealing, or dismissal that has been issued in regard to the conviction in connection with such offense''; second, it must be ''intended by the language in the order itself, or in the legislative provisions under which the order was issued, that the conviction shall be destroyed or sealed from the individual's state, tribal, or federal record, even if exceptions allow the conviction to be considered for certain character and fitness evaluation purposes.'' [20]

The FHBA does not address expungements, sealings, or dismissals by operation of law, and the Board has sought to provide a more comprehensive framework as to such records. The Board has added language to the second (intent) proposed prong of the expungement framework to encompass the language in the expungement order itself, the legislative

[15] *See* House Rpt. No. 117–314 (May 10, 2022), available at *https://www.congress.gov/congressional-report/117th-congress/house-report/314/1.*

[16] 12 U.S.C. 1790a.

[17] *See* 12 U.S.C. 1785(d)(4)(A).

[18] Note that these exceptions do not apply to the offenses described under 12 U.S.C. 1785(d)(2).

[19] 12 U.S.C. 1785(d)(4)(A)(ii).

[20] 12 U.S.C. 1785(d)(4)(B)(ii).

provisions under which the order was issued, *and other legislative provisions.* The Board believes that the additional language is consistent with the purposes of the statute and congressional intent to provide relief to individuals with older or minor offenses.

Paragraph (d) would exclude ''youthful offender'' judgments for minors from the scope of section 205(d). The proposed rule would clarify that it encompasses the term ''youthful offender'' *and similar terms,* because paragraph (d) may apply even if a court does not specifically use the term ''youthful offender'' in an adjudication.

5. Section 752.5—What constitutes a pretrial diversion or similar program under section 205(d)?

Paragraph (a) would define what constitutes a pretrial diversion or similar program (a program entry). A pretrial diversion or similar program means a program characterized by a suspension or eventual dismissal or reversal of charges or criminal prosecution upon agreement by the accused to restitution, drug or alcohol rehabilitation, anger management, or community service. The FHBA establishes this definition.

Paragraph (b) would clarify that when a covered offense either is reduced by a program entry to an offense that would otherwise not be covered by section 205(d) or is dismissed upon successful completion of a program entry, the offense remains a covered offense for purposes of section 205(d). The covered offense will require a consent application unless it is *de minimis* as provided by § 752.8. This language is new as compared to IRPS 19–1 and comes from the FDIC's part 303.

Paragraph (c) would state that expungements or sealings of program entry records will be treated the same as expungements or sealings of convictions. This language is new as compared to IRPS 19–1 and comes from the FDIC's part 303.

6. Section 752.6—What are the types of consent applications that can be filed?

The FHBA codifies procedures for consent applications filed with the NCUA. Specifically, the proposed rule would provide that the NCUA will accept applications from an individual or an insured credit union applying on behalf of an individual. The Board notes the FHBA uses the terms ''national office'' and ''regional office,'' which are inconsistent with the NCUA's organization.[21] The Board is contemplating addressing those technical inconsistencies in the final rule.

Paragraph (b) would provide that an individual consent application or a credit union-sponsored consent application may be filed separately or contemporaneously with the appropriate NCUA Regional Office or ONES.

7. Section 752.7—When must a consent application be filed?

This section states that a consent application is not required for covered offenses that are considered *de minimis* under this part or where another exception under the part applies. A consent application would not be considered by the NCUA until all sentencing requirements associated with a conviction have been met or all requirements of the program entry have been completed. The Board proposes to include this revised language to accord with several of the FHBA's exclusions from section 205(d) that are not tied to the completion of sentencing requirements.

Furthermore, the FHBA requires the NCUA to ''make all forms and instructions related to consent applications available to the public, including on [its] website.'' [22] These forms and instructions ''shall provide a sample cover letter and a comprehensive list of items that may accompany the consent application, including clear guidance on evidence that may support a finding of rehabilitation.'' [23] While the proposed rule would not codify these requirements, the agency will comply with the statutory mandate to make appropriate forms and instructions available to the public. The proposed rule would provide generally that the NCUA's consent application forms as well as additional information concerning section 205(d) can be accessed at the NCUA's Regional Offices or on the NCUA's website.

8. Section 752.8—*De Minimis Offenses*

IRPS 19–1 includes several offenses that would be otherwise covered under section 205(d), but do not require a consent application because they are considered *de minimis.* For these *de minimis* offenses, a person is deemed automatically approved to serve in an insured credit union, and no consent application is required.

IRPS 19–1 updated the general criteria for the *de minimis* offenses to better align with developments in criminal reform and sentencing guidelines. The FHBA largely codified the conditions included in IRPS 19–1; however, in several cases the FHBA expanded upon the relief included in IRPS 19–1. The proposed rule generally would retain the *de minimis* factors included in IRPS 19–1 but would amend the factors to reflect the FHBA.

Paragraph (a)(1) would state an individual who has been convicted of 2 or fewer covered offenses need not file if the individual could have been sentenced to a term of confinement in a correctional facility of 3 years or less and/or a fine of $2,500 or less, and the individual actually served 3 days or less of jail time for each, provided that all of the sentencing requirements associated with the conviction have been completed, each conviction or program entry was entered at least 3 years prior to the date of a consent application (assuming there are 2 convictions or program entries for a covered offense), and each covered offense was not committed against an insured depository institution or insured credit union. Jail time would be calculated based on the time an individual spent incarcerated as a punishment or a sanction—not as pretrial detention—and would not include probation or parole where an individual was restricted to a particular jurisdiction or was required to report occasionally to an individual or a specific location. Jail time would include confinement to a psychiatric treatment center in lieu of a jail, prison, or house of correction on mental competency grounds. The definition is not intended to include any of the following: persons who are restricted to a substance-abuse treatment program facility for part or all of the day; and persons who are ordered to attend outpatient psychiatric treatment.

A consent application would also not be required if there are 2 convictions or program entries for a covered offense, and the actions that resulted in both convictions or program entries all occurred when the individual was 21 years of age or younger and the convictions or program entries were entered at least 18 months prior to the date of a consent application.

A consent application would also not be required under the proposed rule if an individual has convictions or program entries of record based on the writing of ''bad'' or insufficient funds checks and the following conditions apply: (i) the aggregate total face value of all ''bad'' or insufficient funds checks cited across all the convictions or

[21] *See* 12 CFR 790.2. The NCUA is composed of the Board with a Central Office; Field Offices, consisting of 3 Regional Offices and ONES; the Asset Management and Assistance Center; the Community Development Revolving Loan Program; and the NCUA Central Liquidity Facility.

[22] 12 U.S.C. 1785(d)(5)(E)(i).

[23] 12 U.S.C. 1785(d)(5)(E)(ii).

program entries for ''bad'' or insufficient funds checks is $2,000 or less; (ii) no insured depository institution or insured credit union was a payee on any of the ''bad'' or insufficient funds checks that were the basis of the convictions or program entries; and (iii) the individual has no more than 1 other *de minimis* offense.

The FHBA and the proposed rule would also not require a consent application for convictions or program entries for small-dollar, simple theft. Under the proposed rule, convictions or program entries based on the simple theft of goods, services, or currency (or other monetary instrument) would be considered *de minimis* offenses if the following conditions apply: (i) the value of the currency, goods, or services taken is $1,000 or less; (ii) the theft was not committed against an insured depository institution or insured credit union; (iii) the individual has no more than 1 other *de minimis* offense under this section; and (iv) if there are 2 *de minimis* offenses under this section, each conviction or program entry was entered at least 3 years prior to the date a consent application would otherwise be required, or at least 18 months prior to the date a consent application would otherwise be required if the actions that resulted in the conviction or program entry all occurred when the individual was 21 years of age or younger. This exception excludes burglary, forgery, robbery, identity theft, and fraud.

Paragraph (c) would provide that individuals must be covered by a fidelity bond to the same extent as others in similar positions. This policy is consistent with IRPS 19–1.[24]

Paragraph (d) would state that any conviction or program entry for specific criminal offenses under Title 18 set out in 12 U.S.C. 1785(d)(2) cannot qualify for a *de minimis* exemption.

Finally, the Board notes that the FHBA includes ''designated lesser offenses'' in addition to *de minimis* offenses. Designated lesser offenses, including use of fake identification, shoplifting, trespass, fare evasion, or driving with an expired license or tag, are low-risk offenses statutorily excluded from the scope of section 205(d).

9. § 752.9—How To File a Consent Application

This section would provide that consent applications filed by a credit union should be filed with the NCUA's Regional Office where the credit union's home office is located (or with ONES for credit unions that office supervises), and consent applications filed by an individual should be filed with the NCUA's Regional Office where the person lives. States covered by each NCUA Regional Office are listed in 12 CFR 790.2.

When the proposed rule is finalized, the Board will revise delegations of authority related to consent applications. Under the revised delegations, Regional Directors and the ONES Director will have authority to act on both individual and credit union-sponsored applications. Currently, the Regional Directors and the ONES Director only have delegated authority to act on credit union-sponsored applications, and the Board has retained the authority to approve/disapprove individual applications.

10. Section 752.10—How a Consent Application Is Evaluated

Paragraph (a) would set out the factors the NCUA would assess to determine the level of risk the applicant poses to an insured credit union and whether the NCUA would consent to the person's participation in a credit union's affairs. The paragraph reflects new statutory requirements related to the NCUA's review process, including the requirement that the NCUA primarily rely on the criminal history record of the Federal Bureau of Investigation in its review and provide such record to the applicant to review for accuracy.[25] The Board interprets the term ''criminal history record'' to mean ''identity history summary checks,'' which are commonly known as ''rap sheets.'' Under paragraph (a)—and in accordance with the FHBA—the NCUA, in reviewing a consent application, would provide ''such record'' to the individual to review for accuracy.[26] The NCUA would not provide it to the credit union, but only to the individual. In evaluating the risk posed by the person's participation, the Board has proposed 8 considerations that it would evaluate. These considerations are substantively similar to factors under IRPS 19–1.

Paragraph (b) would state that the NCUA would not require an applicant to provide certified copies of criminal history records unless the NCUA determines that there is a clear and compelling justification to require additional information to verify the accuracy of the criminal history record of the Federal Bureau of Investigation.

Paragraph (c) would state that the determining factors in assessing a consent application would be whether the person has demonstrated their fitness to participate in the conduct of the affairs of an insured credit union, and whether the affiliation, or participation by the person in the conduct of the affairs of the credit union, may constitute a threat to the safety and soundness of the credit union or the interests of its members or threaten to impair public confidence in the credit union.

Paragraph (d) would set forth the considerations the NCUA would evaluate in conducting an individualized assessment. The proposed rule also clarifies how the NCUA will evaluate evidence of rehabilitation and other evidence, as required by the FHBA.[27]

Paragraph (e) would provide that the question of whether a person, who was convicted of a crime or who agreed to a program entry, was guilty of that crime shall not be at issue in a proceeding under this subpart or under 12 CFR part 746, subpart B.

Paragraph (f) would provide that the NCUA will also apply the considerations in paragraph (d) to determine whether the interests of justice are served in seeking an exception in the appropriate court when a consent application is made prior to 10 years after the final conviction or agreement to program entry for certain federal offenses.[28]

Paragraph (g) would provide that all approvals and orders will be subject to the condition that the person be covered by a fidelity bond to the same extent as others in similar positions.

Paragraph (h) would provide that when deemed appropriate by the NCUA, credit union-sponsored consent applications are intended to allow the individual to work for the same employer and across positions. NCUA consent would be required for any proposed significant changes in the individual's security-related duties or responsibilities, such as promotion to an officer or other positions that the employer determines will require higher security-screening credentials.

Paragraph (i) would provide that when a person who has received approval under section 205(d) subsequently seeks to participate in the conduct of the affairs of another insured credit union, another consent application must be submitted.

[24] *See* 12 CFR 713 (Fidelity bond and insurance coverage for federally insured credit unions).

[25] *See* 12 U.S.C. 1785(d)(5)(F).

[26] *Id.*

[27] While the statute uses the terms ''rehabilitation'' and ''mitigating'' as separate categories of evidence, the terms appear to be substantially similar in the context of section 205 consent applications, and the use of both terms in these regulations may create confusion. Therefore, the proposed rule uses the term rehabilitation, not mitigating.

[28] *See* 12 U.S.C. 1785(d)(2)(A).

11. Section 752.11—What will the NCUA do if the consent application is denied?

Paragraph (a) would provide that the NCUA would provide a written denial that would summarize or cite the relevant factors from the proposed § 752.10. Paragraph (b) would provide that the applicant can file a written request for reconsideration or appeal under the process contained in 12 CFR part 746, subpart B. That subpart includes uniform procedures by which petitioners may appeal initial agency determinations to the Board.

Under part 746, subpart B, prior to submitting an appeal to the Board, the petitioner may make a written request to the appropriate Regional Office or, if appropriate, ONES, to reconsider an initial agency determination within 30 calendar days of the date of that determination. Within 60 calendar days of the date of an initial agency determination or, as applicable, a determination by the Regional Office or, if appropriate, ONES, on any request for reconsideration, a petitioner may file an appeal seeking review of the determination by the Board. Under part 746, subpart B, a petitioner may also request an oral hearing before the Board. These procedures meet the statutory requirement for ''national office review'' of any consent application that is denied by a Regional Office, if the individual requests a review by the Board.[29] This option is also substantially similar to the FDIC's current parts 303 and 308, except that under those regulations, an oral hearing is conducted unless the applicant or the insured depository institution waives it in writing and instead makes a written submission.[30]

NCUA Practice on Section 205(d)

In general, the proposed rule would mirror the FDIC's part 303 with minimal, non-substantive changes. Additionally, while there were a few differences between the FDIC's part 303 and IRPS 19–1 before the FHBA, such as some details on *de minimis* offenses, expungements, and treatment of drug-related offenses, the enactment of the FBHA resolved most discrepancies between the two agencies' rules and created a more uniform standard. However, there are a few areas in which IRPS 19–1 provided additional context and discussion on its policy and procedures related to section 205(d) compared to part 303. In general, the additional information does not provide any substantive difference from part 303 and instead provides additional clarifying information.

The Board has chosen to omit much of the clarifying information in the proposed rule to ensure its uniformity with part 303; however, the Board also believes credit unions generally have less experience with section 205(d) than insured depository institutions and are typically smaller in size with fewer resources, so additional guidance would help insured credit unions to discharge their responsibilities under section 205(d). Therefore, in finalizing and implementing this rule, the NCUA will prepare guidance that provides insured credit unions additional information about section 205(d). The guidance will include portions of IRPS 19–1 that were not incorporated into the proposed rule.

For example, IRPS 19–1 provides that when the credit union learns that a prospective employee has a prior conviction or entered into a pretrial diversion program for a covered offense, the credit union should document in its files that a consent application is not required because the covered offense is considered *de minimis* and meets all of the criteria for the exception, or—if the credit union is willing to sponsor the prospective employee's consent application—submit an application requesting the Board's consent. The credit union could also extend a conditional offer of employment and notify the prospective employee that it is contingent upon a satisfactory background check to determine whether the individual is prohibited under section 205(d). The Board intends no change of position regarding these policies even though they are not included in the proposed rule.

IRPS 19–1 also states that persons who will occupy clerical, maintenance, service, or purely administrative positions generally can be approved without an extensive review. A more detailed analysis, however, would be performed in the case of persons who will be in a position to influence or control the management or affairs of the insured credit union. The proposed rule would not include a similar delineation between how the NCUA intends to approve consent applications for different types of positions. The Board continues to believe that applications for clerical, maintenance, service, or purely administrative positions do not require the same review as applications for other positions that have access to more of the day-to-day financial operations of a credit union. The NCUA will address this issue in future guidance.

Waiting Time for a Subsequent Consent Application if a Consent Application Is Denied

The FDIC's current part 303 states that an applicant will need to wait one year from the date of the denial or decision of the FDIC Board, or its designee, before resubmitting a consent application. The Board is not proposing to include similar language for several reasons. First, the NCUA does not receive a significant volume of section 205(d) consent applications and does not believe allowing credit unions or individuals to resubmit consent applications at any time would present a burden on the agency and its resources. Second, the NCUA would not want to unfairly delay an individual from seeking employment if the consent application was denied for a reason that could be immediately addressed by the applicant. For example, if the consent application was denied due to insufficient support showing rehabilitation, the individual could immediately refile with additional evidence, such as employment history, letters of recommendation, documentation of participation in substance-abuse programs or job preparation and educational programs, or other relevant evidence.

Other Conforming Amendments

Both the standard FCU Bylaws in appendix A of part 701 and the criteria for determining the insurability of a credit union in 12 CFR 741.3(c) reference section 205(d). In general, both sections prohibit a person who has been convicted of any criminal offense involving dishonesty or breach of trust from serving at an insured credit union, except with the written consent of the Board. The Board believes these references are incomplete because not all convictions of criminal offenses involving dishonesty or breach of trust now serve as the valid basis for a section 205(d) prohibition. Therefore, the proposed rule would replace the current reference to ''any crime involving dishonesty or a breach of trust'' to refer to the specific crimes covered under section 205(d). Referring directly to the FCU Act would also automatically incorporate future statutory changes to section 205(d). The Board may make other similar conforming amendments in finalizing this proposed rule if it identifies other provisions that should be clarified simply to reflect the changes that the FHBA made to the statutory prohibitions.

Additionally, as required by the Gramm-Leach-Bliley Act, appendix B to part 748 (Appendix B) contains

[29] 12 U.S.C. 1785(d)(5)(D).

[30] 12 CFR 308.158(d).

guidance on creating an effective incident response plan in the event of unauthorized access to member information and the requirements of the notices distributed to the affected members.[31] Appendix B states that credit unions should also conduct background checks of employees to ensure that the credit union does not violate 12 U.S.C. 1785(d). The proposed rule would require a background check in § 752.1(b), which is consistent with current expectations, as discussed in the introductory portion of this preamble.[32] Therefore, the proposed rule would amend this footnote to state that insured credit unions must also conduct background checks of employees.

Proposed Amendments to § 701.14 on Change in Official or Senior Executive Officer in Credit Unions That Are Newly Chartered or Are in Troubled Condition

In addition to the prohibition on certain individuals participating in the conduct of the affairs of a credit union included in section 205(d), the FCU Act also sets forth conditions under which certain insured credit unions must notify the NCUA in writing of any proposed changes in its board of directors, committee members, or senior executive staff (section 212).[33] The Board implements section 212 through § 701.14 of its rules.[34] Section 701.14 requires generally that insured credit unions that are newly chartered or troubled file notice with the NCUA before adding, replacing, or changing the duties of a board or committee member or a senior executive officer. The Board has not substantively amended § 701.14 since 2012 when the Board revised the definition of troubled condition.[35] The proposed rule would make minor amendments to § 701.14 and would clarify when a notice is required, how the NCUA would process the notice, and what information must be included in the NCUA's notice of disapproval to the applicant.

First, the proposed rule would clarify when notice is required. Currently, § 701.14 specifies that notice is required whenever there is ''any addition or replacement of a member of the board of directors or committee member or the employment or change in responsibilities of an individual to a position of senior executive officer.'' NCUA staff has received questions on whether notice is required when a member of the board or a committee moves to another position, such as when an existing board member switches to the board chair position. For clarity, the proposed rule would specify that a credit union must provide notice when adding or replacing any member of its board of directors or committees, employing any person as a senior executive officer of the credit union, or changing the responsibilities of a board member, committee member, or a senior executive officer so that the person would assume a different position. The Board solicits comment on whether this proposed change provides clarity or increases burden on credit unions.

Second, the proposed rule would increase the amount of time the NCUA has to initially review a notice. Currently, in § 701.14(c)(3)(iii), the NCUA has 10 calendar days after receiving the notice to inform the credit union that the notice is complete or that additional information is needed. The 10-day notification requirement is not specified in the statute, and NCUA staff has found the 10-day timeframe difficult to meet, as additional information to analyze the request may be required. The Board does not believe that the additional 5 calendar days would unduly delay the start or change in position of board members, committee members, or senior executive officers. However, the Board solicits comments on whether insured credit unions believe this change would pose any significant operational burden, in addition to the general solicitation for comments included in this proposed rule.

The proposed rule would also specify that Regional Director and ONES Director communications under § 701.14 may be done through email. This is not a substantive change but rather a clarification of existing practices and common use of electronic communications in time-sensitive matters.

Finally, the proposed rule would explicitly state that the notice of disapproval will identify the reason(s) for the denial. On occasion, when appealing such a denial, the NCUA has received complaints that applicants were not provided sufficient information in the notice of disapproval about the reason for the decision. Appellants have expressed frustrations that they could not adequately support their appeal without sufficient information on the rationale for the NCUA's decision. The Board believes any notice of disapproval should explicitly state the reason(s) for denial and has included clarifying language in the proposed rule.

Other Relevant Authorities on Prohibitions

Under section 206(i) of the FCU Act (section 206(i)), the Board is authorized to suspend or prohibit an IAP from further participation in the conduct of the affairs of any credit union if: (1) an IAP is charged in any information, indictment, or complaint with a crime involving dishonesty or breach of trust which is punishable by imprisonment for a term exceeding 1 year under state or federal law or certain specific violations of federal criminal law relating to anti-money laundering provisions; and (2) continued service or participation by the IAP may pose a threat to the interests of the credit union's members or may threaten to impair public confidence in the credit union.[36] Despite the similar language between section 206(i) and section 205(d), the FHBA did not make similar amendments to section 206(i) as were made to section 205(d). Section 206(i) is narrower in scope than section 205(d), as it applies to current IAPs and requires an additional showing by the agency to suspend or prohibit an IAP. Because the FHBA did not amend section 206(i), the Board retains statutory authority to suspend or prohibit an IAP for all crimes involving dishonesty or breach of trust, provided that the IAP's continued service or participation may pose a threat to the interests of the credit union's members or may threaten to impair public confidence in the credit union.

The Board also notes that the Secure and Fair Enforcement for Mortgage Licensing Act of 2008 (commonly known as the S.A.F.E. Act) mandates a nationwide licensing and registration system for residential mortgage loan originators.[37] The S.A.F.E. Act includes certain requirements related to minimum standards for state-licensed loan originators—including those working at credit union service organizations—and related to felonies involving dishonesty and breach of trust.[38] Additionally, regulations implementing the S.A.F.E. Act impose an obligation on depository institutions to adopt certain policies, including a requirement that the depository institution review employee criminal background reports, including the criminal background standards for employees in section 206(i) of the FCU Act, 12 U.S.C. 1786(i). The Board notes

[31] 12 CFR 748, App. B.

[32] The Board notes that insured credit unions may extend a conditional offer of employment contingent on the completion of a background check satisfactory to the credit union to determine if the applicant is barred under section 205(d).

[33] 12 U.S.C. 1790a.

[34] 12 CFR 701.14.

[35] 77 FR 45285 (July 31, 2012).

[36] 12 U.S.C. 1786(i)(1)(A).

[37] 12 U.S.C. 5101 *et seq.*

[38] 12 U.S.C. 5104.

these requirements are not included in the FHBA and remain applicable to credit unions and credit union service organizations.

Similarly, under the Anti-Money Laundering Act of 2020, individuals who are found to have committed an ''egregious violation'' of the Bank Secrecy Act or its rules are barred from serving on a U.S. financial institution's board of directors for 10 years from the date of conviction or judgment.[39] The FHBA does not affect this separate statutory prohibition, and it remains applicable to credit unions.

III. Request for Comments

The Board seeks comments on all aspects of this proposed rule and its approach to section 205(d) and more specifically on the questions that follow.

1. *Scope.* Should the final rule include additional information on who may fall within the scope of section 205(d), including persons who participate in the conduct of the affairs of an insured credit union?

2. *Offense date.* Section 205(d)(4)(A)(i) provides for an exception for an offense if ''it has been 7 years or more since the offense occurred.'' [40] There is a similar provision that removes from the definition of ''criminal offense involving dishonesty'' ''a misdemeanor criminal offense committed more than 1 year before the date on which an individual files a consent application, excluding any period of incarceration[.]'' [41] Historically, the NCUA's position has been that actions do not amount to a covered ''offense,'' for section 205(d) purposes, until there has been either a conviction via a guilty plea, finding of guilt, or an entry into a pretrial-diversion program. This is because culpability and responsibility for the actions do not attach until one of those events occurs.[42] However, for purposes of evaluating whether the 7-year or 1-year exception applies, the Board must evaluate if it has been 7 years or more since the ''offense occurred'' or if an ''offense [was] committed more than one year before the date on which an individual files a consent application, excluding any period of incarceration.'' The Board proposes to interpret the phrases ''offense occurred'' and ''offenses committed'' as the ''last date of the underlying misconduct'' given the text of the statute. In instances with multiple offenses, ''offense occurred'' or ''offense committed'' would mean the last date of any of the underlying offenses. However, the Board acknowledges that there may be other, supportable interpretations of this phrase. For example, the Board is aware of legislative history indicating that the timeframes established by the FHBA were chosen because of their relation to an individual's likelihood of rehabilitation and that an individual's rehabilitation likely begins only with conviction or program entry, rather than the date of their misconduct. As such, the Board seeks public comment on the following topic: Is the Board's interpretation of the phrases ''offense occurred'' and ''offense committed'' as the ''last date of underlying misconduct'' appropriate, or are there other interpretations the Board should consider? What support do commenters have for other interpretations given the language of the statute?

3. ''*Sentencing occurred.*'' The FHBA exempts offenses committed by individuals 21 years of age or younger if it has been more than 30 months since the sentencing occurred.[43] However, the statute does not define the phrase ''sentencing occurred.'' The Board proposes to interpret ''sentencing occurred'' to mean the date on which a court imposed the sentence, not the date on which all conditions of sentencing were completed. The Board seeks public comment on the following topic: Is the Board's proposed interpretation of the phrase ''sentencing occurred'' appropriate?

4. *Foreign convictions.* Section 205(d) applies to any person who has been convicted of any criminal offense involving dishonesty or a breach of trust, or has agreed to enter into a pretrial diversion or similar program in connection with a prosecution for such offense.[44] The phrase ''criminal offense involving dishonesty'' is defined in the statute but is silent as to whether it includes convictions and pretrial diversions for criminal offenses prosecuted by foreign authorities (foreign convictions).[45] The statute does not define ''offense involving . . . breach of trust.'' The FDIC's position has been that foreign convictions and pretrial diversions are included within the scope of section 19. The Board believes it is reasonable to follow and adopt the FDIC's long-held position given the statutory mandate for consistency and the FDIC's greater experience with section 19 consent applications. In addition, there are strong public policy rationales for prohibiting a person who has been convicted of certain foreign criminal offenses (or entered into a pretrial diversion program in connection with such an offense) from becoming or continuing as an IAP or participating in the affairs of an insured credit union. However, the Board acknowledges that there may be case law, statutory construction, and other arguments that support a reading of section 205(d) that would exclude foreign convictions and pretrial diversions from the scope of section 205(d). Therefore, the Board seeks public comment on the following topic: Does section 205(d) encompass foreign convictions and pretrial diversions? What support do commenters have for their position?

5. *Expungements, sealings, and dismissals.* The FHBA establishes a new statutory exemption for expunged, sealed, and dismissed convictions (collectively, ''expungements'').[46] The statutory language does not mention expungements ''by operation of law''—as opposed to through a court order. The proposed rule incorporates the new statutory language but also includes a broad interpretation of ''expungement'' to encompass covered offenses that have been expunged by operation of law. The Board seeks public comment on the following topic: Given the new statutory exemption for expunged offenses, is the Board's more expansive proposed interpretation of expungement—which term includes records that have been expunged by application of law—appropriate?

6. *Offenses involving controlled substances.* The FHBA states that an ''offense involving the possession of controlled substances'' is not included within the definition of ''criminal offense involving dishonesty'' and, therefore, are not subject to the section 205(d) prohibition.[47] The proposed rule includes this definitional exclusion and notes that the Board interprets the phrase ''offenses involving the possession of controlled substances'' to include, at a minimum, the offenses of simple possession of controlled substances and possession with intent to distribute controlled substances. This interpretation would mark an expansion from IRPS 19–1. At the same time, this interpretation would track the statutory language of ''offenses involving the possession of controlled substances'' by encompassing the offense of *possession*

[39] Public Law 116–283, codified at 31 U.S.C. 5321(g).

[40] 12 U.S.C. 1785(d)(4)(A).

[41] 12 U.S.C. 1785(d)(6)(B)(iii).

[42] *See* 84 FR 65907, 65917 (Dec. 2, 2019) (''There must be a conviction of record. Section 205(d) does not apply to arrests, pending cases not brought to trial, acquittals, or any conviction which has been reversed on appeal.'')

[43] 12 U.S.C. 1785(d)(4)(A)(ii).

[44] 12 U.S.C. 1785(d)(1).

[45] *See* 12 U.S.C. 1785(d)(6).

[46] 12 U.S.C. 1785(d)(4)(B).

[47] 12 U.S.C. 1785(d)(6)(B)(iii)(II).

with intent to distribute controlled substances. The Board seeks public comment on the following topic: Is the Board's interpretation of ''offense[s] involving the possession of controlled substances'' as applying, at a minimum, to simple possession and possession with intent to distribute appropriate?

7. *De minimis offenses.* The FHBA states that the NCUA may exempt by rule certain *de minimis* offenses from the section 205(d) prohibition. The NCUA considers *de minimis* offenses to be covered offenses for which a consent application is not required because the NCUA deems the application automatically granted. The NCUA has previously promulgated IRPS 19–1, which specified *de minimis* offenses under section 205(d). However, given this new statutory language, the Board is reevaluating its current approach to *de minimis* offenses. Accordingly, the Board seeks public comment on the following topic: Is the Board's current approach to *de minimis* offenses appropriate? Are there additional offenses that the Board should consider *de minimis* under section 19? Commenters should provide support for such a designation.

8. *Conforming changes.* The Board also requests comments on other conforming changes or updates that it should make to its regulations or guidance to implement the new statutory provisions. As noted, in the final rule, the Board may adopt additional conforming amendments to its regulations if it finds that other provisions should be changed solely to indicate the new, more limited scope of the section 205(d) prohibitions. The Board would not anticipate making substantive changes to these provisions that would create new standards beyond those in the statutory amendments.

IV. Regulatory Procedures

Paperwork Reduction Act

The Paperwork Reduction Act of 1995 (PRA) applies to rulemakings in which an agency creates a new or amends existing information collection requirements.[48] For purposes of the PRA, an information collection requirement may take the form of a reporting, recordkeeping, or a third-party disclosure requirement. The NCUA may not conduct or sponsor and the respondent is not required to respond to an information collection, unless it displays a valid Office of Management and Budget (OMB) control number.

The proposed rule would extend greater relief than what is currently available to certain individuals with prior convictions seeking employment with an insured credit union, thereby eliminating the need to submit consent applications for certain offenses, particularly older or expunged convictions, prior misdemeanors, drug possession offenses, and other lesser offenses. The proposed rule should reduce the number of respondents applying for consent, but it may also increase the number of applications because of a renewed awareness of the statutory prohibition. Thus, the estimated number of respondents applying for consent would remain at one. The proposed rule continues to require credit unions to document when an application is not required. This recordkeeping requirement is minimal and only impacts those credit unions or individuals who would otherwise have submitted an application for consent.

These program changes would revise the information collection requirement currently approved OMB control number 3133–0203, as follows:

Title of Information Collection: IRPS 19–1, Guidance Regarding Prohibitions Imposed by Section 205(d) of the Federal Credit Union Act.

Estimated Number of Respondents: 4.

Estimated Number of Responses per Respondent: 1.

Estimated Annual Frequency of Response: 1.

Estimated Hours per Response: 0.75.

Estimated Total Annual Burden Hours: 3.

Affected Public: Private Sector: Not-for-profit institutions; Individual or Household.

The NCUA invites comments on: (a) whether the collections of information are necessary for the proper performance of the agencies' functions, including whether the information has practical utility; (b) the accuracy of the estimates of the burden of the information collections, including the validity of the methodology and assumptions used; (c) ways to enhance the quality, utility, and clarity of the information to be collected; (d) ways to minimize the burden of the information collections on respondents, including through the use of automated collection techniques or other forms of information technology; and (e) estimates of capital or start-up costs and costs of operation, maintenance, and purchase of services to provide information.

All comments are a matter of public record. Comments regarding the information collection requirements should be sent to (1) Jennifer Harrison, NCUA PRA Clearance Officer, National Credit Union Administration, 1775 Duke Street, Alexandria, Virginia 22314, or email at *PRAcomments@ncua.gov* and the (2) Office of Information and Regulatory Affairs, Office of Management and Budget, Attention: Desk Officer for NCUA, New Executive Office Building, Room 10235, Washington, DC 20503, or email at *OIRA_Submission@OMB.EOP.gov.*

Regulatory Flexibility Act

The Regulatory Flexibility Act (RFA) generally requires that when an agency issues a proposed rule or a final rule pursuant to the Administrative Procedure Act or another law, the agency must prepare a regulatory flexibility analysis that meets the requirements of the RFA and publish such analysis in the **Federal Register**. Specifically, the RFA normally requires agencies to describe the impact of a rulemaking on small entities by providing a regulatory impact analysis. For purposes of the RFA, the Board considers credit unions with assets less than $100 million to be small entities.[49] A regulatory flexibility analysis is not required, however, if the agency certifies that the rule will not have a significant economic impact on a substantial number of small entities and publishes its certification and a short, explanatory statement in the **Federal Register** together with the rule.

The Board does not believe the proposed rule would have a significant economic impact on a substantial number of small entities. In the period from 2019 through 2023, the NCUA received 4 consent applications. This averages to one application a year. Therefore, on average, only about one small entity—at most—would be affected by the proposed rule annually.

As discussed in the **SUPPLEMENTARY INFORMATION** section, the proposed rule would align the NCUA's regulations with the FHBA's provisions and more closely align the NCUA's section 205(d) regulations with those of other federal financial regulators. Most of the proposed changes were precipitated by the FHBA—which was effective immediately upon passage—and the proposed rule aligns the NCUA's regulations with these elements of the FHBA; therefore, most of the associated changes in the proposed rule will have no direct effect on individuals or credit unions. Further, since the NCUA estimates that on average approximately one NCUA-insured institution could be affected by the proposed rule annually, any direct effects realized because of the proposed rule are likely to be small and

[48] 44 U.S.C. 3507(d); 5 CFR part 1320.

[49] NCUA IRPS 15–1, 80 FR 57512 (Sept. 24, 2015).

affect a relatively small number of entities.

In light of the foregoing, the NCUA certifies that the proposed rule would not have a significant economic impact on a substantial number of small entities. The NCUA invites comments on all aspects of the supporting information provided in this section. In particular, would this proposed rule have any significant effects on small entities that the NCUA has not identified?

Executive Order 13132

Executive Order 13132 encourages independent regulatory agencies to consider the impact of their actions on state and local interests. The NCUA, an independent regulatory agency as defined in 44 U.S.C. 3502(5), voluntarily complies with the executive order to adhere to fundamental federalism principles.

This proposed rule would apply to all insured credit unions, including federally insured, state-chartered credit unions. The Board has determined that the proposed amendments would not have a substantial direct effect on the states, on the connection between the national government and the states, or on the distribution of power and responsibilities among the various levels of government. Further, the proposed rule would implement a statutory amendment, and the NCUA does not have discretion in implementing the statutory changes to section 205(d). In particular, the Board does not believe that these changes will affect its existing agreements and division of supervisory responsibilities with state regulatory agencies. The Board expects to continue to coordinate with these agencies as appropriate in carrying out its responsibilities under section 205(d) and related provisions. Therefore, the Board has determined that this rule does not constitute a policy that has federalism implications for purposes of the executive order.

Assessment of Federal Regulations and Policies on Families

The NCUA has determined that this proposed rule may affect family well-being positively within the meaning of section 654 of the Treasury and General Government Appropriations Act, 1999, Public Law 105–277, 112 Stat. 2681 (1998). In particular, the NCUA has reviewed the criteria specified in section 654(c)(1) of that act, by evaluating whether this proposed regulatory action (1) impacts the stability or safety of the family, particularly in terms of marital commitment; (2) impacts the authority of parents in the education, nurture, and supervision of their children; (3) helps the family perform its functions; (4) affects disposable income or poverty of families and children; (5) only financially impacts families, if at all, to the extent such impacts are justified; (6) may be carried out by State or local government or by the family; or (7) establishes a policy concerning the relationship between the behavior and personal responsibility of youth and the norms of society. Under this statute, if the agency determines the proposed regulation may negatively affect family well-being, then the agency must provide an adequate rationale for its implementation.

The proposed rule would implement legislative amendments that increase employment opportunities for individuals with certain older or minor criminal offenses involving dishonesty or breach of trust. These increased employment opportunities may strengthen the stability of families, help families perform their functions, and increase disposable income. These changes are not likely to affect the rights of parents in the education or nurture of their children. The changes call for federal rather than state or local government action because the legislation affects the federal statute governing all federally insured credit unions. The Board also notes that it has limited discretion in whether and how to implement the legislative amendments and thus cannot substantially vary from the legislation. The Board has determined that this proposed rule may affect family well-being positively within the meaning of this statute.[50] As with all aspects of the proposed rule, commenters are invited to offer their opinion on this issue.

Providing Accountability Through Transparency Act of 2023

The Providing Accountability Through Transparency Act of 2023 (5 U.S.C. 553(b)(4)) (Act) requires that a notice of proposed rulemaking include the internet address of a summary of not more than 100 words in length of a proposed rule, in plain language, that shall be posted on the internet website under section 206(d) of the E-Government Act of 2002 (44 U.S.C. 3501 note) (commonly known as *regulations.gov*). The Act, under its terms, applies to notices of proposed rulemaking and does not expressly include other types of documents that the Board publishes voluntarily for public comment, such as notices and interim-final rules that request comment despite invoking ''good cause'' to forgo such notice and public procedure. The Board, however, has elected to address the Act's requirement in these types of documents in the interests of administrative consistency and transparency.

In summary, the proposal would incorporate the ''Second Chance'' Interpretive Ruling and Policy Statement 19–1 and the Fair Hiring in Banking Act into the NCUA's regulations. Section 205(d) of the Federal Credit Union Act prohibits, except with the Board's prior written consent, any person who has been convicted of certain criminal offenses involving dishonesty or breach of trust, or who has entered into a pretrial diversion or similar program in connection with a prosecution for such an offense, from participating in the conduct of the affairs of an insured credit union.

The proposal and the required summary can be found at *https://www.regulations.gov.*

List of Subjects

12 CFR Part 701

Administrative practice and procedure, Credit, Credit unions.

12 CFR Part 741

Bank deposit insurance, Credit unions, Reporting and recordkeeping requirements.

12 CFR Part 746

Administrative practice and procedure, Claims, Credit unions, Investigations.

12 CFR Part 748

Computer technology, Confidential business information, Credit unions, internet, Personally identifiable information, Privacy, Reporting and recordkeeping requirements, Security measures.

12 CFR Part 752

Administrative practice and procedure.

By the NCUA Board on October 19, 2023.

Melane Conyers-Ausbrooks,

Secretary of the Board.

For the reasons discussed in the preamble, the Board proposes to amend 12 CFR chapter VII as follows:

PART 701— ORGANIZATION AND OPERATION OF FEDERAL CREDIT UNIONS

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

[50] Public Law 105–277, 112 Stat. 2681 (1998).

Authority: 12 U.S.C. 1752(5), 1755, 1756, 1757, 1758, 1759, 1761a, 1761b, 1766, 1767, 1782, 1784, 1785, 1786, 1787, 1788, 1789. Section 701.6 is also authorized by 15 U.S.C. 3717. Section 701.31 is also authorized by 15 U.S.C. 1601 *et seq.;* 42 U.S.C. 1981 and 3601–3610. Section 701.35 is also authorized by 42 U.S.C. 4311–4312.

■ 2. In 701.14, revise paragraphs (c)(1), (c)(3)(iii), and the second sentence in paragraph (e) as follows:

§ 701.14 Change in official or senior executive officer in credit unions that are newly chartered or are in troubled condition.

(c) * * * (1) *Prior Notice Requirement.* An insured credit union must give the NCUA written notice at least 30 days before the effective date of adding or replacing any member of its board of directors or committee member, employing any person as a senior executive officer of the credit union, or changing the responsibilities of a board member, committee member, or a senior executive officer so that the person would assume a different position if:

(i) The credit union has been chartered for less than 2 years; or

(ii) The credit union meets the definition of troubled condition in paragraph (b)(3) or (4) of this section.

* * * * *

(3) * * *

(iii) *Processing.* Within 15 calendar days after receiving the notice, the Regional Director will inform the credit union either that the notice is complete or that additional, specified information is needed and must be submitted within 30 calendar days. If the initial notice is complete, the Regional Director will issue a written decision of approval or disapproval to the individual and the credit union within 30 calendar days of receipt of the notice. If the initial notice is not complete, the Regional Director will issue a written decision within 30 calendar days of receipt of the original notice plus the amount of time the credit union takes to provide the requested additional information. If the additional information is not submitted within 30 calendar days of the Regional Director's request, the Regional Director may either disapprove the proposed individual or review the notice based on the information provided. If the credit union and the individual have submitted all requested information and the Regional Director has not issued a written decision within the applicable time period, the individual is approved. Regional Director communications may be done through electronic mail.

* * * * *

(e) * * * The Notice of Disapproval will identify the reason(s) for the denial and advise the parties of their rights to request reconsideration from the Regional Director and/or file an appeal with the NCUA Board in accordance with the procedures set forth in 12 CFR part 746, subpart B.

■ 3. In the Official Commentary to Appendix A to part 701, under ''Article V. Elections,'' revise paragraph *i.*(b) to read as follows:

Appendix A to Part 701—Federal Credit Union Bylaws

Official NCUA Commentary—Federal Credit Union Bylaws

Article V. Elections

* * * * *

i. Eligibility Requirements: * * *

(b) The individual cannot have been convicted of a crime covered under section 205(d) of the Federal Credit Union Act (12 U.S.C. 1785(d)) unless the NCUA Board has waived the prohibition for the conviction; and

* * * * *

PART 741—REQUIREMENTS OF INSURANCE

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

Authority: 12 U.S.C. 1757, 1766(a), 1781–1790, and 1790d; 31 U.S.C. 3717.

■ 5. In § 741.3, revise the second sentence of paragraph (c) as follows:

§ 741.3 Criteria.

(c) *Fitness of management.* * * * No person shall serve as a director, officer, committee member, or employee of an insured credit union who has been convicted of a crime covered under section 205(d) of the Federal Credit Union Act (12 U.S.C. 1785(d)), except with the written consent of the Board.

* * * * *

PART 746—APPEALS PROCEDURES

■ 6. The authority citation for part 746 continues to read as follows:

Authority: 12 U.S.C. 1766, 1787, and 1789.

§ 746.201 [Amended]

■ 7. In § 746.201, in paragraph (c), add ''752.11(b),'' between ''745.201(c),'' and ''subpart J to part 747 of this chapter,''.

PART 748—SECURITY PROGRAM, SUSPICIOUS TRANSACTIONS, CATASTROPHIC ACTS, CYBER INCIDENTS, AND BANK SECRECY ACT COMPLIANCE

■ 8. The authority citation for part 748 continues to read as follows:

Authority: 12 U.S.C. 1766(a), 1786(b)(1), 1786(q), 1789(a)(11); 15 U.S.C. 6801–6809; 31 U.S.C. 5311 and 5318.

■ 9. Revise footnote 7 in appendix B to part 748 to read as follows.

Appendix B to Part 748—Guidance on Response Programs for Unauthorized Access to Member Information and Member Notice

[7] Credit unions must also conduct background checks of employees to ensure that the credit union does not violate 12 U.S.C. 1785(d), which prohibits a credit union from hiring an individual convicted of certain criminal offenses or who is subject to a prohibition order under 12 U.S.C. 1786(g).

* * * * *

■ 10. Add part 752 to read as follows:

PART 752—CONSENT TO SERVICE OF PERSONS CONVICTED OF, OR WHO HAVE PROGRAM ENTRIES FOR, CERTAIN CRIMINAL OFFENSES

Sec.

Authority: 12 U.S.C. 1785(d).

§ 752.1 What is section 205(d) of the Federal Credit Union Act?

(a) This subpart covers consent applications under section 205(d) of the Federal Credit Union Act (FCU Act), 12 U.S.C. 1785(d). The NCUA refers to such applications as ''consent applications.'' Under section 205(d), any person who has been convicted of any criminal offense involving dishonesty or breach of trust, or has agreed to enter into a pretrial diversion or similar program (program entry) in connection with a prosecution for such offense (collectively, covered offenses), may not become, or continue as, an institution-affiliated party (IAP) of an insured credit union; or otherwise participate, directly or indirectly, in the conduct of the affairs of any insured credit union without the prior written consent of the NCUA. Section 205(d) imposes a ten-year ban against the Board granting consent for a person convicted of certain crimes enumerated in Title 18 of the United States Code. In order for the Board to grant consent during the ten-year period, the Board must file a

motion with, and obtain the approval of, the sentencing court.

(b) In addition, the law prohibits an insured credit union from permitting such a person to engage in any conduct or to continue any relationship prohibited by section 205(d). Insured credit unions must therefore make a reasonable, documented, inquiry to verify an applicant's history to ensure that a person who has a conviction or program entry covered by the provisions of section 205(d) is not hired or permitted to participate in its affairs without the written consent of the NCUA issued under this subpart. Insured credit unions may extend a conditional offer of employment contingent on the completion of a background check satisfactory to the credit union to determine if the applicant is prohibited under section 205(d), but the applicant may not work for, be employed by, or otherwise participate in the affairs of the insured credit union until the credit union has determined that the applicant is not prohibited under section 205(d).

(c) If there is a conviction or program entry covered by the prohibitions of section 205(d), a consent application under this subpart must be filed seeking the NCUA's consent to become, or to continue as, an IAP; or to otherwise participate, directly or indirectly, in the affairs of the insured credit union. The consent application must be filed, and consented to, prior to serving in any of the foregoing capacities unless such consent application is not required under the subsequent provisions of this subpart. The purpose of a consent application is to provide the applicant an opportunity to demonstrate that, notwithstanding the prohibition, a person is fit to participate in the conduct of the affairs of an insured credit union without posing a risk to its safety and soundness or impairing public confidence in that credit union. The burden is upon the applicant to establish that the consent application warrants approval.

§ 752.2 Who is covered by section 205(d)?

(a)(1) Persons covered by section 205(d) include IAPs, as defined by 12 U.S.C. 1786(r), and others who are participants in the conduct of the affairs of an insured credit union. Therefore, all directors, officers, and employees of an insured credit union who fall within the scope of section 205(d), including *de facto* employees, as determined by the NCUA based upon generally applicable standards of employment law, will also be subject to section 205(d).

(2) Whether other persons who are not IAPs are covered depends upon their degree of influence or control over the management or affairs of an insured credit union. Those who exercise major policymaking functions of an insured credit union are deemed participants in the affairs of that institution and covered by section 205(d). Similarly, directors and officers of subsidiaries or joint ventures of an insured credit union will be covered if they participate in the affairs of the insured credit union or are in a position to influence or control the management or affairs of the insured credit union. Typically, an independent contractor does not have a relationship with the insured credit union other than the activity for which the credit union has contracted. However, an independent contractor who influences or controls the management or affairs of the insured credit union would be covered by section 205(d).

(b) The term *person,* for purposes of section 205(d), means an individual and does not include a corporation, firm, or other business entity.

§ 752.3 Which offenses qualify as ''Covered Offenses'' under section 205(d)?

(a) *General definitions.* The conviction or program entry must be for a criminal offense involving dishonesty or breach of trust.

(1) The term *criminal offense involving dishonesty*—

(i) Means an offense under which an individual, directly or indirectly—

(A) Cheats or defrauds; or

(B) Wrongfully takes property belonging to another in violation of a criminal statute;

(ii) Includes an offense that federal, state, or local law defines as dishonest, or

for which dishonesty is an element of the offense; and

(iii) Does not include—

(A) A misdemeanor criminal offense committed more than 1 year before the date on which an individual files a consent application, excluding any period of incarceration; or

(B) An offense involving the possession of controlled substances. At a minimum, this exclusion applies to criminal offenses involving the simple possession of a controlled substance and possession with intent to distribute a controlled substance. This exclusion may also apply to other drug-related offenses depending on the statutory elements of the offenses or from court determinations that the statutory provisions of the offenses involve dishonesty or breach of trust as noted in paragraph (b) of this section. Potential applicants may contact their appropriate NCUA Regional Office or the Office of National Examinations and Supervision, if applicable, if they have questions about whether their offenses are covered under section 205(d).

(iv) The term *offense committed* in paragraph (a)(1)(iii)(A) means the last date of the underlying misconduct. In instances with multiple offenses, *offense committed* means the last date of any of the underlying offenses.

(2) The term *breach of trust* means a wrongful act, use, misappropriation, or omission with respect to any property or fund that has been committed to a person in a fiduciary or official capacity, or the misuse of one's official or fiduciary position to engage in a wrongful act, use, misappropriation, or omission.

(b) *Dishonesty or breach of trust.* Whether a crime involves dishonesty or breach of trust will be determined from the statutory elements of the offense itself or from court determinations that the statutory provisions of the offense involve dishonesty or breach of trust.

(c) *Certain older offenses excluded.* — (1) *General.* Section 205(d) does not apply to an offense if—

(i) it has been 7 years or more since the offense occurred; or

(ii) the individual was incarcerated with respect to the offense, and it has been 5 years or more since the individual was released from incarceration.

(iii) The NCUA interprets the term ''offense occurred'' to mean the last date of the underlying misconduct. In instances with multiple covered offenses, ''offense occurred'' means the last date of any of the underlying offenses.

(2) *Offenses committed by individuals 21 years of age or younger.* For individuals who committed an offense when they were 21 years of age or younger, section 205(d) shall not apply to the offense if it has been more than 30 months since the sentencing occurred. The NCUA interprets ''sentencing occurred'' to mean the date on which a court imposed the sentence, not the date on which all conditions of sentencing were completed.

(3) *Limitation.* This paragraph (c) shall not apply to an offense described under 12 U.S.C. 1785(d)(2).

(d) *Designated lesser offenses excluded.* Section 205(d) does not apply to the following offenses, if 1 or more years has passed since the applicable conviction or program entry: using fake identification; shoplifting; trespassing; fare evasion; and driving with an expired license or tag.

(e) *Foreign convictions.* The NCUA considers individuals who are convicted of or enter into a pretrial diversion program for a criminal offense involving

dishonesty or breach of trust in foreign jurisdictions to be subject to section 205(d), unless the offense is otherwise excluded by this subpart.

§ 752.4 What constitutes a conviction under section 205(d)?

(a) *Convictions requiring a consent application.* There must be a conviction of record. Section 205(d) does not cover arrests or pending cases not brought to trial, unless the person has a program entry as set out in § 752.5. Section 205(d) does not cover acquittals or any conviction that has been reversed on appeal, unless the reversal was for the purpose of re-sentencing. A conviction with regard to which an appeal is pending requires a consent application. A conviction for which a pardon has been granted will require a consent application.

(b) *Convictions not requiring a* consent *application.* When an individual is charged with a covered offense and, in the absence of a program entry as set out in § 752.5, is subsequently convicted of an offense that is not a covered offense, the conviction is not subject to section 205(d).

(c) *Expungement, dismissal, and sealing.* A conviction shall not be considered a conviction of record and shall not require a consent application if—

(1) there is an order of expungement, sealing, or dismissal that has been issued in regard to the conviction in connection with such offense, or if a conviction has been otherwise expunged, sealed, or dismissed by operation of law; and

(2) it is intended by the language in the order itself, or in the legislative provisions under which the order was issued, or in other legislative provisions, that the conviction shall be destroyed or sealed from the individual's state, tribal, or federal record, even if exceptions allow the conviction to be considered for certain character and fitness evaluation purposes.

(d) *Youthful offenders.* An adjudication by a court against a person as a ''youthful offender'' (or similar term) under any youth-offender law applicable to minors as defined by state law, or any judgment as a ''juvenile delinquent'' by any court having jurisdiction over minors as defined by state law, does not require a consent application. Such an adjudication does not constitute a matter covered under section 205(d) and is not a conviction or program entry for determining the applicability of § 752.8.

§ 752.5 What constitutes a pretrial diversion or similar program under section 205(d)?

(a) The term ''pretrial diversion or similar program'' (program entry) means a program characterized by a suspension or eventual dismissal or reversal of charges or criminal prosecution upon agreement by the accused to restitution, drug or alcohol rehabilitation, anger management, or community service. Whether the outcome of a case constitutes a program entry is determined by relevant Federal, State, or local law, and, if not so designated under applicable law, then the determination of whether a disposition is a program entry will be made by the Board on a case-by-case basis.

(b) When a covered offense either is reduced by a program entry to an offense that would otherwise not be covered by section 205(d) or is dismissed upon successful completion of a program entry, the covered offense remains a covered offense for purposes of section 205(d). The covered offense will require a consent application unless it is *de minimis* as provided by § 752.8 of this subpart.

(c) Expungements, dismissals, or sealings of program entries will be treated the same as those for convictions.

§ 752.6 What are the types of consent applications that can be filed?

(a) The NCUA will accept consent applications from—

(1) an individual; or

(2) an insured credit union applying on behalf of an individual.

(b) An individual or an insured credit union may file consent applications at separate times. Under either approach, the consent application(s) must be filed with the appropriate NCUA Regional Office, or the Office of National Examinations and Supervision, as required by this subpart.

§ 752.7 When may a consent application be filed?

(a) Except for situations in which no consent application is required under section 205(d) and this subpart, a consent application must be filed when there is a conviction by a court of competent jurisdiction for a covered offense by any adult or minor treated as an adult, or when such person has a program entry regarding that offense. Before a consent application may be filed, all of the sentencing requirements associated with a conviction, or conditions imposed by the program entry, including but not limited to, imprisonment, fines, condition of rehabilitation, and probation requirements, must be completed, and the case must be considered final by the procedures of the applicable jurisdiction.

(b) The NCUA's consent application forms as well as additional information concerning section 205(d) can be accessed at the NCUA's Regional Offices or the Office of National Examinations and Supervision, if applicable, or on the NCUA's website.

§ 752.8 *De minimis* offenses

(a) *In general.* Approval is automatically granted, and a consent application will not be required where all of the following *de minimis* criteria are met.

(1) The individual has been convicted of, or has program entries for, no more than 2 covered offenses, including those subject to paragraph (b) of this section; and for each covered offense, all of the sentencing requirements associated with the conviction, or conditions imposed by the program entry, have been completed (the sentence- or program-completion requirement does not apply under paragraph (b)(2) of this section);

(2) For each covered offense, the individual could have been sentenced to a term of confinement in a correctional facility of 3 years or less and/or a fine of $2,500 or less, and the individual actually served 3 days or less of jail time for each covered offense.

(i) Jail time is calculated based on the time an individual spent incarcerated as a punishment or a sanction—not as pretrial detention—and does not include probation or parole where an individual was restricted to a particular jurisdiction or was required to report occasionally to an individual or a specific location. Jail time includes confinement to a psychiatric treatment center in lieu of a jail, prison, or house of correction on mental-competency grounds. The definition is not intended to include either of the following:

(ii) Persons who are restricted to a substance-abuse treatment program facility for part or all of the day; and

(iii) Persons who are ordered to attend outpatient psychiatric treatment.

(3) If there are 2 convictions or program entries for a covered offense, each conviction or program entry was entered at least 3 years prior to the date a consent application would otherwise be required, except as provided in paragraph (b)(1) of this section; and

(4) Each covered offense was not committed against an insured depository institution or insured credit union.

(b) *Other types of offenses for which the de minimis exception applies and no consent application is required*—(1)

Age of person at time of covered offense. If there are 2 convictions or program entries for a covered offense, and the actions that resulted in both convictions or program entries all occurred when the individual was 21 years of age or younger, then the *de minimis* criteria in paragraph (a)(3) of this section shall be met if the convictions or program entries were entered at least 18 months prior to the date a consent application would otherwise be required.

(2) *Convictions or program entries for insufficient funds checks.* Convictions or program entries of record based on the writing of ''bad'' or insufficient funds check(s) shall be considered *de minimis* offenses under this provision if the following conditions apply:

(i) The aggregate total face value of all ''bad'' or insufficient funds check(s) cited across all the conviction(s) or program entry(ies) for ''bad'' or insufficient funds checks is $2,000 or less;

(ii) No insured depository institution or insured credit union was a payee on any of the ''bad'' or insufficient funds checks that were the basis of the conviction(s) or program entry(ies); and

(iii) The individual has no more than 1 other *de minimis* offense under this section.

(3) *Convictions or program entries for small-dollar, simple theft.* Convictions or program entries based on the simple theft of goods, services, or currency (or other monetary instrument) shall be considered *de minimis* offenses under this provision if the following conditions apply:

(i) The value of the currency, goods, or services taken is $1,000 or less;

(ii) The theft was not committed against an insured depository institution or insured credit union;

(iii) The individual has no more than 1 other *de minimis* offense under this section; and

(iv) If there are 2 *de minimis* offenses under this section, each conviction or program entry was entered at least 3 years prior to the date a consent application would otherwise be required, or at least 18 months prior to the date a consent application would otherwise be required if the actions that resulted in the conviction or program entry all occurred when the individual was 21 years of age or younger.

(v) Simple theft excludes burglary, forgery, robbery, identity theft, and fraud.

(c) *Fidelity bond coverage and disclosure to institutions.* Any person who meets the criteria under this section shall be covered by a fidelity bond to the same extent as others in similar positions, and shall disclose the presence of the conviction(s) or program entry(ies) to all insured credit unions in the affairs of which he or she intends to participate.

(d) *Non-qualifying convictions or program entries.* No conviction or program entry for a violation of the Title 18 sections set out in 12 U.S.C. 1785(d)(2) can qualify under any of the *de minimis* exceptions set out in this section.

§ 752.9 How to file a consent application.

Forms and instructions should be obtained from the NCUA's website (*www.ncua.gov*), and the consent application(s) must be filed with the appropriate NCUA Regional Director. A consent application may be filed by an individual and by an insured credit union on behalf of an individual. The appropriate Regional Office for a credit union-sponsored application is the office covering the state where the insured credit union's home office is located, or the Office of National Examinations and Supervision. The appropriate Regional Office for an individual consent application is the office covering the state where the person resides. States covered by each NCUA Regional Office are listed in section 790.2 of this chapter.

§ 752.10 How a consent application is evaluated.

(a) *Criminal history records.* In reviewing a consent application, the NCUA will—

(1) primarily rely on the criminal history record of the Federal Bureau of Investigation; and

(2) provide such record to the applicant to review for accuracy.

(b) *Certified copies.* The NCUA will not require an applicant to provide certified copies of criminal history records unless the NCUA determines that there is a clear and compelling justification to require additional information to verify the accuracy of the criminal history record of the Federal Bureau of Investigation.

(c) *Factors for determination.* The ultimate determinations in assessing a consent application are whether the person has demonstrated their fitness to participate in the conduct of the affairs of an insured credit union, and whether the affiliation, or participation by the person in the conduct of the affairs of the credit union may constitute a threat to the safety and soundness of the credit union or the interests of its members or threaten to impair public confidence in the credit union.

(d) *Individualized assessment.* When evaluating consent applications, the NCUA will conduct an individualized assessment that will consider:

(1) Whether the conviction or program entry is subject to section 205(d) and the specific nature and circumstances of the offense;

(2) Whether the participation directly or indirectly by the person in any manner in the conduct of the affairs of the insured credit union constitutes a threat to the safety and soundness of the credit union or the interests of its members or threatens to impair public confidence in the credit union;

(3) Evidence of rehabilitation including the applicant's age at the time of the conviction or program entry, the time that has elapsed since the conviction or program entry, the relationship of the individual's offense to the responsibilities of the applicable position;

(4) The individual's employment history, letters of recommendation, certificates documenting participation in substance-abuse programs, successful participating in job preparation and educational programs, and other relevant evidence;

(5) The ability of management of the insured credit union to supervise and control the person's activities;

(6) The applicability of the insured credit union's fidelity bond coverage to the person; and

(7) For state-chartered, federally insured credit unions, the opinion or position of the state regulator; and

(8) Any additional factors in the specific case that appear relevant to the consent application.

(e) *Underlying merits not at issue.* The question of whether a person, who was convicted of a crime or who agreed to a program entry, was guilty of that crime shall not be at issue in a proceeding under this subpart or under 12 CFR part 746, subpart B.

(f) *Application of factors to 10-year ban exception.* The foregoing factors will also be applied by the NCUA to determine whether the interests of justice are served in seeking an exception in the appropriate court when a consent application is made to terminate the 10-year ban prior to its expiration date under 12 U.S.C. 1785(d)(2)(A) for certain Federal offenses.

(g) *Fidelity bond requirements not affected.* All approvals and orders will be subject to the condition that the person be covered by a fidelity bond to the same extent as others in similar positions. If the NCUA has approved a consent application filed by an individual and has issued a consent order, the individual must disclose the presence of the conviction(s) or program

entry(ies) to all insured credit unions in the affairs of which they wish to participate.

(h) *Sponsored consent applications.* When deemed appropriate by the NCUA, credit union-sponsored consent applications are to allow the individual to work for the same employer (without restrictions on the location) and across positions, except that the prior consent of the NCUA (which may require a new consent application) will be required for any proposed significant changes in the individual's security-related duties or responsibilities, such as promotion to an officer or other positions that the employer determines will require higher security screening credentials.

(i) *Subsequent consent applications.* In situations in which an approval has been granted for a person to participate in the affairs of a particular insured credit union and the person subsequently seeks to participate at another insured credit union, another consent application must be submitted and approved by the NCUA prior to the person participating in the affairs of the other insured credit union.

§ 752.11 What will the NCUA do if the consent application is denied?

(a) The NCUA will inform the applicant in writing that the consent application has been denied and summarize or cite the relevant considerations specified in § 752.10 of this subpart.

(b) The denial will also notify the applicant of the right to request reconsideration from the Regional Office or the Office of National Examinations and Supervision, or to file an appeal with the Board, and shall include a description of applicable filing deadlines and time frames for agency responses. The Regional Office or the Office of National Examinations and Supervision and the Board will apply the review process contained in 12 CFR part 746, subpart B, to any request for reconsideration or appeal. The request for review must include a statement of the underlying facts that form the basis of the request for reconsideration or appeal, a statement of the basis for the denial to which the applicant objects and the alleged error in such denial, and any other support, materials, or evidence relied upon by the applicant that were not previously provided.

[FR Doc. 2023–23509 Filed 11–6–23; 8:45 am]

BILLING CODE 7535–01–P

CONSUMER PRODUCT SAFETY COMMISSION

16 CFR Part 1408

[Docket No. CPSC–2019–0020]

Safety Standard for Residential Gas Furnaces and Boilers; Correction

AGENCY: Consumer Product Safety Commission.

ACTION: Proposed rule; correction.

SUMMARY: On October 25, 2023, the Commission published a notice of proposed rulemaking (NPR) to address dangerous levels of carbon monoxide production and leakage from residential gas furnaces and boilers. That document contained a typographical error in the preamble. This document corrects that error.

DATES: November 7, 2023.

FOR FURTHER INFORMATION CONTACT: Ronald A. Jordan, Directorate for Engineering Sciences, Mechanical Engineering, Consumer Product Safety Commission, National Product Testing and Evaluation Center, 5 Research Place, Rockville, MD 20850; telephone: 301–987–2219; *rjordan@cpsc.gov.*

SUPPLEMENTARY INFORMATION: The Commission is correcting a typographical error in the preamble of the NPR, *Safety Standard for Residential Gas Furnaces and Boilers,* 16 CFR part 1408, which appeared in the **Federal Register** on October 25, 2023. 88 FR 73272. This document corrects a typographical error in section XV of the preamble, entitled Paperwork Reduction Act. On page 73289, first column, second paragraph, the first sentence erroneously states ''4,374 hours (833 hours + 833 + 208 hours + 2,500 hours)''. This notice corrects that error by revising that language to correctly read ''3,541 hours (833 hours + 208 hours + 2,500 hours)''. The estimated time burden thus is lower than stated in the NPR. The estimated financial burden in the same sentence is unchanged.

Alberta E. Mills,

Secretary, Consumer Product Safety Commission.

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DEPARTMENT OF THE TREASURY

Internal Revenue Service

26 CFR Parts 1, 31, and 301

[REG–122793–19]

RIN 1545–BP71

Gross Proceeds and Basis Reporting by Brokers and Determination of Amount Realized and Basis for Digital Asset Transactions

AGENCY: Internal Revenue Service (IRS), Treasury.

ACTION: Notification of rescheduling of public hearing on a proposed rulemaking.

SUMMARY: This document reschedules and changes to telephonic-only the public hearing originally scheduled for November 7, 2023, for a notice of proposed rulemaking (REG–122793–19) that was published in the **Federal Register** on Tuesday, August 29, 2023. The rescheduled hearing will be held on November 13, 2023, at 10 a.m. ET by telephone only. The proposed regulations relate to information reporting by brokers, the determination of amount realized and basis, and backup withholding, for certain digital asset sales and exchanges.

DATES: The previously scheduled public hearing for the notice of proposed rulemaking published on August 29, 2023 (88 FR 59576), has been rescheduled to a telephonic-only hearing on November 13, 2023, at 10 a.m. ET.

ADDRESSES: Commenters are strongly encouraged to submit public comments electronically. Submit electronic submissions via the Federal eRulemaking Portal at *www.regulations.gov* (indicate IRS and REG–122793–19) by following the online instructions for submitting comments. Once submitted to the Federal eRulemaking Portal, comments cannot be edited or withdrawn. The Department of the Treasury and the IRS will publish any comments submitted electronically or on paper to the public docket. Send paper submissions to CC:PA:01:PR (REG–122793–19), Room 5203, Internal Revenue Service, P.O. Box 7604, Ben Franklin Station, Washington, DC 20044. Submissions may be hand-delivered Monday through Friday between the hours of 8 a.m. and 4 p.m. to CC:PA:01:PR (REG–122793–19), Courier's Desk, Internal Revenue Service, 1111 Constitution Ave. NW, Washington, DC 20224.

FOR FURTHER INFORMATION CONTACT: Concerning submissions of comments