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NATIONAL CREDIT UNION ADMINISTRATION

12 CFR Part 709

RIN 3133-AE82

Involuntary Liquidation of Federal Credit Unions and Claims Procedures

AGENCY: National Credit Union Administration (NCUA).

ACTION: Final rule.

SUMMARY: The NCUA Board (Board) is amending part 709 of its rules to update and clarify the procedures that apply to claims administration for federally insured credit unions that enter involuntary liquidation. Specifically, the final rule amends the payout priority provision by specifying the conditions that claims in the nature of severance must meet to be allowed as provable claims.

DATES: The rule is effective [INSERT DATE 30 DAYS AFTER PUBLICATION IN THE FEDERAL REGISTER].

FOR FURTHER INFORMATION CONTACT: Ian Marenga, Senior Trial Attorney, at 1775 Duke Street, Alexandria, Virginia 22314, or telephone: (703) 518-6540.

SUPPLEMENTARY INFORMATION

I. Background

Section 1217 of the Financial Institutions Reform, Recovery and Enforcement Act of 1989 (FIRREA)¹ amended the Federal Credit Union Act (FCU Act) by adding Section 207(b), thereby creating a comprehensive statutory framework for the liquidation of federally insured credit unions.² Section 207(b)(4) authorizes the Board to “prescribe regulations regarding the allowance or disallowance of claims by the liquidating agent and providing for administrative determination of claims and review of such determination.”³ In accordance with this authority, the Board adopted part 709 in 1991.⁴

Under a separate provision of the FCU Act, the Board is authorized to prohibit or limit “golden parachute payments,” defined to include payments that are contingent on the termination of the party’s employment at the credit union and that are made when the credit union is in troubled financial condition.⁵ Part 750 of the NCUA’s regulations contains explicit limitations on the

¹ Sec. 1217(a)(3), (4), Pub. L. No. 101-73. Sec. 1217(a)(3), (4).

² 12 U.S.C. 1787(b).

³ 12 U.S.C. 1787(b)(4).

⁴ 56 FR 56925 (Nov. 7, 1991).

⁵ 12 U.S.C. 1786(t)(4); 12 CFR 750.1(d).

ability of an institution affiliated party to pursue a severance claim with the liquidating agent after a credit union has become insolvent and is placed in conservatorship or liquidation.⁶

In January 2018, the Board issued a proposed rule and request for public comment in which it proposed to clarify how the agency will handle severance claims in involuntary liquidations.⁷

Specifically, the Board proposed to create an exception to the generally applicable bar on severance claims in liquidation that is codified in the NCUA's regulation governing golden parachute payments. As reflected in the proposed regulatory text, the Board proposed to elaborate on the definition of permissible employment-related claims in involuntary liquidations to include vacation, sick, and severance pay if the payment is supported by an employee handbook or other credit union record and is calculable in accordance with a formula or criteria available to all employees. This proposed allowance for some severance claims, as explained in the proposed rule preamble, is an exception to the general rule in part 750 providing that all claims for employee welfare benefits are not provable against the liquidating agent for a failed insured credit union.

As explained in the next section, after reviewing the six public comment letters on the proposed rule, the Board adopts the proposal as a final rule without change.

II. Summary of Comments

The NCUA received six comment letters in response to the proposed rule—two from credit union trade organizations, three from credit union leagues and associations, and one from a credit

⁶ 12 CFR 750.7.

⁷ 83 FR 4450 (Jan. 31, 2018).

union. All commenters generally supported the proposed rule's purpose of clarifying the relationship between the golden parachute regulation and the involuntary liquidation claims procedures. One commenter suggested that the Board permit separately-negotiated executive agreements to form the basis of allowable severance claims under part 709. The commenter expressed concern that excluding such agreements from the scope of allowable claims under part 709 could affect credit unions' ability to retain executives.

As the proposed regulatory text indicates, the Board proposed to update part 709 to recognize that severance claims meeting specific criteria would be allowable in involuntary liquidation despite the general bar on such payments in part 750. Although the Board recognizes that the specific criteria set forth in the proposed regulatory text may be narrower than all payments that may be permissible or subject to NCUA approval under part 750, it is important to note that, prior to this rulemaking, the regulations provided that all claims for employee welfare benefits are not provable against the liquidating agent.

The proposed rule was designed to allow an exception to the general rule in part 750 but not repeal it. The Board is not persuaded that it should seek to expand the scope of that exception now. Attracting and retaining effective management is an important consideration, but the rule change does not negatively affect this interest. Indeed, it creates more certainty for severance claims in involuntary liquidations and affords the opportunity to all employees to be eligible to claim these benefits when the claims are based on the fair, objective factors described in the

proposed regulatory text. The Board notes that this rule only affects involuntary liquidations, which are infrequent, with only five occurring in 2017, for example.⁸

Accordingly, the Board adopts the proposed rule without change.

III. Regulatory Procedures

Regulatory Flexibility Act

The Regulatory Flexibility Act requires the NCUA to prepare an analysis to describe any significant economic impact a rule may have on a substantial number of small entities (primarily those under \$100 million in assets). The severance provision imposes no new requirements on credit unions. Instead, it provides a limited exception to an existing regulation that applies to liquidated credit unions. Accordingly, the final rule will not have a significant economic impact on a substantial number of small credit unions, and therefore, no regulatory flexibility analysis is required.

Paperwork Reduction Act

The Paperwork Reduction Act of 1995 (PRA) applies to rulemakings in which an agency by rule creates a new paperwork burden on regulated entities or modifies an existing burden. 44 U.S.C. 3507(d). For purposes of the PRA, a paperwork burden may take the form of either a reporting or a recordkeeping requirement, both referred to as information collections. Part 709 only concerns credit unions that have failed and imposes no information collection requirements on existing credit unions. Accordingly, there are no PRA implications.

⁸ See <https://www.ncua.gov/services/Pages/closed-credit-unions/2017.aspx>.

Small Business Regulatory Enforcement Fairness Act of 1996

The Small Business Regulatory Enforcement Fairness Act of 1996 (SBREFA) provides generally for congressional review of agency rules. A reporting requirement is triggered in instances where the NCUA issues a final rule as defined by Section 551 of the Administrative Procedure Act. The NCUA does not believe this final rule is a “major rule” within the meaning of the relevant sections of SBREFA. The NCUA has submitted the rule to the Office of Management and Budget for its determination in that regard.

Executive Order 13132

Executive Order 13132 encourages independent regulatory agencies to consider the impact of their actions on state and local interests. In adherence to fundamental federalism principles, the NCUA, an independent regulatory agency as defined in 44 U.S.C. 3502(5), voluntarily complies with the executive order. This final rule will clarify certain procedures for the NCUA’s administration of liquidated federally insured credit unions. This final rule will 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. The Board has determined that the final rule does not constitute a policy that has federalism implications for purposes of the executive order.

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

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

List of Subjects in

12 CFR part 709

Credit unions, Involuntary liquidation

By the National Credit Union Administration Board, on _____ 2018.

Gerard Poliquin
Secretary of the Board

For the reasons discussed above, the NCUA Board amends 12 CFR part 709 as follows:

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

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

Authority: 12 U.S.C. 1757, 1766, 1767, 1786(h), 1786(t), and 1787(b)(4), 1788, 1789, 1789a.

§709 [Amended]

2. Revise paragraph (b)(2) of § 709.5 to read as follows:

§ 709.5 Payout priorities in involuntary liquidation.

* * * * *

(b) * * *

(2) Claims for wages and salaries, including vacation, severance, and sick leave pay; *provided, however,* that, in accordance with § 750.7 of this Chapter, no claim for vacation, severance, or sick leave pay is provable unless entitlement to the benefit is provided for in the credit union employee handbook or other written credit union record, is calculable in accordance with an objective formula, and is available to all employees who meet applicable eligibility requirements, such as minimum length of service, or if such payment is required by applicable state or local law.

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