15G7535-01-U

NATIONAL CREDIT UNION ADMINISTRATION

12 CFR Part 709

RIN 3133-AE41

Safe Harbor

AGENCY: National Credit Union Administration (NCUA).

ACTION: Final rule.

SUMMARY: The NCUA Board ("Board") is issuing this final rule to amend its regulations regarding the treatment by the Board, as liquidating agent or conservator ("liquidating agent" or "conservator," respectively) of a federally insured credit union ("FICU"), of financial assets transferred by the credit union in connection with a securitization or a participation. The final rule replaces NCUA's current safe harbor for financial assets transferred in connection with securitizations and participations in which the financial assets were transferred in compliance with the existing regulation, and defines the conditions for safe harbor protection for securitizations and participations for which transfers of financial assets would be made after the effective date of this rule.

DATES: The effective date for this rule is [INSERT DATE 30 DAYS FROM DATE OF PUBLICATION IN FEDERAL REGISTER].

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SUPPLEMENTARY INFORMATION:

I. Background

In 2000, when it adopted a regulation codified at 12 CFR 709.10,[1] the Board clarified the scope of its statutory authority as conservator or liquidating agent to disaffirm or repudiate contracts of an FICU with respect to transfers of financial assets by a FICU in connection with a securitization or participation. Current §709.10 provides that a conservator or liquidating agent will not use its statutory authority to disaffirm or repudiate contracts to reclaim, recover, or recharacterize as property of a FICU or the liquidation estate any financial assets transferred by the FICU in connection with a securitization or in the form of a participation, provided that such transfer meets all conditions for sale accounting treatment under generally accepted accounting

1 65 FR 55442 (Sept. 14, 2000).

principles ("GAAP").[2] Current §709.10 also provides a "safe harbor" by confirming "legal isolation" if all other standards for off balance sheet accounting treatment, along with some additional conditions focusing on the enforceability of the transaction, were met by the transfer in connection with a securitization or a participation. Satisfaction of "legal isolation" is vital to securitization transactions because of the risk that the pool of financial assets transferred into the securitization trust could be recovered in bankruptcy or in a credit union liquidation. Generally, to satisfy the legal isolation condition, the transferred financial assets must have been presumptively placed beyond the reach of the transferor, its creditors, a bankruptcy trustee, or in the case of a FICU, NCUA as conservator or liquidating agent. Thus, current §709.10 addresses only purported sales which meet the conditions for off balance sheet accounting treatment under GAAP. The implementation of accounting rules since 2000, however, has created uncertainty for loan participation and potential securitization participants.

A. Modifications to GAAP Accounting Standards

In 2009, the Financial Accounting Standards Board ("FASB") finalized modifications to GAAP through Statement of Financial Accounting Standards No. 166, (now codified in FASB Accounting Standards Codification (ASC) Topic 860, Transfers and Servicing) and Statement of Financial Accounting Standards No. 167 (now codified in FASB ASC Topic 810, Consolidation)

[2] In the Proposal, NCUA stated that the agency had not previously stated that federal credit unions ("FCUs") have the authority to issue asset-backed securities ("ABS") and that its understanding was that no FCU had done so. NCUA also does not believe that any federally insured, state-chartered credit unions ("FISCUs") have issued ABS. Therefore, the securitization aspect of the 2000 Rule has not been applied. In connection with this final rule updating the 2000 Rule, the Office of General Counsel recently published a legal opinion letter on NCUA's website, which finds that the securitization of assets is a power incidental to the operation of FCUs. Accordingly, if an FCU (or a FISCU if permitted by state law) issues ABS, these amendments to §709.10 are necessary to preserve the safe harbor for investors.

(together, the "2009 GAAP Modifications"). The 2009 GAAP Modifications made changes that affect whether a special purpose entity ("SPE") must be consolidated for financial reporting purposes, thereby subjecting many SPEs to GAAP consolidation requirements. These accounting changes could require a FICU to consolidate an issuing entity to which financial assets have been transferred for securitization on to its balance sheet for financial reporting purposes primarily because an affiliate of the FICU retains control over the financial assets. Given the 2009 GAAP Modifications, legal and accounting treatment of a transaction may no longer be aligned. As a result, the safe harbor provision of the 2000 Rule may not apply to a transfer in connection with a securitization that does not qualify for off balance sheet accounting treatment.

FASB ASC Topic 860 also affects the treatment of participation interests transferred by a FICU, in that it defines participating interests as pari-passu, pro-rata interests in financial assets, and subjects the sale of a participation interest to the same conditions as the sale of financial assets. FASB ASC Topic 860 provides that transfers of participation interests that do not qualify for sale treatment will be viewed as secured borrowings. While the GAAP modifications have some effect on participations, most participations are likely to continue to meet the conditions for sale accounting treatment under GAAP.

B. FCU Act Changes

In 2005, Congress enacted Section 207(c)(13)(C)[3] of the Federal Credit Union Act (the "FCU Act").[4] This paragraph generally provides that no person may exercise any right or power to terminate, accelerate, or declare a default under a contract to which the FCU is a party, or obtain possession of or exercise control over any property of the FCU, or affect any contractual rights of the FCU, without the consent of the conservator or liquidating agent, as appropriate, during the 45-day period beginning on the date of the appointment of the conservator or the 90-day period beginning on the date of the appointment of the liquidating agent. If a securitization is treated as a secured borrowing, section 207(c)(13)(C) could prevent the investors from recovering monies due to them for up to 90 days. Consequently, securitized assets that remain property of the FCU (but subject to a security interest) would be subject to the stay, raising concerns that any attempt by securitization investors to exercise remedies with respect to the FCU's assets could be delayed. During the stay, interest and principal on the securitized debt could remain unpaid. This 90-day delay could cause substantial downgrades in the ratings provided on existing securitizations and could prevent planned securitizations for multiple asset classes, such as credit cards, automobile loans, and other credits, from being brought to market.

C. Notice of Proposed Rulemaking

In response to the changes outlined above, on June 26, 2014, the Board issued a notice of proposed rulemaking (Proposal) to revise the agency's safe harbor provisions.[5] The Proposal was prompted in part by the Federal Deposit Insurance Corporation's (FDIC's) decision in 2010

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[3] 12 U.S.C. 1787(c)(13)(C).
[4] 12 U.S.C. 1751 *et seq*.
[5] 79 FR 36252 (June 26, 2014).

to issue a final rule to resolve the issues raised by the 2009 GAAP modifications and parallel 2005 changes to the Federal Deposit Insurance Act.[6] To avoid unnecessary complexity and assure loan participants and securitization investors, the Proposal was modeled on the FDIC's safe harbor rule, which is codified at 12 CFR §360.6, Treatment of Financial Assets Transferred in Connection with a Securitization or Participation.

The Proposal sought to address concerns of securitization investors and loan participants regarding the impact of the 2009 GAAP Modifications on the eligibility of transfers of financial assets for safe harbor protection by clarifying the position of the conservator or liquidating agent under established law. Under section 207(c)(12) of the FCU Act, the conservator or liquidating agent cannot use its statutory power to repudiate or disaffirm contracts to avoid a legally enforceable and perfected security interest in transferred financial assets "except where such an interest is taken in contemplation of the credit union's insolvency or with the intent to hinder, delay or defraud the credit union or the creditors of such credit union."[7] This provision applies whether or not a securitization or participation transaction meets the conditions for sale accounting. The Proposal sought to clarify that, prior to any monetary default or repudiation, the conservator or liquidating agent would consent to the making of required payments of principal and interest and other amounts due on the securitized obligations during the statutory stay period.

In addition, the Proposal stated that, if the conservator or liquidating agent decides to repudiate the securitization transaction, the payment of repudiation damages in an amount equal to the par

[6] 75 FR 60287 (Sept. 30, 2010).
[7] 12 U.S.C. 1787(c)(12).
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value of the outstanding obligations on the date of liquidation will discharge the lien on the securitization assets.

Following issuance of NCUA's Proposal, the FDIC issued two additional rules revising its securitization safe harbor rule to (1) be consistent with regulations required under Section 15G of the Securities and Exchange Act, 15 U.S.C. 78a *et seq*. pursuant to section 941(b) of the Dodd-Frank Wall Street Reform and Consumer Protection Act;[8] and (2) clarify that the documents governing a securitization transaction need not require an action prohibited under Regulation X (12 CFR part 1024).[9] The Board has reviewed these changes and believes they are within the scope of the Proposal; consistent with current accepted standards and practices within the securitization industry; and uncontroversial enough in nature so that the public would not reasonably benefit from being given an additional opportunity to provide comments on these minor changes. Accordingly, the Board has amended the original proposed language to incorporate those conforming amendments into §§709.10(b)(5)(i) and (b)(3)(ii)(A) of this final rule. The amendments are discussed in more detail below.

II. Comments on the Proposal

NCUA received seven comments on the Proposal to continue the safe harbor for financial assets transferred in connection with securitizations and participations in which the financial assets transferred in connection with the securitization. All the commenters supported the Proposal, stating that investors would have no interest in pursuing securitizations without the safe harbor

[8] 80 FR 73087 (Nov. 24, 2015).
[9] 81 FR 41422 (June 27, 2016).

protections.   Two commenters, however, did question the proposed limit of six tranches in a securitization. One commenter also questioned the proposed limits on external credit enhancements. These comments are discussed in more detail below. Based on the rationale previously set forth, the commenters overwhelming support, and for the reasons explained in more detail below, the Board has decided to finalize the Proposal with only the slight modification mentioned above to §709.10(b)(5)(i).

III. Final Rule

A. General Considerations

Consistent with the Proposal, this final rule replaces current §709.10 of NCUA's regulations. Section 709.10(a) of the rule sets forth definitions of terms used in the rule. It retains many of the definitions used in the current §709.10(a), but modifies or adds definitions to the extent necessary to accurately reflect current industry practice in securitizations. Pursuant to these definitions, the safe harbor does not apply to certain government sponsored enterprises ("Specified GSEs"), affiliates of certain such enterprises, or any entity established or guaranteed by those GSEs. In addition, the rule is not intended to apply to the Government National Mortgage Association ("Ginnie Mae") or Ginnie Mae-guaranteed securitizations. When Ginnie Mae guarantees a security, the mortgages backing the security are assigned to Ginnie Mae, an entity owned entirely by the United States government. Ginnie Mae's statute contains broad authority to enforce its contract with the lender/issuer and its ownership rights in the mortgages backing Ginnie Mae-guaranteed securities. In the event that an entity otherwise subject to the rule issues both guaranteed and non-guaranteed securitizations, the securitizations guaranteed by a Specified GSE are not subject to the rule.

Section 709.10(b) of this final rule imposes conditions to the availability of the safe harbor for transfers of financial assets to an issuing entity in connection with a securitization. These conditions make a clear distinction between the conditions imposed on residential mortgage-backed securities (RMBS) from those imposed on securitizations for other asset classes. In the context of a conservatorship or liquidation, the conditions applicable to all securitizations will improve overall transparency and clarity through disclosure and documentation requirements, along with ensuring effective incentives for prudent lending by requiring that the payment of principal and interest be based primarily on the performance of the financial assets and by requiring retention of a share of the credit risk in the securitized loans.

The conditions applicable to RMBS are more detailed and include additional capital structure, disclosure, documentation and compensation requirements, as well as a requirement for the establishment of a reserve fund. These requirements are intended to address the factors that caused significant losses in RMBS securitization structures as demonstrated in the 2007–2008 financial crisis. Confidence can be restored in RMBS markets only through greater transparency and other structures that support sustainable mortgage origination practices and require increased disclosures. These standards respond to investor demands for greater transparency and alignment of the interests of parties to the securitization. In addition, they are generally consistent with industry efforts, while taking into account legislative and regulatory initiatives.

B. Capital Structure and Financial Assets

The benefits of this final rule should be available only to securitizations that are readily understood by the market, increase liquidity of the financial assets, and reduce consumer costs. Consistent with the Security and Exchange Commission's ("SEC's") Regulation AB, the documents governing the securitization must provide financial asset level disclosure as appropriate to the securitized financial assets for any re-securitizations (securitizations supported by other securitization obligations). These disclosures must include full disclosure of the obligations, including the structure and the assets supporting each of the underlying securitization obligations, and not just the obligations that are transferred in the re-securitization. This requirement applies to all re-securitizations, including static re-securitizations as well as managed collateralized debt obligations.

All securitizations. Consistent with the Proposal, this final rule provides that securitizations that are unfunded or synthetic transactions are not eligible for expedited consent. To support sound lending, the documents governing all securitizations must require that payments of principal and interest on the obligations be primarily dependent on the performance of the financial assets supporting the securitization and that such payments not be contingent on market or credit events that are independent of the assets supporting the securitization, except for interest rate or currency mismatches between the financial assets and the obligations to investors.

RMBS only. In formulating the rule, the Board sought to permit innovation and accommodate financing needs, and thus attempted to strike a balance between permitting multi-tranche structures for RMBS transactions and promoting readily understandable securitization structures and limiting overleveraging of residential mortgage assets.

For RMBS only, the Proposal limited the capital structure of the securitization to six or fewer tranches to discourage complex and opaque structures. The most senior tranche could include time-based sequential pay or planned amortization and companion sub-tranches, which are not viewed as separate tranches for the purpose of the six tranche requirement. This condition would not have prevented an issuer from creating the economic equivalent of multiple tranches by re-securitizing one or more tranches, so long as they meet the conditions set forth in the rule, including adequate disclosure in connection with the re-securitization. In addition, RMBS could not include leveraged tranches that introduced market risks (such as leveraged super senior tranches). Although the financial assets transferred into an RMBS would have been permitted to benefit from asset level credit support, such as guarantees (including guarantees provided by governmental agencies, private companies, or government-sponsored enterprises), co-signers, or insurance, the RMBS could not benefit from external credit support at the issuing entity or pool level. The Proposal intended that guarantees permitted at the asset level include guarantees of payment or collection, but not credit default swaps or similar items. The temporary payment of principal and interest, however, could be supported by liquidity facilities. These conditions were designed to limit both the complexity and the leverage of an RMBS and therefore the systemic risks introduced by them in the market. In addition, the Proposal provided that the securitization obligations could be enhanced by credit support or guarantees provided by Specified GSEs. However, as noted in the discussion on the definitions in the Proposal, a securitization that was wholly guaranteed by a Specified GSE would not have been subject to the rule and thus would not have been eligible for the safe harbor.

Public Comments on the Proposal

Two commenters expressed concern that codifying a limit of six credit tranches in a securitization may have the unintended consequence of limiting a FCU's ability to access the market or issuing a securitization at the best possible price. The commenter recommended that, because there is no empirical evidence that structures with more than six tranches create materially more risk than those with less than six, the Board should eliminate this requirement from the safe harbor. In addition, one commenter urged elimination of the prohibition on external credit enhancements for RMBS.

Discussion

The Board disagrees with the commenter's recommendations. As previously stated, the rule was intentionally modeled on §360.6 of the FDIC's regulations to encourage a market for securitization participants and help assure investors. The limiting language in §§709.10(b)(1)(ii)(A) and (B) of the Proposal is nearly identical[10] to the language in §§360.6(b)(1)(ii)(A) and (B) of FDIC's regulation. Retaining the six credit tranche limitation and the prohibition on external credit enhancements will not disadvantage FICUs relative to

[10] The text of the provision in NCUA's rule uses the word "must" instead of the word "shall," which is used in the FDIC rule, the provisions are otherwise identical. No material difference is intended by the use of the word must instead of the word shall in NCUA's rule.

banks, and will help limit the complexity of assigning a value to securities in the event of liquidation. Accordingly, the Board has decided to retain the proposed language in §§709.10(b)(1)(ii)(A) and (B) in the final rule without change.

C. Disclosure

For all securitizations, disclosure serves as an effective tool for increasing the demand for high quality financial assets and thereby establishing incentives for robust financial asset underwriting and origination practices. Consistent with the Proposal, this final rule increases transparency in securitizations by enabling investors to decide whether to invest in a securitization based on full information with respect to the quality of the asset pool and thereby provide additional liquidity only for sustainable origination practices.

The data must enable investors to analyze the credit quality for the specific asset classes that are being securitized. The documents governing securitizations must, at a minimum, require disclosure for all issuances to include the types of information required under current Regulation AB or any successor disclosure requirements with the level of specificity that applies to public issuances, even if the obligations are issued in a private placement or are not otherwise required to be registered.

The documents governing securitizations that qualify under the rule must require disclosure of the structure of the securitization and the credit and payment performance of the obligations, including the relevant capital or tranche structure and any liquidity facilities and credit enhancements. The disclosure must be required to include the priority of payments and any specific subordination features, as well as any waterfall triggers or priority of payment reversal features. The disclosure at issuance must include the representations and warranties made with respect to the financial assets and the remedies for breach of such representations and warranties, including any relevant timeline for cure or repurchase of financial assets, and policies governing delinquencies, servicer advances, loss mitigation and write offs of financial assets. The documents must also require that periodic reports provided to investors include the credit performance of the obligations and financial assets, including periodic and cumulative financial asset performance data, modification data, substitution and removal of financial assets, servicer advances, losses that were allocated to each tranche and remaining balance of financial assets supporting each tranche as well as the percentage coverage for each tranche in relation to the securitization as a whole. Where appropriate for the type of financial assets included in the pool, reports must also include asset level information that may be relevant to investors (e.g. changes in occupancy, loan delinquencies, defaults, etc.). NCUA recognizes that for certain asset classes, such as credit card receivables, the disclosure of asset level information is less informative and, thus, will not be required.

The securitization documents must also require disclosure to investors of the nature and amount of compensation paid to any mortgage or other broker, the servicer(s), rating agency or third-party advisor, and the originator or sponsor, and the extent to which any risk of loss on the underlying financial assets is retained by any of them for such securitization. The documents must require disclosure of changes to this information while obligations are outstanding. This disclosure should enable investors to assess potential conflicts of interests and how the compensation structure affects the quality of the assets securitized or the securitization as a whole.

For RMBS, consistent with the Proposal, this final rule requires the sponsor to disclose loan level data as to the financial assets securing the mortgage loans, such as loan type, loan structure, maturity, interest rate and location of property. Sponsors of securitizations of residential mortgages will be required to affirm compliance in all material respects with applicable statutory and regulatory standards for origination of mortgage loans. None of the disclosure conditions should be construed as requiring the disclosure of personally identifiable information of obligors or information that would violate applicable privacy laws. The rule requires sponsors to disclose a third-party due diligence report on compliance with standards and representations and warranties made about the financial assets.

Finally, this final rule, consistent with the Proposal, specifies that the securitization documents require disclosure by servicers of any ownership interest of the servicer or any affiliate of the servicer in other whole loans secured by the same real property that secures a loan included in the financial asset pool. This provision does not require disclosure of interests held by servicers or their affiliates in the securitization securities. This provision is intended to give investors information to evaluate potential servicer conflicts of interest that might impede the servicer's actions to maximize value for the benefit of investors.

D. Documentation and Recordkeeping

For all securitizations, this final rule, consistent with the Proposal, requires operative agreements to use available standardized documentation for each available asset class. It is not possible to define in advance when use of standardized documentation will be appropriate, but when there is general market use of a form of documentation for a particular asset class, or where a trade group has formulated standardized documentation generally accepted by the industry, such documentation must be used.

Consistent with the Proposal, the rule also requires that securitization documents define the contractual rights and responsibilities of the parties, including but not limited to representations and warranties, ongoing disclosure requirements and any measures to avoid conflicts of interest. The documents are required to provide authority for the parties to fulfill their rights and responsibilities under the securitization contracts.

Consistent with the Proposal, additional conditions apply to RMBS to address a significant issue that has been demonstrated in the mortgage crisis by requiring that servicers have authority to mitigate losses on mortgage loans consistent with maximizing net present value of the mortgages. Therefore, for RMBS, contractual provisions in the servicing agreement must provide servicers with authority to modify loans to address reasonably foreseeable defaults and to take other action to maximize the value and minimize losses on the securitized financial assets. The documents must require servicers to apply industry best practices related to asset management and servicing.

The RMBS documents may not give control of servicing discretion to a particular class of investors. The documents must require that the servicer act for the benefit of all investors rather for the benefit of any particular class of investors. Consistent with the forgoing, the documents must require the servicer to commence action to mitigate losses no later than ninety days after an asset first becomes delinquent unless all delinquencies on such an asset have been cured. A servicer must be required to maintain sufficient records of its actions to permit appropriate review of its actions.

In January 2013, the Consumer Financial Protection Bureau (‘‘CFPB’’) adopted mortgage loan servicing requirements that became effective on January 10, 2014. One of the requirements, set forth in Subpart C to Regulation X, at 12 CFR 1024.41, generally prohibits a servicer from commencing a foreclosure unless the borrower’s mortgage loan obligation is more than 120 days delinquent. This section of Regulation X also provides additional rules that, among other things, require a lender to further delay foreclosure if the borrower submits a loss mitigation application before the lender has commenced the foreclosure process, and requires a lender to delay a foreclosure for which it has commenced the foreclosure process if a borrower has submitted a complete loss mitigation application more than 37 days before a foreclosure sale.[11]

In response to this change, the Board is now making minor amendments in this final rule to clarify that the 90-day loss mitigation requirement does not conflict with the foreclosure commencement delays mandated by the CFPB under Regulation X. In particular, 709.10(b)(3)(ii)(A) retains the original language proposed, but now includes additional language

[11] *See* 12 CFR 1024.41(f) and (g).

stating that the loss mitigation action requirement thereunder "will not be deemed to require that the documents include any provision concerning loss mitigation that requires any action that may conflict with the requirements of Regulation X. . . ."

In addition, NCUA believes that a prolonged period of servicer advances in a market downturn misaligns servicer incentives with those of the RMBS investors. Servicing advances also serve to aggravate liquidity concerns, exposing the market to greater systemic risk. Occasional advances for late payments, however, are beneficial to ensure that investors are paid in a timely manner. To that end, consistent with the Proposal, the servicing agreement for RMBS must not require the primary servicer to advance delinquent payments of principal and interest by borrowers for more than three payment periods unless financing or reimbursement facilities to fund or reimburse the primary servicers are available. However, such facilities shall not be dependent for repayment on foreclosure proceeds.

E. Compensation

Consistent with the Proposal, the compensation requirements of this final rule apply only to RMBS. Due to the demonstrated issues in the compensation incentives in RMBS, the rule seeks to realign compensation to parties involved in the rating and servicing of residential mortgage securitizations.

The securitization documents are required to provide that any fees payable credit rating agencies or similar third-party evaluation companies must be payable in part over the five-year period after the initial issuance of the obligations based on the performance of surveillance services and the performance of the financial assets, with no more than 60% of the total estimated compensation due at closing. Thus, payments to rating agencies must be based on the actual performance of the financial assets, not their ratings.

A second area of concern is aligning incentives for proper servicing of the mortgage loans. Therefore, the documents must require that compensation to servicers must include incentives for servicing, including payment for loan restructuring or other loss mitigation activities, which maximizes the net present value of the financial assets in the RMBS.

F. Origination and Retention Requirements

As discussed above and consistent with the Proposal, this final rule imposes conditions addressing origination and retention requirements for all securitizations to provide further incentives for quality origination practices. Because the regulations required under Section 15G of the Securities Exchange Act, 15 U.S.C. 78a *et seq.*, added by Section 941(b) of the Dodd-Frank Wall Street Reform and Consumer Protection Act have now gone into effect,[12] the Board has amended this final rule to eliminate the references to the retention requirements for securities issued prior to the effective dates of that rulemaking. Accordingly, the final rule now provides that for any securitization, the documents creating the securitization shall require retention of an economic interest in the credit risk of the financial assets in accordance with the regulations required under Section 15G of the Securities Exchange Act, 15 U.S.C. 78a *et seq.*, added by

[12] 79 FR 77602 (Dec. 24, 2014) (Providing that the effective dates for under the Section 15G Regulations is December 24, 2015 for residential mortgage securitizations and December 24, 2016 for all other securitizations.).

Section 941(b) of the Dodd-Frank Wall Street Reform and Consumer Protection Act, including restrictions on sale, pledging and hedging set forth therein.

The Board continues to believe that requiring the sponsor to retain an economic interest in the credit risk relating to each credit tranche or in a representative sample of financial assets will help ensure quality origination practices. A risk retention requirement that did not cover all types of exposure would not be sufficient to create an incentive for quality underwriting at all levels of the securitization. The recent economic crisis made clear that, if quality underwriting is to be assured, it will require true risk retention by sponsors, and that the existence of representations and warranties or regulatory standards for underwriting will not alone be sufficient.

G. Additional Conditions

Consistent with the Proposal, §709.10(c) of this final rule includes general conditions for securitizations and the transfer of financial assets. These conditions also include requirements that are consistent with good financial institution practices.

The transaction should be an arms-length, bona fide securitization transaction and the documents must limit sales to credit union service organizations in which the sponsor credit union has an interest (other than a wholly-owned credit union service organization consolidated for accounting and capital purposes with the credit union), and insiders of the sponsor. The securitization agreements must be in writing, approved by the board of directors of the credit union or its loan committee (as reflected in the minutes of a meeting of the board of directors or committee), and have been, continuously, from the time of execution, in the official record of the credit union. The securitization must have been entered into in the ordinary course of business, not in contemplation of insolvency and with no intent to hinder, delay or defraud the credit union or its creditors.

The rule applies only to transfers made for adequate consideration. The transfer and/or security interest need to be properly perfected under the Uniform Commercial Code (UCC) or applicable state law. NCUA anticipates that it will be difficult to determine whether a transfer complying with the rule is a sale or a security interest, and therefore expects that a security interest will be properly perfected under the UCC, either directly or as a backup.

The governing documents must require that the sponsor separately identify in its financial asset data bases the financial assets transferred into a securitization and maintain an electronic or paper copy of the closing documents in a readily accessible form, and that the sponsor maintain a current list of all of its outstanding securitizations and issuing entities, and the most recent SEC Form 10-K or other periodic financial report for each securitization and issuing entity. The documents must also provide that if acting as servicer, custodian or paying agent, the sponsor is not permitted to commingle amounts received with respect to the financial assets with its own assets except for the time necessary to clear payments received, and in event for more than two business days. The documents must require the sponsor to make these records available to NCUA promptly upon request. This requirement will facilitate the timely fulfillment of the conservator’s or liquidating agent's responsibilities upon appointment and will expedite the conservator’s or liquidating agent's analysis of securitization assets. This will also facilitate the conservator’s or liquidating agent's analysis of the credit union's assets and determination of which assets have been securitized and are therefore potentially eligible for expedited access by investors.

In addition, the rule requires that the transfer of financial assets and the duties of the sponsor as transferor be evidenced by an agreement separate from the agreement governing the sponsor's duties, if any, as servicer, custodian, paying agent, credit support provider or in any capacity other than transferor.

H. The Safe Harbor

Consistent with the Proposal, §709.10(d)(1) of the rule continues the safe harbor provision that was provided by the 2000 Rule with respect to participations so long as the participation satisfies the conditions for sale accounting treatment set forth by generally accepted accounting principles. In addition, last-in first-out participations are specifically included in the safe harbor, provided that they satisfy requirements for sale accounting treatment other than the pari-passu, proportionate interest requirement that is not satisfied solely as a result of the last-in first-out structure.

Consistent with the Proposal, §709.10(d)(2) of the Rule addresses transfers of financial assets made in connection with a securitization for which transfers of financial assets are made after the effective date of this rule or securitizations from a master trust or revolving trust established after the date of adoption of this rule, that (in each case) satisfy the conditions for sale accounting treatment under GAAP in effect for reporting periods after November 15, 2009. For such securitizations, NCUA as conservator or liquidating agent will not, in the exercise of its statutory authority to disaffirm or repudiate contracts, reclaim, recover, or recharacterize as property of the institution or the liquidation estate any such transferred financial assets, provided that such securitizations comply with the conditions set forth in paragraphs (b) and (c) of the rule.

Consistent with the Proposal, §709.10(d)(3) of the Rule addresses transfers of financial assets in connection with a securitization for which transfers of financial assets were made after the effective date of this rule or securitizations from a master trust or revolving trust established after the date of adoption of the rule, that (in each case) satisfy the conditions set forth in paragraphs (b) and (c), but where the transfer does not satisfy the conditions for sale accounting treatment under GAAP in effect for reporting periods after November 15, 2009.

Consistent with the Proposal, §709.10(d)(3)(i) provides that if the conservator or liquidating agent is in monetary default due to its failure to pay or apply collections from the financial assets received by it in accordance with the securitization documents, and remains in monetary default for ten business days after actual delivery of a written notice to the conservator or liquidating agent requesting exercise of contractual rights because of such default, the conservator or liquidating agent consents to the exercise of such contractual rights, including any rights to obtain possession of the financial assets or the exercise of self-help remedies as a secured creditor, provided that no involvement of the conservator or liquidating agent is required, other than consents, waivers or the execution of transfer documents reasonably requested in the ordinary course of business in order facilitate the exercise of such contractual rights. This paragraph also provides that the consent to the exercise of such contractual rights shall serve as full satisfaction for all amounts due.

Consistent with the Proposal, §709.10(d)(3)(ii) provides that, if the conservator or liquidating agent gives a written notice of repudiation of the securitization agreement pursuant to which assets were transferred and does not pay the damages due by reason of such repudiation within ten business days following the effective date of the notice, the conservator or liquidating agent consents to the exercise of any contractual rights, including any rights to obtain possession of the financial assets or the exercise of self-help remedies as a secured creditor, provided that no involvement of the conservator or liquidating agent is required other than consents, waivers or the execution of transfer documents reasonably requested in the ordinary course of business in order facilitate the exercise of such contractual rights. Paragraph 3(d)(ii) also provides that the damages due for these purposes shall be an amount equal to the par value of the obligations outstanding on the date of liquidation less any payments of principal received by the investors through the date of repudiation, plus unpaid, accrued interest through the date of repudiation to the extent actually received through payments on the financial assets received through the date of repudiation, and that upon receipt of such payment all liens on the financial assets created pursuant to the securitization documents shall be released.

In computing amounts payable as repudiation damages, consistent with the FCU Act, the conservator or liquidating agent will not give effect to any provisions of the securitization documents increasing the amount payable based on the appointment of as the conservator or liquidating agent.[13] The rule clarifies that repudiation damages will be equal to the par value of the obligations as of the date of liquidation, less payments of principal received by the investors to the date of repudiation, plus unpaid, accrued interest through the date of repudiation to the extent actually received through payments on the financial assets received through the date of repudiation. The rule also provides that the conservator or liquidating agent consents to the exercise of remedies by investors, including self-help remedies as secured creditors, in the event that NCUA repudiates a securitization transfer agreement and does not pay damages in such amount within ten business days following the effective date of notice of repudiation. Thus, if NCUA repudiates and the investors are not paid the par value of the securitization obligations, plus unpaid, accrued interest through the date of repudiation to the extent actually received through payments on the financial assets received through the date of repudiation, they will be permitted to obtain the asset pool. Accordingly, exercise by the conservator or the liquidating agent of its repudiation rights will not expose investors to market value risks relating to the asset pool.

I. Consent to Certain Payments and Servicing

Consistent with the Proposal, §709.10(e) provides that prior to repudiation or, in the case of monetary default, prior to the effectiveness of the consent referred to in §709.10(d)(3)(i), the conservator or liquidating agent consents to the making of, or if acting as servicer agrees to make, required payments to the investors during the stay period imposed by 12 U.S.C. 1787(c)(13)(C). The rule also provides that the conservator or liquidating agent consents to any

[13] 12 U.S.C. 1787(c)(13).

servicing activity required in furtherance of the securitization (subject to its rights to repudiate the servicing agreements), in connection with securitizations that meet the conditions set forth in paragraphs (b) and (c) of §709.10 of the rule.

J. Miscellaneous

Consistent with the Proposal, §709.10(f) requires that any party requesting consent pursuant to paragraph (d)(3), provide notice to the conservator or liquidating agent, together with a statement of the basis upon which the request is made, together with copies of all documentation supporting the request. This includes a copy of the applicable agreements (such as the transfer agreement and the security agreement) and of any applicable notices under the agreements.

Consistent with the Proposal, §709.10(g) provides that the conservator or liquidating agent will not seek to avoid an otherwise legally enforceable agreement that is executed by a FICU in connection with a securitization solely because the agreement does not meet the "contemporaneous" requirement of 12 U.S.C. 1787(b)(9) and 1788(a)(3).

Consistent with the Proposal, §709.10(h) of the rule provides that the consents set forth in the rule will not act to waive or relinquish any rights granted to NCUA, the conservator, or the liquidating agent, in any capacity, pursuant to any other applicable law or any agreement or contract except as specifically set forth in the rule, and nothing contained in the section will alter the claims priority of the securitized obligations.

Consistent with the Proposal, §709.10(i) provides that except as specifically set forth in the rule, the rule does not authorize, and shall not be construed as authorizing the attachment of any involuntary lien upon the property of the conservator or liquidating agent. The rule should not be construed as waiving, limiting or otherwise affecting the rights or powers of NCUA, the conservator, or the liquidating agent to take any action or to exercise any power not specifically mentioned, including but not limited to any rights, powers or remedies of the conservator or the liquidating agent regarding transfers taken in contemplation of the FICU's insolvency or with the intent to hinder, delay or defraud the FICU, or the creditors of such FICU, or that is a fraudulent transfer under applicable law.

The right to consent under 12 U.S.C. 1787(c)(13)(C) may not be assigned or transferred to any purchaser of property from a conservator or liquidating agent, other than to a conservator or bridge credit union. The rule can be repealed by NCUA upon 30 days' notice provided in the Federal Register, but any repeal will not apply to any issuance that complied with the rule before such repeal.

III. Regulatory Procedures

1. Regulatory Flexibility Act

The Regulatory Flexibility Act requires NCUA to prepare an analysis of any significant economic impact any proposed regulation may have on a substantial number of small entities (primarily those under $100 million in assets).[14] The final rule will apply only to the largest credit unions, as they are the only ones with the infrastructure and resources to securitize assets. Accordingly, the Board certifies it will not have an economic impact on any small credit unions.

2. 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 increases an existing burden.[15] For purposes of the PRA, a paperwork burden may take the form of a reporting or recordkeeping requirement, both referred to as information collections. The changes to part 709 impose new information collection requirements.

Estimated PRA Burden: The information collection requirements are related to federal security filings. As discussed above, because this final rule is based on 12 CFR 360.6, the NCUA has also based its information collection requirements on the information collection estimates provided under that regulation. According, NCUA's burden estimates for the applications are as follows:

1. 10K Annual Report:

    Non Reg AB Compliant:

    Estimated Number of Respondents: 2

    Affected Public: NCUA-insured credit unions.

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[14] 5 U.S.C. 603(a); 12 U.S.C. 1787(c)(1).
[15] 44 U.S.C. 3507(d); 5 CFR part 1320.

Frequency of Response: 1 time per year.

Average Time Per Response: 27 hours.

Estimated Annual Burden: 54 hours.

Reg AB Compliant:

Estimated Number of Respondents: 2

Affected Public: NCUA-insured credit unions.

Frequency of Response: 1 time per year.

Average Time Per Response: 4.5 hours.

Estimated Annual Burden: 9 hours.

2. 8K Annual Report:

Non Reg AB Compliant:

Estimated Number of Respondents: 2

Affected Public: NCUA-insured credit unions.

Frequency of Response: 2 time per year.

Average Time Per Response: 27 hours.

Estimated Annual Burden: 108 hours.

Reg AB Compliant:

Estimated Number of Respondents: 2

Affected Public: NCUA-insured credit unions.

Frequency of Response: 2 time per year.

Average Time Per Response: 4.5 hours.

Estimated Annual Burden: 18 hours.

3. 10D Annual Report:

Non Reg AB Compliant:

Estimated Number of Respondents: 2

Affected Public: NCUA-insured credit unions.

Frequency of Response: 5 time per year.

Average Time Per Response: 27 hours.

Estimated Annual Burden: 270 hours.

Reg AB Compliant:

Estimated Number of Respondents: 2

Affected Public: NCUA-insured credit unions.

Frequency of Response: 5 time per year.

Average Time Per Response: 4.5 hours.

Estimated Annual Burden: 45 hours.

4. 12b–25 Notification:

Estimated Number of Respondents: 2

Affected Public: NCUA-insured credit unions.

Frequency of Response: 2 time per year.

Average Time Per Response: 2.5 hours.

Estimated Annual Burden: 10 hours.

3. Executive Order 13132

Executive Order 13132 encourages independent regulatory agencies to consider the impact of their actions on state and local interests. 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 final rule does not have substantial direct effects on the states, on the relationship between the national government and the states, or on the distribution of power and responsibilities among the various levels of government. NCUA has therefore determined that this final does not constitute a policy that has federalism implications for purposes of the executive order.

4. Assessment of Federal Regulations and Policies on Families

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

5. Small Business Regulatory Enforcement Act Fairness Act

The Small Business Regulatory Enforcement Fairness Act of 1996 (Pub. L. 104–121) (SBREFA) provides generally for congressional review of agency rules. A reporting requirement is triggered in instances where NCUA issues a final rule as defined by Section 551 of the Administrative Procedure Act.[16] NCUA does not believe this final rule is a ‘‘major rule’’ within the meaning of the relevant sections of SBREFA. As required by SBREFA, NCUA has filed the appropriate reports so that this final rule may be reviewed.

[16] 5 U.S.C. 551.

List of Subjects

12 CFR Part 709

Credit unions, Liquidations.

By the National Credit Union Administration Board, on June 23, 2017.

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Gerard Poliquin

Secretary of the Board

For the reasons discussed above, the National Credit Union Administration amends part 709 as follows:

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

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

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

2. Revise §709.10 to read as follows:

§ 709.10 Treatment of financial assets transferred in connection with a securitization or participation.

(a) *Definitions.*

Financial asset means cash or a contract or instrument that conveys to one entity a contractual right to receive cash or another financial instrument from another entity.

Investor means a person or entity that owns an obligation issued by an issuing entity.

Issuing entity means an entity that owns a financial asset or financial assets transferred by the sponsor and issues obligations supported by such asset or assets. Issuing entities may include, but are not limited to, corporations, partnerships, trusts, and limited liability companies and are commonly referred to as special purpose vehicles or special purpose entities. To the extent a securitization is structured as a multi-step transfer, the term issuing entity would include both the issuer of the obligations and any intermediate entities that may be a transferee. Notwithstanding the foregoing, a Specified GSE or an entity established or guaranteed by a Specified GSE does not constitute an issuing entity.

Monetary default means a default in the payment of principal or interest when due following the expiration of any cure period.

Obligation means a debt or equity (or mixed) beneficial interest or security that is primarily serviced by the cash flows of one or more financial assets or financial asset pools, either fixed or revolving, that by their terms convert into cash within a finite time period, or upon the disposition of the underlying financial assets, and by any rights or other assets designed to assure the servicing or timely distributions of proceeds to the security holders issued by an issuing entity. The term may include beneficial interests in a grantor trust, common law trust or similar issuing entity to the extent that such interests satisfy the criteria set forth in the preceding sentence, but does not include LLC interests, partnership interests, common or preferred equity, or similar instruments evidencing ownership of the issuing entity.

Participation means the transfer or assignment of an undivided interest in all or part of a financial asset, that has all of the characteristics of a "participating interest," from a seller, known as the "lead," to a buyer, known as the "participant," without recourse to the lead, pursuant to an agreement between the lead and the participant. "Without recourse" means that the participation is not subject to any agreement that requires the lead to repurchase the participant's interest or to otherwise compensate the participant upon the borrower's default on the underlying obligation.

Securitization means the issuance by an issuing entity of obligations for which the investors are relying on the cash flow or market value characteristics and the credit quality of transferred financial assets (together with any external credit support permitted by this section) to repay the obligations.

Servicer means any entity responsible for the management or collection of some or all of the financial assets on behalf of the issuing entity or making allocations or distributions to holders of the obligations, including reporting on the overall cash flow and credit characteristics of the financial assets supporting the securitization to enable the issuing entity to make payments to investors on the obligations. The term “servicer” does not include a trustee for the issuing entity or the holders of obligations that makes allocations or distributions to holders of the obligations if the trustee receives such allocations or distributions from a servicer and the trustee does not otherwise perform the functions of a servicer.

Specified GSE means each of the following: (i) the Federal National Mortgage Association and any affiliate thereof; (ii) Federal Home Loan Mortgage Corporation and any affiliate thereof; (iii) the Government National Mortgage Association; and (iv) any federal or state sponsored mortgage finance agency.

Sponsor means a person or entity that organizes and initiates a securitization by transferring financial assets, either directly or indirectly, including through an affiliate, to an issuing entity, whether or not such person owns an interest in the issuing entity or owns any of the obligations issued by the issuing entity.

Transfer means: (i) the conveyance of a financial asset or financial assets to an issuing entity; or (ii) the creation of a security interest in such asset or assets for the benefit of the issuing entity.

(b) *Coverage.* This section applies to securitizations that meet the following criteria:

(1) *Capital structure and financial assets.* The documents creating the securitization must define the payment structure and capital structure of the transaction.

(i) *Requirements applicable to all securitizations:*

(A) The securitization may not consist of re-securitizations of obligations or collateralized debt obligations unless the documents creating the securitization require that disclosures required in paragraph (b)(2) of this section are made available to investors for the underlying assets supporting the securitization at initiation and while obligations are outstanding; and

(B) The documents creating the securitization must require that payment of principal and interest on the securitization obligation will be primarily based on the performance of financial assets that are transferred to the issuing entity and, except for interest rate or currency mismatches between the financial assets and the obligations, will not be contingent on market or credit events that are independent of such financial assets. The securitization may not be an unfunded securitization or a synthetic transaction.

(ii) *Requirements applicable only to securitizations in which the financial assets include any residential mortgage loans:*

(A) The capital structure of the securitization must be limited to no more than six credit tranches and cannot include "sub-tranches," grantor trusts or other structures. Notwithstanding the foregoing, the most senior credit tranche may include time-based sequential pay or planned amortization and companion sub-tranches; and

(B) The credit quality of the obligations cannot be enhanced at the issuing entity or pool level through external credit support or guarantees. However, the credit quality of the obligations may be enhanced by credit support or guarantees provided by Specified GSEs and the temporary payment of principal and/or interest may be supported by liquidity facilities, including facilities designed to permit the temporary payment of interest following appointment of the NCUA Board as conservator or liquidating agent. Individual financial assets transferred into a securitization may be guaranteed, insured, or otherwise benefit from credit support at the loan level through mortgage and similar insurance or guarantees, including by private companies, agencies or other governmental entities, or government-sponsored enterprises, and/or through co-signers or other guarantees.

(2) *Disclosures.* The documents must require that the sponsor, issuing entity, and/or servicer, as appropriate, will make available to investors, information describing the financial assets, obligations, capital structure, compensation of relevant parties, and relevant historical performance data set forth in paragraph (b)(2) of this section.

(i) *Requirements applicable to all securitizations:*

(A) The documents must require that, on or prior to issuance of obligations and at the time of delivery of any periodic distribution report and, in any event, at least once per calendar quarter, while obligations are outstanding, information about the obligations and the securitized financial assets will be disclosed to all potential investors at the financial asset or pool level and security level, as appropriate for the financial assets, to enable evaluation and analysis of the credit risk and performance of the obligations and financial assets. The documents must require that such information and its disclosure, at a minimum, complies with the requirements of Securities and Exchange Commission Regulation AB, or any successor disclosure requirements for public issuances, even if the obligations are issued in a private placement or are not otherwise required to be registered. Information that is unknown or not available to the sponsor or the issuer after reasonable investigation may be omitted if the issuer includes a statement in the offering documents disclosing that the specific information is otherwise unavailable.

(B) The documents must require that, on or prior to issuance of obligations, the structure of the securitization and the credit and payment performance of the obligations will be disclosed, including the capital or tranche structure, the priority of payments, and specific subordination features; representations and warranties made with respect to the financial assets, the remedies for, and the time permitted for cure of any breach of representations and warranties, including the repurchase of financial assets, if applicable; liquidity facilities and any credit enhancements permitted by this rule, any waterfall triggers, or priority of payment reversal features; and policies governing delinquencies, servicer advances, loss mitigation, and write-offs of financial assets.

(C) The documents must require that while obligations are outstanding, the issuing entity will provide to investors information with respect to the credit performance of the obligations and the financial assets, including periodic and cumulative financial asset performance data, delinquency and modification data for the financial assets, substitutions and removal of financial assets, servicer advances, as well as losses that were allocated to such tranche and remaining balance of financial assets supporting such tranche, if applicable, and the percentage of each tranche in relation to the securitization as a whole.

(D) In connection with the issuance of obligations, the documents must disclose the nature and amount of compensation paid to the originator, sponsor, rating agency or third-party advisor, any mortgage or other broker, and the servicer(s), and the extent to which any risk of loss on the underlying assets is retained by any of them for such securitization be disclosed. The securitization documents must require the issuer to provide to investors while obligations are outstanding any changes to such information and the amount and nature of payments of any deferred compensation or similar arrangements to any of the parties.

(ii) *Requirements applicable only to securitizations in which the financial assets include any residential mortgage loans:*

(A) Prior to issuance of obligations, sponsors must disclose loan level information about the financial assets including, but not limited to, loan type, loan structure (for example, fixed or adjustable, resets, interest rate caps, balloon payments, etc.), maturity, interest rate and/or Annual Percentage Rate, and location of the property.

(B) Prior to issuance of obligations, sponsors must affirm compliance in all material respects with applicable statutory and regulatory standards for the underwriting and origination of residential mortgage loans. Sponsors must disclose a third-party due diligence report on compliance with such standards and the representations and warranties made with respect to the financial assets.

(C) The documents must require that prior to issuance of obligations and while obligations are outstanding, servicers will disclose any ownership interest by the servicer or an affiliate of the servicer in other whole loans secured by the same real property that secures a loan included in the financial asset pool. The ownership of an obligation, as defined in this regulation, does not constitute an ownership interest requiring disclosure.

(3) *Documentation and recordkeeping.* The documents creating the securitization must specify the respective contractual rights and responsibilities of all parties and include the

requirements described in paragraph (b)(3) of this section and use as appropriate any available standardized documentation for each different asset class.

(i) *Requirements applicable to all securitizations.* The documents must define the contractual rights and responsibilities of the parties, including but not limited to representations and warranties and ongoing disclosure requirements, and any measures to avoid conflicts of interest; and provide authority for the parties, including but not limited to the originator, sponsor, servicer, and investors, to fulfill their respective duties and exercise their rights under the contracts and clearly distinguish between any multiple roles performed by any party.

(ii) *Requirements applicable only to securitizations in which the financial assets include any residential mortgage loans:*

(A) Servicing and other agreements must provide servicers with authority, subject to contractual oversight by any master servicer or oversight advisor, if any, to mitigate losses on financial assets consistent with maximizing the net present value of the financial asset. Servicers shall have the authority to modify assets to address reasonably foreseeable default, and to take other action to maximize the value and minimize losses on the securitized financial assets. The documents shall require that the servicers apply industry best practices for asset management and servicing. The documents shall require the servicer to act for the benefit of all investors, and not for the benefit of any particular class of investors, that the servicer maintain records of its actions to permit full review by the trustee or other representative of the investors and that the servicer must commence action to mitigate losses no later than ninety (90) days after an asset first becomes delinquent unless all delinquencies have been cured, *provided* that this requirement will not be deemed to require that the documents include any provision concerning loss mitigation that requires any action that may conflict with the requirements of Regulation X (12 CFR part 1024), as Regulation X may be amended or modified from time to time.

(B) The servicing agreement may not require a primary servicer to advance delinquent payments of principal and interest for more than three payment periods, unless financing or reimbursement facilities are available, which may include, but are not limited to, the obligations of the master servicer or issuing entity to fund or reimburse the primary servicer, or alternative reimbursement facilities. Such “financing or reimbursement facilities” under this paragraph may not be dependent for repayment on foreclosure proceeds.

(4) *Compensation.* The following requirements apply only to securitizations in which the financial assets include any residential mortgage loans. Compensation to parties involved in the securitization of such financial assets must be structured to provide incentives for sustainable credit and the long-term performance of the financial assets and securitization as follows:

(i) The documents must require that any fees or other compensation for services payable to credit rating agencies or similar third-party evaluation companies are payable, in part, over the five-year period after the first issuance of the obligations based on the performance of surveillance services and the performance of the financial assets, with no more than sixty percent of the total estimated compensation due at closing; and

(ii) The documents must provide that compensation to servicers will include incentives for servicing, including payment for loan restructuring or other loss mitigation activities, which maximizes the net present value of the financial assets. Such incentives may include payments for specific services, and actual expenses, to maximize the net present value or a structure of incentive fees to maximize the net present value, or any combination of the foregoing that provides such incentives.

(5) *Origination and retention requirements*—(i) *Requirements applicable to all securitizations.* For any securitization, the documents creating the securitization shall require retention of an economic interest in the credit risk of the financial assets in accordance with the regulations required under Section 15G of the Securities Exchange Act, 15 U.S.C. 78a *et seq.*, added by Section 941(b) of the Dodd-Frank Wall Street Reform and Consumer Protection Act, including restrictions on sale, pledging and hedging set forth therein.

(ii) *Requirements applicable only to securitizations in which the financial assets include any residential mortgage loans:*

(A) The documents must require the establishment of a reserve fund equal to at least five (5) percent of the cash proceeds of the securitization payable to the sponsor to cover the repurchase of any financial assets required for breach of representations and warranties. The balance of such fund, if any, must be released to the sponsor one year after the date of issuance.

(B) The documents must include a representation that the assets were originated in all material respects in compliance with statutory, regulatory, and originator underwriting standards in effect at the time of origination. The documents must include a representation that the mortgages included in the securitization were underwritten at the fully indexed rate, based upon the borrowers' ability to repay the mortgage according to its terms, and rely on documented income and comply with all existing all laws, rules, regulations, and guidance governing the underwriting of residential mortgages by federally insured credit unions.

(c) *Other requirements.* (1) The transaction should be an arms-length, bona fide securitization transaction. The documents must require that the obligations issued in a securitization shall not be predominantly sold to a credit union service organization in which the sponsor credit union has an interest (other than a wholly-owned credit union service organization consolidated for accounting and capital purposes with the credit union) or insider of the sponsor;

(2) The securitization agreements are in writing, approved by the board of directors of the credit union or its loan committee (as reflected in the minutes of a meeting of the board of directors or committee), and have been, continuously, from the time of execution in the official record of the credit union;

(3) The securitization was entered into in the ordinary course of business, not in contemplation of insolvency and with no intent to hinder, delay, or defraud the credit union or its creditors;

(4) The transfer was made for adequate consideration;

(5) The transfer and/or security interest was properly perfected under the UCC or applicable state law;

(6) The transfer and duties of the sponsor as transferor must be evidenced in a separate agreement from its duties, if any, as servicer, custodian, paying agent, credit support provider, or in any capacity other than the transferor; and

(7) The documents must require that the sponsor separately identify in its financial asset data bases the financial assets transferred into any securitization and maintain (i) an electronic or

paper copy of the closing documents for each securitization in a readily accessible form, (ii) a current list of all of its outstanding securitizations and the respective issuing entities, and (iii) the most recent Securities and Exchange Commission Form 10-K, if applicable, or other periodic financial report for each securitization and issuing entity. The documents must provide that to the extent serving as servicer, custodian, or paying agent for the securitization, the sponsor may not comingle amounts received with respect to the financial assets with its own assets except for the time, not to exceed two business days, necessary to clear any payments received. The documents must require that the sponsor will make these records readily available for review by NCUA promptly upon written request.

(d) *Safe harbor* —(1) *Participations*. With respect to transfers of financial assets made in connection with participations, the NCUA Board as conservator or liquidating agent will not, in the exercise of its statutory authority to disaffirm or repudiate contracts, reclaim, recover, or recharacterize as property of the credit union or the liquidation estate any such transferred financial assets, provided that such transfer satisfies the conditions for sale accounting treatment under generally accepted accounting principles, except for the "legal isolation" condition that is addressed by this section. The foregoing sentence applies to a last-in, first-out participation, provided that the transfer of a portion of the financial asset satisfies the conditions for sale accounting treatment under generally accepted accounting principles that would have applied to such portion if it had met the definition of a "participating interest," except for the "legal isolation" condition that is addressed by this section.

(2) *For securitizations meeting sale accounting requirements.* With respect to any securitization for which transfers of financial assets were made after adoption of this rule, or

from a master trust or revolving trust established after adoption of this rule, and which complies with the requirements applicable to that securitization as set forth in paragraphs (b) and (c) of this section, the NCUA Board as conservator or liquidating agent will not, in the exercise of its statutory authority to disaffirm or repudiate contracts, reclaim, recover, or recharacterize as property of the credit union or the liquidation estate such transferred financial assets, provided that such transfer satisfies the conditions for sale accounting treatment under generally accepted accounting principles in effect for reporting periods after November 15, 2009, except for the "legal isolation" condition that is addressed by this paragraph (d)(2).

(3) *For securitizations not meeting sale accounting requirements.* With respect to any securitization for which transfers of financial assets were made after adoption of this rule, or from a master trust or revolving trust established after adoption of this rule, and which complies with the requirements applicable to that securitization as set forth in paragraphs (b) and (c) of this section, but where the transfer does not satisfy the conditions for sale accounting treatment set forth by generally accepted accounting principles in effect for reporting periods after November 15, 2009, the following conditions apply:

(i) *Monetary default.* If, at any time after appointment, the NCUA Board as conservator or liquidating agent is in a monetary default under a securitization due to its failure to pay or apply collections from the financial assets received by it in accordance with the securitization documents, whether as servicer or otherwise, and remains in monetary default for ten business days after actual delivery of a written notice to the NCUA Board as conservator or liquidating agent pursuant to paragraph (f) of this section requesting the exercise of contractual rights because of such monetary default, the NCUA Board as conservator or liquidating agent hereby consents pursuant to 12 U.S.C. 1787(c)(13)(C) to the exercise of any contractual rights in accordance with the documents governing such securitization, including but not limited to taking possession of the financial assets and exercising self-help remedies as a secured creditor under the transfer agreements, provided no involvement of the conservator or liquidating agent is required other than such consents, waivers, or execution of transfer documents as may be reasonably requested in the ordinary course of business in order to facilitate the exercise of such contractual rights. Such consent does not waive or otherwise deprive the NCUA Board as conservator or liquidating agent or its assignees of any seller's interest or other obligation or interest issued by the issuing entity and held by the conservator or liquidating agent or its assignees, but shall serve as full satisfaction of the obligations of the insured credit union in conservatorship or liquidation and the NCUA Board as conservator or liquidating agent for all amounts due.

(ii) *Repudiation.* If the NCUA Board as conservator or liquidating agent provides a written notice of repudiation of the securitization agreement pursuant to which the financial assets were transferred, and does not pay damages, defined in this paragraph, within ten business days following the effective date of the notice, the NCUA Board as conservator or liquidating agent hereby consents pursuant to 12 U.S.C. 1787(c)(13)(C) to the exercise of any contractual rights in accordance with the documents governing such securitization, including but not limited to taking possession of the financial assets and exercising self-help remedies as a secured creditor under the transfer agreements, provided no involvement of the conservator or liquidating agent is required other than such consents, waivers, or execution of transfer documents as may be reasonably requested in the ordinary course of business in order to facilitate the exercise of such contractual rights. For purposes of this paragraph, the damages due will be in an amount equal to the par value of the obligations outstanding on the date of appointment of the conservator or liquidating agent, less any payments of principal received by the investors through the date of repudiation, plus unpaid, accrued interest through the date of repudiation in accordance with the contract documents to the extent actually received through payments on the financial assets received through the date of repudiation. Upon payment of such repudiation damages, all liens or claims on the financial assets created pursuant to the securitization documents shall be released. Such consent does not waive or otherwise deprive the NCUA Board as conservator or liquidating agent or its assignees of any seller's interest or other obligation or interest issued by the issuing entity and held by the conservator or liquidating agent or its assignees, but serves as full satisfaction of the obligations of the insured credit union in conservatorship or liquidation and the NCUA Board as conservator or liquidating agent for all amounts due.

(iii) *Effect of repudiation.* If the NCUA Board as conservator or liquidating agent repudiates or disaffirms a securitization agreement, it will not assert that any interest payments made to investors in accordance with the securitization documents before any such repudiation or disaffirmance remain the property of the conservatorship or liquidation.

(e) *Consent to certain actions.* Prior to repudiation or, in the case of a monetary default referred to in paragraph (d)(3)(i) of this section, prior to the effectiveness of the consent referred to therein, the NCUA Board as conservator or liquidating agent consents pursuant to 12 U.S.C. 1787(c)(13)(C) to the making of, or if serving as servicer, does make, the payments to the investors to the extent actually received through payments on the financial assets (but in the case of repudiation, only to the extent supported by payments on the financial assets received through the date of the giving of notice of repudiation) in accordance with the securitization documents, and, subject to the conservator's or liquidating agent's rights to repudiate such agreements, consents to any servicing activity required in furtherance of the securitization or, if acting as servicer, the conservator or liquidating agent performs such servicing activities in accordance with the terms of the applicable servicing agreements, with respect to the financial assets included in securitizations that meet the requirements applicable to that securitization as set forth in paragraphs (b) and (c) of this section.

(f) *Notice for consent.* Any party requesting the NCUA Board's consent as conservator or liquidating agent under 12 U.S.C. 1787(c)(13)(C) pursuant to paragraph (d)(3)(i) of this section must provide notice to the President, NCUA Asset Management & Assistance Center, 4807 Spicewood Springs Road, Suite 5100, Austin, TX 78759-8490, and a statement of the basis upon which such request is made, and copies of all documentation supporting such request, including without limitation a copy of the applicable agreements and of any applicable notices under the contract.

(g) *Contemporaneous requirement.* The NCUA Board as conservator or liquidating agent will not seek to avoid an otherwise legally enforceable agreement that is executed by an insured credit union in connection with a securitization or in the form of a participation solely because the agreement does not meet the "contemporaneous" requirement of 12 U.S.C.1787(b)(9) and 1788(a)(3).

(h) *Limitations.* The consents set forth in this section do not act to waive or relinquish any rights granted to NCUA in any capacity, including the NCUA Board as conservator or liquidating agent, pursuant to any other applicable law or any agreement or contract except as specifically set forth herein. Nothing contained in this section alters the claims priority of the securitized obligations.

(i) *No waiver.* This section does not authorize the attachment of any involuntary lien upon the property of the NCUA Board as conservator or liquidating agent. Nor does this section waive, limit, or otherwise affect the rights or powers of NCUA in any capacity, including the NCUA Board as conservator or liquidating agent, to take any action or to exercise any power not specifically mentioned, including but not limited to any rights, powers or remedies of the NCUA Board as conservator or liquidating agent regarding transfers or other conveyances taken in contemplation of the credit union's insolvency or with the intent to hinder, delay or defraud the credit union or the creditors of such credit union, or that is a fraudulent transfer under applicable law.

(j) *No assignment.* The right to consent under 12 U.S.C. 1787(c)(13)(C) may not be assigned or transferred to any purchaser of property from the NCUA Board as conservator or liquidating agent, other than to a conservator or bridge credit union.

(k) *Repeal.* This section may be repealed by NCUA upon 30 days' notice provided in the FEDERAL REGISTER, but any repeal does not apply to any issuance made in accordance with this section before such repeal.