

7535-01-U

NATIONAL CREDIT UNION ADMINISTRATION

12 CFR Part 701

RIN 3133-AD67

Secondary Capital Accounts

AGENCY: National Credit Union Administration (NCUA).

ACTION: Final Rule.

SUMMARY: On February 19, 2010, NCUA published an interim final rule amending its regulation governing secondary capital accounts to permit low-income designated credit unions to redeem all or part of secondary capital accepted from the United States Government or any of its subdivisions at any time after the secondary capital has been on deposit for two years. The amendments also allowed early redemption, under the

same terms and conditions, of secondary capital accepted as a match to the government-funded secondary capital. Finally, the amendments changed the loss-distribution provision that applies to secondary capital accounts so that secondary capital accepted under the 2010 Community Development Capital Initiative is senior to any required matching secondary capital accepted from an alternative source. This rule confirms those amendments as final with some technical changes and clarifications.

DATES: Effective [INSERT date of publication in the FEDERAL REGISTER], the interim final rule amending 12 CFR Part 701 published on February 19, 2010 (75 FR 7339), which was effective February 19, 2010, is confirmed as final.

FOR FURTHER INFORMATION CONTACT: Kevin Tuininga, Trial Attorney, at 1775 Duke Street, Alexandria, Virginia 22314-3428, or telephone: (703) 518-6543.

SUPPLEMENTARY INFORMATION:

A. Background

In February 2010, NCUA issued an interim final rule, with request for comments, to permit low-income designated credit unions (“LICUs”) to redeem all or part of secondary capital (“SC”) accepted from the United States Government or any of its subdivisions (“government-funded SC”) ¹ and its matching SC, if any, at any time after the SC has been on deposit for two years. 75 FR 7339 (Feb. 19, 2010). This amendment was intended to facilitate LICU participation in the United States Department of the

¹ Where the term appears in this preamble, Government-funded SC refers only to SC funded by the Federal government as opposed to State governments or their subdivisions.

Treasury's ("Treasury") Community Development Capital Initiative ("CDCI"), which offered funds under the Troubled Asset Relief Program ("TARP") to LICUs in the form of SC ("CDCI SC"). To comply with the terms of the CDCI, the interim final also provided that CDCI SC must be held senior to its matching SC, if any, and gave LICUs two options for ensuring the subordination of matching SC. In this final rule, NCUA is confirming the amendments to its rule on the redemption and priority of certain SC accounts. The final rule also makes a number of technical adjustments and clarifications to reflect terms of the CDCI that have developed since the interim final rule was issued.

2. The CDCI

Treasury announced the CDCI on February 3, 2010 as a new program under the TARP aimed to invest lower-cost capital in community development financial institutions.² To qualify for CDCI consideration, credit unions must have a low-income designation pursuant to 12 CFR § 701.34 and a Community Development Financial Institution ("CDFI") certification from the CDFI Fund.³

The terms of the CDCI provide that a LICU accepted for participation is eligible to issue CDCI Senior Securities up to an aggregate principal amount of 3.5 percent of the LICU's total assets. The Senior Securities have either an eight-year or thirteen-year

² The Emergency Economic Stabilization Act of 2008 authorized the Secretary of the Treasury to establish the TARP for the purpose of restoring and sustaining the viability of financial institutions. 12 U.S.C. 5211.

³ The CDFI Fund is operated by Treasury and charged with promoting economic revitalization and community development through investment in community development financial institutions.

maturity and are purchased by Treasury.⁴ Securities with a thirteen-year maturity pay cumulative interest at an annual rate of two percent until the eighth anniversary of their date of issuance. Over the remaining five years to maturity, the securities pay cumulative interest at an annual rate of nine percent. Securities with an eight-year maturity pay cumulative interest at an annual rate of two percent through maturity.

In some circumstances, the CDCI terms may require LICUs to obtain matching funds from non-government sources. Where match is required, a LICU must agree to hold the matching SC subordinate to the CDCI SC. In particular, the subordination terms require that all of a LICU's CDCI SC be redeemed before any of its match may be redeemed. CDCI SC along with its matching SC is subject to NCUA's regulation governing SC accounts. § 701.34(b)-(d).

3. The Interim Final Rule

The interim final rule sought to remove any regulatory disincentive for LICUs to apply for participation in the CDCI and to make other changes necessary to alleviate conflicts between NCUA's regulation and the terms of the CDCI. To do so, the interim final rule exempted all government-funded SC from the limits of the redemption schedule in § 701.34(d)(3). It also exempted SC accepted as a match to government-funded SC from the redemption schedule limits. The exemption was intended to give LICUs the opportunity to avoid the nine-percent interest rate over the last five years to maturity on CDCI SC that was initially offered with only a 13-year maturity. The exception also

⁴ At the time the interim final was approved, Treasury was offering to purchase only thirteen-year Senior Securities.

sought to avoid subjecting LICUs to potentially high interest rates on SC accepted as a match to CDCI SC. In contemplation of similar future opportunities, the exemption language was drafted to encompass the early redemption of government-funded SC accepted under programs other than the CDCI that could arise in response to adverse economic conditions.

The interim final rule also amended the loss distribution procedures applicable to SC accounts to ensure that CDCI SC would be held senior to any matching SC required under the Initiative. In particular, the interim final rule authorized LICUs to choose between two different methods of match subordination.

The two subordination methods apply only to CDCI SC and its match accepted under the CDCI of 2010 and not to government-funded SC accepted under other programs that do not require seniority status. LICUs eligible to accept CDCI SC without any match must follow the pro-rata loss distribution procedure that makes the CDCI SC available to cover a loss at the same rate as any other SC. The interim final rule did not affect in any manner the SC redemption procedures for non-government-funded SC that is not accepted as a match to government-funded SC.

C. Summary of Public Comments

NCUA received two comment letters on the interim final rule: one from a national trade association and one on behalf of two State credit union leagues. One comment letter expressed support for the interim final rule and did not suggest any changes. The other

comment letter also expressed support but advised clarification on whether early redemption would be permitted where government-funded SC is only partially matched.

NCUA believes the interim final rule in its current form guards against ambiguity to the extent possible with regard to early redemption. The rule states, without reference to ratio, that matching SC is eligible for early redemption under the same terms and conditions as the government-funded SC with which it is matched. Under the plain meaning of the rule, to be “matching secondary capital,” the account in question must necessarily have met all the requirements to qualify as matching SC pursuant to the terms of the program under which the government-funded SC was offered. Assuming the SC qualified as match, the rule makes the match eligible for early redemption.

Rather than eliminating ambiguity, addressing amounts or ratios in clarifying circumstances where matching SC is eligible for early redemption could raise further questions with regard to the congruity of rate, term, priority, or some other unanticipated variable. Divergence in these variables does not affect whether SC accepted as a match to government-funded SC is eligible for early redemption.⁵

D. Final Rule

This final rule confirms the amendments made in the interim final rule. It also includes some technical changes and clarifications that respond to considerations that arose during development and implementation of the CDCI.

⁵ Eligibility for early redemption, however, does not mean early redemption is automatically approved. The terms of the particular government program, applicable SC contract, and the criteria for Regional Director approval could still restrict early redemption.

At the time of the interim final's issuance, Treasury referred to what is now the CDCI as the "CDC Program." To account for this name change, in § 701.34(b)(7), this final rule replaces "Community Development Capital Program" and its abbreviation with "Community Development Capital Initiative" or "CDCI."

In addition, finalized seniority terms with respect to SC accepted as a match to CDCI SC will be such that no amount of the match can be redeemed until every dollar of the CDCI SC has been returned to Treasury.⁶ Thus, the final rule eliminates the interim final rule's now-unnecessary language in § 701.34(b)(7)(i)-(ii) that contemplates the possibility matching SC could be properly redeemed prior to redemption of CDCI SC.

Although Treasury's more recent articulation of the CDCI contemplates issuance of eight-year securities bearing two percent interest for the entire term, the final rule retains the exceptions for early redemption of both government-funded SC and its match.⁷ Doing so will allow LICUs who are able to recruit match with a longer maturity or that do not require matching SC to choose to accept the thirteen-year CDCI SC. These LICUs can later decide whether to seek early redemption or retain the CDCI SC despite the interest rate spike to nine-percent.

⁶ The language of the interim final rule states that CDCI SC becomes available to cover losses only after its matching SC has been depleted or "properly redeemed." During initial development of the CDCI, it was unclear whether Treasury would require matching funds to be on hand for the entire term of the CDCI SC or whether a shorter, minimum term might apply to matching SC. Since the interim final's approval, Treasury has confirmed that it will not allow redemption of any SC accepted as a match to CDCI SC until all of the CDCI SC has been redeemed.

⁷ Treasury agreed to offer LICUs the option of issuing eight-year securities to ease concerns investors would be unwilling to contribute matching SC to LICUs with a maturity as long as thirteen years.

The final change relates to the schedule for recognizing net-worth value set forth in § 701.34(c)(2). Without an adjustment in this final rule, a problem arises with literal application of the net-worth recognition schedule in some instances where a LICU suffers a loss to, or redeems all or part of, government-funded SC and/or its matching SC before or during the last five years to maturity. To illustrate, if a LICU redeems half of its government-funded SC in year eight of its thirteen-year maturity, the net-worth recognition schedule directs the LICU to recognize 80 percent of the original account balance as net worth although the LICU retains only half of the account's original balance.

To correct this problem, the final rule expressly provides that a LICU's recordation of the net-worth value of an account in its financial statement may never exceed the remaining balance of the account after early redemptions or losses. For SC accounts with less than five years remaining maturity, a LICU must record the net-worth value of the accounts in its financial statement in accordance with the lesser of the following: (1) the remaining balance of the account after early redemptions and losses; or (2) the declining percentage calculations set forth in the net-worth schedule that are based on the original balance of the account.⁸

C. Immediate Effective Date

NCUA is issuing this rulemaking as a final rule effective upon publication. The Administrative Procedure Act ("APA"), 5 U.S.C. § 553, requires that, once finalized, a

⁸ Application of the net-worth schedule has no effect on how losses are distributed among accounts under the pro-rata loss distribution procedure of § 701.34(b)(7).

substantive rulemaking must have a delayed effective date of 30 days from the date of publication, except for good cause. In this regard, NCUA believes the 30-day delayed effective date is inapplicable because the final rule makes only technical adjustments and clarifications to the interim final rule and to § 701.34. As such, the rule is not substantive and is not subject to the 30-day publication requirement. Even if the rule were otherwise subject to the 30-day requirement, NCUA believes good cause exists for waiving the 30-day delayed effective date because the interim final rule is already in effect and is not significantly altered by this final rule.

Regulatory Procedures

Regulatory Flexibility Act

The Regulatory Flexibility Act requires 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 ten million dollars in assets). This final rule does not impose any regulatory burden, instead providing LICUs with the flexibility to redeem SC accepted from the United States Government or any of its subdivisions, along with its matching SC, at any time after the SC has been on deposit for two years. The rule will not have a significant economic impact on a substantial number of small credit unions. Thus, a Regulatory Flexibility Analysis is not required.

Paperwork Reduction Act

NCUA has determined this rule will not increase paperwork requirements under the Paperwork Reduction Act of 1995 and regulations of the Office of Management and Budget.

Executive Order 13132

Executive Order 13132 encourages independent regulatory agencies to consider the impact of their regulatory actions on State and local interests. NCUA, an independent regulatory agency as defined in 44 U.S.C. § 3502(5), voluntarily adheres to the fundamental federalism principles addressed by the Executive Order. This rule would not have a substantial direct effect on the States, on the relationship between the national government and the States, or on the distribution of power and responsibilities among the various levels of government. Accordingly, this rule does not constitute a policy that has federalism implications for purposes of the Executive Order.

Treasury and General Government Appropriations Act, 1999

NCUA has determined 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).

Small Business Regulatory Enforcement 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, 5 U.S.C. 551. The Office of Information and Regulatory Affairs, an office within the Office of Management and Budget, has determined that this is not a major rule for purposes of SBREFA.

List of Subjects in 12 CFR Part 701

Credit, Credit unions, Mortgages.

By the National Credit Union Administration Board, this 16th day of September, 2010.

Mary F. Rupp,

Secretary of the Board

For the reasons discussed above, 12 CFR part 701 is amended as follows:

PART 701 — ORGANIZATION AND OPERATION OF FEDERAL CREDIT UNIONS

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

Authority: 12 U.S.C. 1752(5), 1755, 1756, 1757, 1758, 1759, 1761a, 1761b, 1766, 1767, 1782, 1784, 1786, 1787, 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. Amend § 701.34 by making technical changes to the last sentence of the introductory text to paragraph (b)(7), making technical changes to paragraphs (b)(7)(i) and (ii), and revising the introductory text to paragraph (c)(2) to read as follows:

§ 701.34 Designation of low income status; Acceptance of secondary capital accounts by low-income designated credit unions.

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(b) * * *

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(7) Availability to cover losses. Funds deposited into a secondary capital account, including interest accrued and paid into the secondary capital account, must be available to cover operating losses realized by the LICU that exceed its net available reserves (exclusive of secondary capital and allowance accounts for loan and lease losses), and to the extent funds are so used, the LICU must not restore or replenish the account under any circumstances. The LICU may, in lieu of paying interest into the secondary capital account, pay accrued interest directly to the investor or into a

separate account from which the secondary capital investor may make withdrawals. Losses must be distributed pro-rata among all secondary capital accounts held by the LICU at the time the losses are realized. In instances where a LICU accepted secondary capital from the United States Government or any of its subdivisions under the Community Development Capital Initiative of 2010 ("CDCI secondary capital") and matching funds were required under the Initiative and are on deposit in the form of secondary capital at the time a loss is realized, a LICU must apply either of the following pro-rata loss distribution procedures to its secondary capital accounts with respect to the loss:

(i) If not inconsistent with any agreements governing other secondary capital on deposit at the time a loss is realized, the CDCI secondary capital may be excluded from the calculation of the pro-rata loss distribution until all of its matching secondary capital has been depleted, thereby causing the CDCI secondary capital to be held as senior to all other secondary capital until its matching secondary capital is exhausted. The CDCI secondary capital should be included in the calculation of the pro-rata loss distribution and is available to cover the loss only after all of its matching secondary capital has been depleted.

(ii) Regardless of any agreements applicable to other secondary capital, the CDCI secondary capital and its matching secondary capital may be considered a single account for purposes of determining a pro-rata share of the loss and the amount determined as the pro-rata share for the combined account must first be applied to the

matching secondary capital account, thereby causing the CDCI secondary capital to be held as senior to its matching secondary capital. The CDCI secondary capital is available to cover the loss only after all of its matching secondary capital has been depleted.

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(c) * * *

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(2) Schedule for recognizing net worth value. The LICU's reflection of the net worth value of the accounts in its financial statement may never exceed the full balance of the secondary capital on deposit after any early redemptions and losses. For accounts with remaining maturities of less than five years, the LICU must reflect the net worth value of the accounts in its financial statement in accordance with the lesser of (i) the remaining balance of the accounts after any redemptions and losses or (ii) the amounts calculated based on the following schedule:

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