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NATIONAL CREDIT UNION ADMINISTRATION

12 CFR Part 701

RIN: 3133-AE76

Emergency Mergers - Chartering and Field of Membership

AGENCY: National Credit Union Administration (NCUA).

ACTION: Proposed rule.

SUMMARY: The NCUA Board (Board) proposes to amend in its Chartering and Field of Membership Manual the definition of the term “in danger of insolvency” for emergency merger purposes. The current definition requires a credit union to fall into at least one of three net worth categories over a period of time to be “in danger of insolvency.” For two of the three categories, the Board proposes to lengthen by six months the forecast horizons, the time period in which NCUA projects a credit union’s net worth will decline to the point that it falls into one of the categories. This will extend the time period in which a credit union’s net worth is projected to either render it insolvent or drop below two percent from 24 to 30 months and from 12 to 18 months, respectively. Additionally, the Board proposes to add a fourth category to the three

existing net worth categories to include credit unions that have been granted or received assistance under section 208 of the Federal Credit Union Act (FCU Act) in the 15 months prior to the Region's determination that the credit union is in danger of insolvency.

DATES: Comments must be received on or before [INSERT DATE THAT IS 60 DAYS FROM DATE OF PUBLICATION IN THE FEDERAL REGISTER].

ADDRESSES: You may submit comments by any of the following methods (**Please send comments by one method only**):

- Federal eRulemaking Portal: http://www.regulations.gov. Follow the instructions for submitting comments.
- NCUA Web Site: https://www.ncua.gov/regulation-supervision/Pages/rules/proposed.aspx. Follow the instructions for submitting comments.
- E-mail: Address to regcomments@ncua.gov. Include "[Your name] Comments on Proposed Rule 701, In Danger of Insolvency Definition" in the e-mail subject line.
- Fax: (703) 518-6319. Use the subject line described above for e-mail.
- Mail: Address to Gerard S. Poliquin, Secretary of the Board, National Credit Union Administration, 1775 Duke Street, Alexandria, Virginia 22314-3428.
- Hand Delivery/Courier: Same as mail address.

PUBLIC INSPECTION: You may view all public comments on NCUA's website at https://www.ncua.gov/regulation-supervision/Pages/rules/proposed.aspx as submitted, except for those we cannot post for technical reasons. NCUA will not edit or remove any identifying or contact information from the public comments submitted. You may inspect paper copies of comments in NCUA's law library at 1775 Duke Street, Alexandria, Virginia 22314, by appointment weekdays between 9 a.m. and 3 p.m. To make an appointment, call (703) 518–6546 or send an e-mail to OGCMail@ncua.gov.

FOR FURTHER INFORMATION CONTACT: Thomas I. Zells, Staff Attorney, Office of General Counsel, or Amanda Parkhill, Loss/Risk Analysis Officer, Office of Examination and Insurance, at 1775 Duke Street, Alexandria, VA 22314 or telephone: (703) 548-2478 (Mr. Zells) or (703) 518-6385 (Ms. Parkhill).

SUPPLEMENTARY INFORMATION:

I. Background

Credit unions that experience a sharp decline in net worth have a much higher likelihood of failing. From the second quarter of 1996 through the second quarter of 2016, there were 11,734 federally insured credit unions. As shown by the table below, 2,502 of these credit unions fell below the well-capitalized threshold (7 percent net worth ratio) after having a net worth ratio above that threshold for at least one quarter. The net worth ratio of 490 of these 2,502 credit unions eventually fell below two percent. Importantly, only 15 percent of those credit unions whose net worth dropped below two percent sometime in this period remain active.

Table 1. Credit Unions Falling Below Critical Net Worth Ratio Thresholds

Net Worth Ratio Fell:	# of CUs	Active	% Active
Below 7%	2,502	1,104	44%
Below 6%	1,563	475	30%
Below 5%	1,126	254	23%
Below 4%	825	151	18%
Below 3%	647	102	16%
Below 2%	490	73	15%

Credit union failures are costly to the entire credit union system through their effect on the National Credit Union Share Insurance Fund (NCUSIF). NCUA, as a prudential safety and soundness regulator, is charged with protecting the safety and soundness of the credit union system and, in turn, the NCUSIF and the taxpayer through regulation and supervision.[1] One way to mitigate some of the cost to the NCUSIF and minimize disruption to credit union members is to find appropriate merger partners for at-risk credit unions.

[1] NCUA's mission is to "provide, through regulation and supervision, a safe and sound credit union system, which promotes confidence in the national system of cooperative credit." https://www.ncua.gov/About/Pages/Mission-and-Vision.aspx.

Under the emergency merger provision of section 205(h) of the FCU Act, the Board may allow a credit union that is either insolvent or in danger of insolvency to merge with another credit union if the Board finds that: (1) an emergency requiring expeditious action exists; (2) no other reasonable alternatives are available; and (3) the action is in the public interest.[2] Under these circumstances, the Board may approve an emergency merger without regard to common bond or other legal constraints, such as obtaining the approval of the members of the merging credit union. The emergency merger statute addresses exigent circumstances and is intended to serve the public interest and credit union members by providing for the continuation of credit union services to members and by preserving credit union assets and the NCUSIF.

To take such action, NCUA must first determine that a credit union is either insolvent or in danger of insolvency before the agency can make the additional findings that an emergency exists, other alternatives are not reasonably available, and the public interest would be served by the merger. The FCU Act, however, does not define when a credit union is ‘‘in danger of insolvency.”

In 2009, NCUA proposed a definition of in danger of insolvency to establish an objective standard to aid it in making in danger of insolvency determinations.[3] In doing so, NCUA aimed to provide certainty and consistency regarding how it interprets the in danger of insolvency

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[2] 12 U.S.C. 1785(h).
[3] 74 FR 68722 (Dec. 29, 2009).

standard. In 2010, NCUA finalized the 2009 proposed definition, which provided for the above-referenced three net worth categories, and it remains the current definition.[4]

Experience gained since 2010, including the analysis of Call Reports and other NCUA internal data, have led the Board to conclude that an update to the current definition of in danger of insolvency is needed.

II. Summary of the Proposed Rule

A. Overview

The current definition of in danger of insolvency requires a credit union to fall into at least one of three net worth categories to be found to be in danger of insolvency. The Board believes it necessary to amend the current definition in three ways.

First, the Board proposes to lengthen by six months the "forecast horizons," the time periods in which NCUA projects a credit union's net worth for determining if it is in danger of insolvency. This change would apply to two of the three current categories. It would result in forecast horizons of 30 months for the insolvency (zero net worth) category, up from 24 months, and 18 months for the critically undercapitalized (under two percent net worth) category, up from 12 months. The third category of the current definition, in which a credit union is significantly

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[4] 75 FR 36257 (June 25, 2010).

undercapitalized and NCUA determines there is no reasonable prospect of the credit union becoming adequately capitalized in the succeeding 36 months, would remain unchanged.

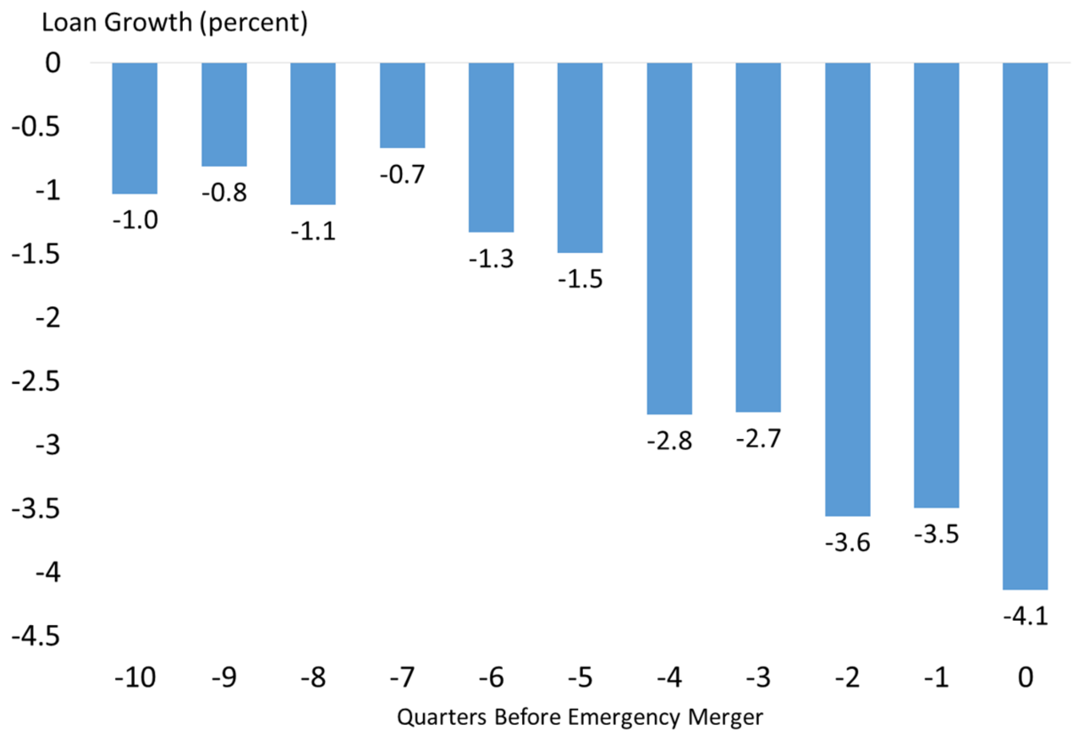
The second change the Board proposes is the addition of a fourth category to the definition. Specifically, a credit union would be considered in danger of insolvency if it had been granted or received assistance under section 208 of the FCU Act in the 15 months prior to the Region's determination that the credit union is in danger of insolvency.

Finally, the Board proposes to make a technical spelling correction to the first category of the definition to replace the word "relay" with the word "rely".

The Board believes the proposed changes to the current definition would provide NCUA with a more appropriate degree of flexibility and better allow NCUA to act when the statutory criteria for an emergency merger are met, namely an emergency requiring expeditious action exists, no other reasonable alternatives are available, and the action is in the public interest.[5] As detailed below, both the experience NCUA has gained in applying the current definition and quantitative data have persuaded the Board that the proposed changes are necessary. Under the time frames of the current definition, NCUA has, on several occasions, been prevented from instituting an emergency merger because a struggling credit union had not yet met the regulatory time frames to be considered in danger of insolvency, although it had otherwise met the statutory criteria. The lack of flexibility in the current rule can result in continued decline in the health of a credit

[5] 12 U.S.C. 1785(h).

union, leading to a reduction in member services as the institution moves towards resolution. As shown in the chart below, credit union loan growth declines in the quarters leading up to an emergency merger.



In some instances, the rigidity of the current regulatory definition unnecessarily limits NCUA's ability to resolve failing institutions. This comes at a greater cost to a credit union's members and the NCUSIF, particularly in the case of an eventual liquidation. The FCU Act grants the Board broad authority to define the term "in danger of insolvency" for emergency merger purposes. The Board believes that the proposed definition increases agency flexibility and will enable NCUA to act more timely to preserve credit union services and credit union assets and to protect the safety and soundness of the credit union system and the NCUSIF.

B. Extending the Forecast Horizons

The Board proposes to amend the definition of in danger of insolvency in the glossary to appendix B to part 701 to extend the forecast horizons, the time periods in which NCUA must project whether a credit union will become insolvent or critically undercapitalized. Currently, to be deemed in danger of insolvency under the definition's first two categories, NCUA must project a credit union's future net worth will decline at a rate that will either render the credit union insolvent within 24 months or drop below two percent (critically undercapitalized) within 12 months. The Board proposes to extend these periods to 30 months and 18 months, respectively. The Board intends to leave as is the forecast horizon of the third category of the definition pertaining to significantly undercapitalized credit unions that NCUA projects have no reasonable prospect of becoming adequately capitalized in the succeeding 36 months.

The Board believes that these proposed changes to the definition will capture more credit unions that are in danger of insolvency earlier in their decline, before their net worth declines most rapidly, and will provide value to both the members of the credit union being merged and the NCUSIF. Increasing the likelihood that a distressed credit union would be eligible for an emergency merger earlier could help to protect net worth, reduce payouts on deposit insurance or merger assistance, and improve merger prospects. The proposed changes also provide NCUA with additional flexibility to resolve the distressed credit union through a merger and help to better ensure continuity of financial services for members. This additional flexibility is especially beneficial when circumstances deplete a credit union's capital slowly and steadily rather than abruptly, such as in the case of an institution with a large portfolio of declining illiquid assets.

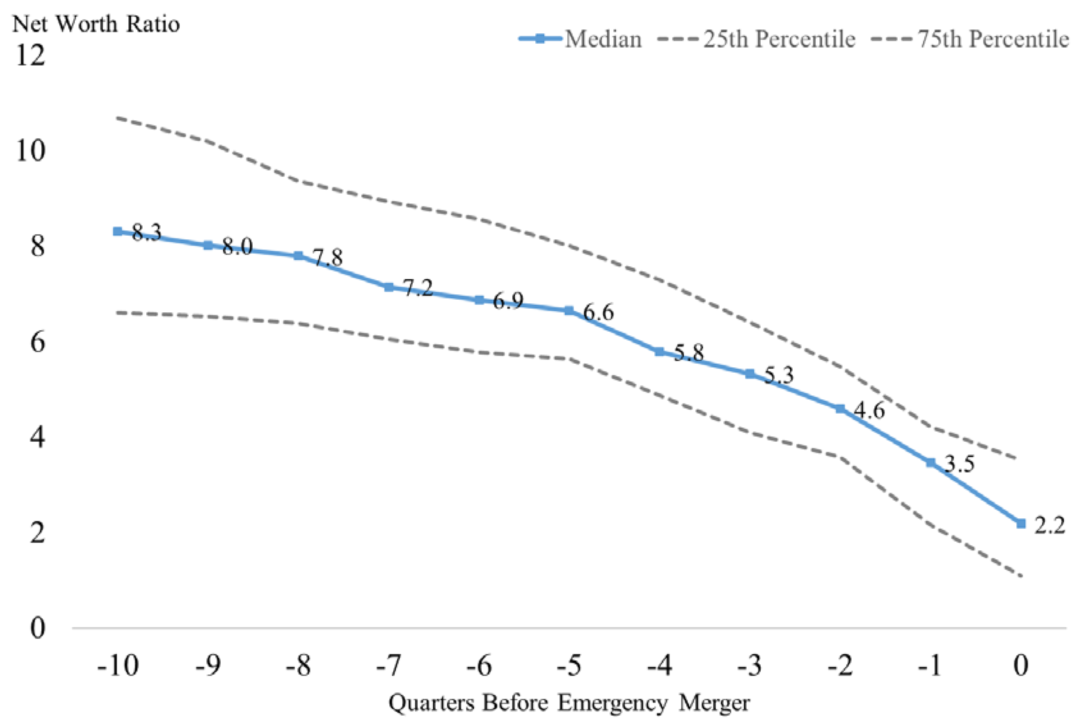
To evaluate the benefit of shifting the critically undercapitalized threshold from 12 to 18 months and the insolvency threshold from 24 to 30 months, NCUA used a simple forecast of the net worth ratios of 46 credit unions that underwent an emergency merger between the second quarter of 2010, when the current in danger of insolvency definition was put into place, and the fourth quarter of 2016.[6] Of the 46 credit unions that underwent an emergency merger since the rule was previously revised by the NCUA Board, 11 credit unions with total assets of $812 million would have qualified for an emergency merger earlier under the proposed definition of in danger of insolvency. The 11 credit unions had $12 million more in net worth at the time the credit unions first qualified under the proposed definition compared with the 2010 definition. The $12 million additional net worth meant the credit unions had net worth ratios 1 to 3 percentage points higher.

Also, the longer forecast horizon allows NCUA to identify a significant number of additional potential credit union emergency merger candidates. The largest diagnostic improvements from extending the forecast horizon occur in the two quarters prior to an emergency merger. Instead

[6] This simple hypothetical forecast was used exclusively for purposes of analyzing emergency merger data and forecast horizons. It is not representative of, and does not limit, how NCUA projects credit unions to meet the established and proposed in danger of insolvency categories. The forecast of the net worth ratio uses the change in the net worth ratio during the most recently available four quarters and projects that change in net worth through the forecast horizon for each threshold. In other words, NCUA calculated whether the credit union would fall below either of the critical thresholds using a simple straight line projection approach, with the projected rate of decline in net worth equal to the most recently available four-quarter change.

of 31% of the credit unions estimated to be below the critically undercapitalized threshold within 12 months two quarters before the emergency merger and 50% one quarter before, 42% and 58% of the credit unions are estimated to be below the critically undercapitalized threshold within 18 months. The identification of these additional credit unions represent an opportunity for NCUA to preserve services to members and member assets through the emergency merger process prior to the quarters when the net worth of these credit unions declines the most. As the chart below illustrates, credit union net worth generally declines the most in the quarters leading up to an emergency merger.

Net Worth Ratio Prior to an Emergency Merger



The data closely aligns with the views and experiences of NCUA. The agency has found that the current forecast horizons for these two categories can result in the unnecessary delay or even rejection of emergency merger requests that do not meet the current regulatory definition of in danger of insolvency, but would otherwise meet the statutory criteria for an emergency merger. NCUA believes that extending these forecast horizons will lessen the potential for such occurrences. When a credit union cannot be timely merged through an emergency merger and no other credit unions with compatible fields of membership submit a merger proposal, NCUA must consider alternative and usually less desirable means of resolution. These less desirable means of resolution could even include the liquidation of the credit union. In general, merging a credit union into another institution is more desirable than liquidating the credit union because a merger is generally lower cost to the NCUSIF and provides continued and, in most cases, expanded service to the membership.

NCUA believes that the delay associated with waiting for an institution to deteriorate to the point where it satisfies the current regulatory definition of in danger of insolvency has too frequently resulted in struggling institutions being allowed to deteriorate over time to the point where they are no longer viable merger partners and have to be resolved by means that are more costly to the NCUSIF and more disruptive to the members. Rather than continue to operate under the current definition, which hampers NCUA's ability to take responsible supervisory action on a timely basis and ensure the safety and soundness of the credit union system, the Board proposes to amend the regulatory definition of in danger of insolvency to facilitate those mergers that satisfy the statutory requirements.

As stated above, the Board proposes to leave the forecast horizon for the third category of the current definition as is. Rather than establishing a time period in which credit unions are projected to decline to a certain point, as the other two categories do, the third category only allows NCUA to find that a credit union is in danger of insolvency if the credit union has no reasonable prospect of improving its net worth from the significantly undercapitalized level to the adequately capitalized level in the succeeding 36 months. The Board believes that the current forecast horizon for this category already provides credit unions significant time to become adequately capitalized and is concerned that any extension to the forecast horizon would make it exceedingly difficult to accurately determine if a credit union has a reasonable possibility of returning its net worth to the adequately capitalized level.

C. Section 208 Assistance

The Board proposes to expand the definition of in danger of insolvency in the glossary to appendix B to part 701 to add a fourth category that provides that a credit union will satisfy the definition of in danger of insolvency if the credit union has been granted or received assistance under section 208 of the FCU Act in the 15 months prior to the Region making such determination. Section 208 allows the Board to provide special assistance to credit unions to avoid liquidation.

In analyzing credit union Call Reports and other internal NCUA data, NCUA has found that an overwhelming number of credit unions that received section 208 assistance eventually left the credit union system. Between the first quarter of 2001 and the fourth quarter of 2016, 181 credit unions received at least one type of section 208 assistance. Since then, 165, or 91.2%, of these credit unions have stopped filing Call Reports.

Further, the data shows that not only did the overwhelming majority of the credit unions that received section 208 assistance stop filing Call Reports, but did so not long after, or prior to, receiving the assistance. Notably, 13.9% of the total number of credit unions that received section 208 assistance began receiving such assistance after they filed their final Call Report. An additional 37.0% of these 165 credit unions filed their final Call Report in the same quarter in which they first began receiving section 208 assistance. Another 41.2% of these credit unions filed their final Call Report within the four quarters after the quarter they first received section 208 assistance. In total, 152 of the 165 credit unions, or 92.1%, stopped filing Call Reports prior to or within 15 months of receiving the section 208 assistance.

Credit Unions Receiving Section 208 Assistance: First Receipt of Section 208 Assistance to Last Call Report Filed

	Number	%
Same quarter	61	37.0
1 year	68	41.2
2 years	3	1.8
3 years	2	1.2
4 or more years	8	4.8

Credit Unions Receiving Section 208 Assistance: First Receipt of Section 208 Assistance to Last Call Report Filed		
Assistance began after final call report was filed	23	13.9
Total	165	100.0

The quantitative evidence, along with NCUA's experiences and observations, demonstrate that credit unions receiving section 208 assistance within the last 15 months are in danger of insolvency for emergency merger purposes.

It must be noted that the Board is not proposing that every credit union that receives section 208 assistance, thus meeting the proposed definition of in danger of insolvency, is destined for an emergency merger. The emergency merger statute addresses exigent circumstances. Credit unions to be merged on an emergency basis still must meet the statutory requirements that an emergency exists, other alternatives are not reasonably available, and the public interest would be served by the merger.[7] However, quantitative evidence and NCUA's experience do indicate that a credit union's receipt of section 208 assistance is a reliable indicator of a credit union being in danger of insolvency and a safety and soundness concern.

[7] 12 U.S.C. 1785(h).

III. Regulatory Procedures

A. Regulatory Flexibility Act

The Regulatory Flexibility Act (RFA) generally requires that, in connection with a notice of proposed rulemaking, an agency prepare and make available for public comment an initial regulatory flexibility analysis that describes the impact of a proposed rule on small entities. A regulatory flexibility analysis is not required, however, if the agency certifies that the rule will not have a significant economic impact on a substantial number of small entities (defined for purposes of the RFA to include credit unions with assets less than $100 million) and publishes its certification and a short, explanatory statement in the Federal Register together with the rule. The proposed rule merely provides NCUA greater flexibility to authorize emergency mergers and will not have an impact on small credit unions. Accordingly, NCUA certifies that the proposed rule will not have a significant economic impact on a substantial number of small credit unions.

B. Paperwork Reduction Act

The Paperwork Reduction Act of 1995 (PRA) applies to rulemakings in which an agency creates a new or amends existing information collection requirements.[8] For the purpose of the PRA, an

[8] 44 U.S.C. 3507(d); 5 CFR part 1320.

information collection requirement may take the form of a reporting, recordkeeping, or a third-party disclosure requirement. The proposed rule does not contain information collection requirements that require approval by OMB under the PRA.[9] The proposed rule would merely provide NCUA greater flexibility to authorize emergency mergers.

C. Executive Order 13132

Executive Order 13132 encourages independent regulatory agencies to consider the impact of their actions on state and local interests. In adherence to fundamental federalism principles, NCUA, an independent regulatory agency as defined in 44 U.S.C. 3502(5), voluntarily complies with the executive order. This rulemaking will not have a substantial direct effect on the states, on the connection between the national government and the states, or on the distribution of power and responsibilities among the various levels of government. NCUA has determined that this proposal does not constitute a policy that has federalism implications for purposes of the executive order.

D. Assessment of Federal Regulations and Policies on Families

NCUA has determined that this final rule will not affect family well-being within the meaning of Section 654 of the Treasury and General Government Appropriations Act, 1999.[10]

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[9] 44 U.S.C. Chap. 35.

[10] Pub. L. 105–277, 112 Stat. 2681 (1998).

List of Subjects

12 CFR Part 701

Credit, Credit unions, Reporting and recordkeeping requirements.

By the National Credit Union Administration Board on July 20, 2017.

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Gerard Poliquin

Secretary of the Board

For the reasons discussed above, the NCUA Board amends 12 CFR part 701 as follows:

PART 701—ORGANIZATION AND OPERATION OF FEDERAL CREDIT UNIONS

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

Authority: 12 U.S.C. 1752(5), 1755, 1756, 1757, 1758, 1759, 1761a, 1761b, 1766, 1767, 1782, 1784, 1785, 1786, 1787, 1788, 1789. Section 701.6 is also authorized by 15 U.S.C. 3717.

Section 701.31 is also authorized by 15 U.S.C. 1601 *et seq.;* 42 U.S.C. 1981 and 3601-3610. Section 701.35 is also authorized by 42 U.S.C. 4311-4312.

2. Revise the definition of “in danger of insolvency” in Appendix 1 (Glossary) to appendix B to part 701 to read as follows:

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In danger of insolvency – In making the determination that a particular credit union is in danger of insolvency, NCUA will establish that the credit union falls into one or more of the following categories:

1. The credit union's net worth is declining at a rate that will render it insolvent within 30 months. In projecting future net worth, NCUA may rely on data in addition to Call Report data. The trend must be supported by at least 12 months of historic data.

2. The credit union's net worth is declining at a rate that will take it under two percent (2%) net worth within 18 months. In projecting future net worth, NCUA may rely on data in addition to Call Report data. The trend must be supported by at least 12 months of historic data.

3. The credit union's net worth, as self-reported on its Call Report, is significantly undercapitalized, and NCUA determines that there is no reasonable prospect of the credit union becoming adequately capitalized in the succeeding 36 months. In making its determination on the prospect of achieving adequate capitalization, NCUA will assume that, if adverse economic

conditions are affecting the value of the credit union's assets and liabilities, including property values and loan delinquencies related to unemployment, these adverse conditions will not further deteriorate.

4. The credit union has been granted or received assistance under section 208 of the Federal Credit Union Act, 12 U.S.C. 1788, in the 15 months prior to the Region's determination that the credit union is in danger of insolvency.

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