

**7535-01-U**

**NATIONAL CREDIT UNION ADMINISTRATION**

**12 CFR Part 723**

**Member Business Loans**

**AGENCY:** National Credit Union Administration (NCUA).

**ACTION:** Proposed rule with request for comments.

**SUMMARY:** NCUA proposes to revise the collateral and security requirements of its member business loans (MBL) rule to enable credit unions subject to the rule to participate more fully in Small Business Administration (SBA) guaranteed loan programs.

**DATES:** Comments must be received on or before August 30, 2004.

**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:  
[http://www.ncua.gov/RegulationsOpinionsLaws/proposed\\_regs/proposed\\_regs.html](http://www.ncua.gov/RegulationsOpinionsLaws/proposed_regs/proposed_regs.html).  
Follow the instructions for submitting comments.
- E-mail: Address to [regcomments@ncua.gov](mailto:regcomments@ncua.gov). Include “[Your name] Comments on Proposed Rule 723, Member Business Loans” in the e-mail subject line.
- Fax: (703) 518-6319. Use the subject line described above for e-mail.
- Mail: Address to Becky Baker, Secretary of the Board, National Credit Union Administration, 1775 Duke Street, Alexandria, Virginia 22314-3428.
- Hand Delivery/Courier: Same as mail address.

**FOR FURTHER INFORMATION CONTACT:** Frank S. Kressman, Staff Attorney, at the above address, or telephone: (703) 518-6540.

**SUPPLEMENTARY INFORMATION:**

**A. Background**

Last year, NCUA amended its MBL rule and other rules related to business lending to enhance credit unions’ ability to meet their members’ business loans needs. 68 FR 56537 (October 1, 2003).

In addition to comments on the proposed amendments, NCUA received other suggestions as to how it could improve the MBL rule. Among the most significant of

these, commenters suggested NCUA amend the MBL rule “so that it could be better aligned with lending programs offered by the Small Business Administration” such as the SBA’s Basic 7(a) Loan Program. Id. at 56538. While NCUA recognized the merits of this suggestion, NCUA could not include it in the final rulemaking because it addressed issues outside the scope of the proposed rule. The Administrative Procedure Act generally prohibits federal government agencies from adopting rules without affording the opportunity for public comment. 5 U.S.C. 553. NCUA noted in the final rule, however, that it would review this suggestion to determine if it would be appropriate to act on it in a subsequent rulemaking.

## **B. Regulatory Amendments**

NCUA proposes to amend the MBL rule to permit credit unions to make SBA guaranteed loans under SBA’s less restrictive lending requirements instead of under the more restrictive MBL rule’s lending requirements. NCUA has reviewed the SBA’s loan programs in which credit unions can participate and believes they provide reasonable criteria for credit union participation and compliance within the bounds of safety and soundness. Additionally, these SBA programs are ideally suited to the mission of many credit unions to satisfy their members’ business loans needs.

NCUA recognizes that the collateral and security requirements for MBLs, including construction and development loans, are generally more restrictive than those of the SBA’s guaranteed loan programs and could hamper a credit union’s ability to participate fully in SBA loan programs. As a result, the MBL rule’s collateral and security

requirements could prevent a credit union from making a particular loan that it could otherwise make under SBA's requirements. NCUA believes the proposal will provide relief from these more restrictive requirements and will help enable credit unions to better serve their members' business loans needs.

### **C. Clarification Of Existing Authority**

Recently, NCUA's Office of General Counsel in Legal Opinion # 03-0911, dated May 20, 2004, clarified that NCUA's general lending rule and the Federal Credit Union Act (Act) permit federal credit unions (FCUs) to make MBLs under the terms of the SBA's guaranteed loan programs to the extent the terms and conditions under which the guarantee is provided are consistent with the requirements and limitations in the MBL rule. 12 CFR §701.21(e); 12 U.S.C. 1757(5)(A)(iii). Specifically, the opinion identified loan maturity limits, usury ceilings and prepayment penalties as terms of the SBA's guaranteed loan programs that an FCU could use in lieu of corresponding terms in NCUA's rules. The opinion stated, however, that a credit union could not rely on the exception for government guaranteed loan programs in NCUA's general lending rule and the Act with regard to collateral requirements for MBLs. 12 CFR §701.21(e); 12 U.S.C. 1757(5)(A)(iii). The opinion explained the MBL rule expressly sets collateral requirements for MBLs, in the form of maximum loan-to-value ratios. The collateral requirements of the SBA's guaranteed loan programs are not consistent with those of the current MBL rule and, therefore, cannot be used. The proposed amendments will remove that impediment by exempting SBA guaranteed loans from the MBL rule's collateral requirements.

There could be circumstances where a business loan made under an SBA loan program would not be subject to the MBL rule. For example, a \$40,000 business loan with an SBA guarantee to a member who has no other loans with the originating credit union would be too small to meet the definition of an MBL. Thus, the credit union in this example can rely on the authority provided by §701.21(e) of NCUA's rules and make a business loan as part of an SBA loan program under all of the terms and conditions required or permitted by the program.

The MBL rule applies to all FCUs and to most federally-insured state credit unions (FISCUs). A FISCU is exempt from the MBL rule only if, after August 7, 1998, the enactment of the Credit Union Membership Access Act, Public Law 105-21, its state supervisory authority (SSA) has adopted its own business loan rule, with the approval of the NCUA Board, for use instead of NCUA's MBL rule. The proposed regulatory amendments regarding collateral requirements apply to all credit unions subject to the MBL rule, but it is important to note that legal opinion OGC 03-0911 applies only to FCUs, not FISCUs. NCUA does not object to a FISCU using the exception for government guaranteed loan programs in NCUA's general lending rule if its SSA has determined the FISCU has authority to do so under relevant state law.

While NCUA believes many credit unions would greatly benefit from participating in these SBA programs, NCUA also believes that programs of this type can create some additional safety and soundness concerns. For example, the loans being guaranteed

are often more risky than other loans made by credit unions. In fact, most credit unions would not make these kinds of loans without the security the SBA guarantees provide. NCUA is aware that SBA guarantee programs generally place stringent requirements on participating lenders to comply with program requirements or face losing the guarantee. Accordingly, NCUA recommends that, before a credit union becomes a participating lender, it makes certain it fully understands the terms of the program and has procedures in place to assure its compliance with all program requirements. Although this rulemaking only pertains to SBA guaranteed loan programs, NCUA will consider other government programs as the need arises.

## **REGULATORY PROCEDURES**

### Regulatory Flexibility Act

The Regulatory Flexibility Act requires NCUA to prepare an analysis to describe any significant economic impact a proposed rule may have on a substantial number of small credit unions (those under ten million dollars in assets). The proposed rule permits credit unions to more fully participate in SBA loan programs, without imposing any additional regulatory burden. The proposed rule would not have a significant economic impact on a substantial number of small credit unions, and, therefore, a regulatory flexibility analysis is not required.

### Paperwork Reduction Act

NCUA has determined that the proposed rule would 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 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. The proposed rule would not have substantial direct effects 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 proposed rule does not constitute a policy that has federalism implications for purposes of the executive order.

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

The NCUA has determined that this proposed rule would 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).

## **AGENCY REGULATORY GOAL**

NCUA's goal is to promulgate clear and understandable regulations that impose minimal regulatory burden. We request your comments on whether the proposed rule is understandable and minimally intrusive.

## **List of Subjects**

### **12 CFR part 723**

Credit, Credit unions, Reporting and recordkeeping requirements.

By the National Credit Union Administration Board on June 24, 2004.

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Becky Baker

Secretary of the Board

For the reasons stated above, NCUA proposes to amend 12 CFR part 723 as follows:

## **PART 723 — MEMBER BUSINESS LOANS**

1. The authority citation for part 723 continues to read as follows:

**Authority:** 12 U.S.C. 1756, 1757, 1757A, 1766, 1785, 1789.

2. Revise the introductory sentence of §723.3 to read as follows:

**§ 723.3 What are the requirements for construction and development lending?**

Except as provided in §723.4 or unless your Regional Director grants a waiver, loans granted for the construction or development of commercial or residential property are subject to the following additional requirements.

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3. Revise §723.4 to read as follows:

**§ 723.4 What other regulations apply to member business lending?**

(a) The provisions of §701.21(a) through (g) of this chapter apply to member business loans granted by federal credit unions to the extent they are consistent with this part. Except as required by part 741 of this chapter, federally insured state-chartered credit unions are not required to comply with the provisions of §701.21(a) through (g) of this chapter.

(b) If a federal credit union makes a member business loan as part of a Small Business Administration guaranteed loan program with loan requirements that are less restrictive than those required by NCUA, then the federal credit union may follow the loan requirements of the relevant Small Business Administration guaranteed loan program to the extent they are consistent with this part. A federally insured state-chartered credit union that is subject to this part and makes a member business loan as part of a Small Business Administration guaranteed loan program with loan requirements that are less restrictive than those required by NCUA may follow the loan requirements of the relevant Small Business Administration guaranteed loan program to the extent they are consistent with this part if its state supervisory authority has determined that the credit union has authority to do so under state law.

(c) The collateral and security requirements of §723.3 and §723.7 do not apply to member business loans made as part of a Small Business Administration guaranteed loan program.

4. Revise §723.7(a) introductory text to read as follows:

**§ 723.7 What are the collateral and security requirements?**

(a) Except as provided in §723.4 or unless your Regional Director grants a waiver, all member business loans, except those made under paragraphs (c), (d), and (e) of this section, must be secured by collateral as follows:

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