

7535-01-U

NATIONAL CREDIT UNION ADMINISTRATION

12 CFR Part 701

RIN 3133-AD67

Secondary Capital Accounts

AGENCY: National Credit Union Administration (NCUA).

ACTION: Interim final rule with request for comments.

SUMMARY: NCUA is amending its rules 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 will also allow early redemption, under the same terms and conditions, of secondary capital

accepted as a match to the government-funded secondary capital. Finally, the amendments change the loss distribution provision that applies to secondary capital accounts so that secondary capital accepted under the 2010 Community Development Capital Program is senior to any required matching secondary capital accepted from an alternative source. Early redemption will continue to require approval of the appropriate Regional Director. The amended rule will accomplish the following: (1) bring NCUA regulations into compliance with the Community Development Capital Program; and (2) allow qualifying low-income designated credit unions that accept secondary capital pursuant to the Troubled Asset Relief Program through the Community Development Capital Program to avoid an accelerated interest rate on the secondary capital over the last five years to maturation.

DATES: This rule is effective [on the date of publication in the FEDERAL REGISTER]. Comments must be received on or before [30 days from the 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:
<http://www.ncua.gov/Resources/RegulationsOpinionsLaws/ProposedRegulations.aspx>. Follow the instructions for submitting comments.

- E-mail: Address to regcomments@ncua.gov. Include “[Your name] Comments on Secondary Capital Accounts” in the e-mail subject line.
- Fax: (703) 518-6319. Use the subject line described above for e-mail.
- Mail: Address to Mary Rupp, Secretary of the Board, National Credit Union Administration, 1775 Duke Street, Alexandria, Virginia 22314-3428.
- Hand Delivery/Courier: Same as mail address.

PUBLIC INSPECTION: All public comments are available on the agency’s website at <http://www.ncua.gov/Resources/RegulationsOpinionsLaws/RegulationComments.aspx> as submitted, except as may not be possible for technical reasons. Public comments will not be edited to remove any identifying or contact information. Paper copies of comments may be inspected in NCUA’s law library at 1775 Duke Street, Alexandria, Virginia 22314, by appointment weekdays between 9:00 a.m. and 3:00 p.m. To make an appointment, call (703) 518-6546 or send an e-mail to OGCMail@ncua.gov.

FOR FURTHER INFORMATION CONTACT: Kevin Tuininga, Trial Attorney, at the above address, or telephone: (703) 518-6543.

SUPPLEMENTARY INFORMATION:

A. Background

1. Secondary Capital

Pursuant to the Federal Credit Union Act, 12 U.S.C. §1751 *et seq.*, the NCUA Board (“Board”) has authority to permit credit unions serving predominantly low-income members (“LICUs”) to accept payments on shares from non-natural persons subject to limitations the Board prescribes. 12 U.S.C. 1757(6). In 1996, the Board exercised this authority by permitting LICUs, including State-chartered credit unions to the extent allowed by State law, to accept secondary capital (“SC”) from non-natural person members and nonmembers. 61 FR 50696 (Sept. 27, 1996). The Board intended that SC accounts provide LICUs with additional means to accumulate capital. 61 FR 3788 (Feb. 2, 1996); 71 FR 4234 (Jan. 26, 2006). Accumulated capital could be used to expand lending and financial services and to absorb losses that might otherwise cause or contribute to failure. *Id.*

The Board also implemented a number of measures designed to ensure the safety and soundness of LICUs that accepted SC. 61 FR at 3788, 3791. As part of the safety and soundness measures, the original SC rule prohibited redemption of any part of a SC account prior to maturity. *Id.* at 3791. The rule also directed that LICUs record the capital value of SC accounts with a maturation date of less than five years in accordance with an annual reduction of 20 percent of the original balance. *Id.* This net-worth reduction was designed in large part to avoid overreliance on the availability of temporary SC accounts and to encourage LICUs “to continually replenish their sources of maturing secondary capital to the extent such funds are needed to support ongoing lending programs and other operations.” *Id.* at 3789.

In 2006, the Board amended the rule to allow LICUs to redeem discounted SC over the five years prior to maturity at a maximum annual rate of 20 percent of the original balance, subject to the approval of the appropriate Regional Director. 71 FR at 4239. This redemption schedule followed the schedule for discounting the net-worth value of SC accounts. 70 FR 43790 (July 29, 2005). The amendment was designed to prevent the net worth value of SC discounted according to the annual reduction from diluting a LICU's net worth ratio calculated pursuant to NCUA's system of prompt corrective action. 71 FR at 4235. The final 20-percent increment of discounted SC could not be redeemed prior to the maturation date. *Id.*

2. The Troubled Asset Relief Program

On October 3, 2008, the President signed into law the Emergency Economic Stabilization Act of 2008 ("EESA"). Pub.L. No. 110-343 (2008). The EESA authorized the Secretary of the Treasury to establish the Troubled Asset Relief Program ("TARP") with the purpose of restoring and sustaining the viability of financial institutions. 12 U.S.C. 5211. Pursuant to TARP, the United States Department of the Treasury ("Treasury") has announced a Capital Program for certified Community Development Financial Institutions ("Community Development Capital Program" or "CDC Program"). To qualify for participation in the CDC Program, credit unions must have a low-income designation pursuant to 12 CFR §701.34.

The terms of the CDC Program provide that LICUs accepted for participation would be eligible to issue CDC Senior Securities, or subordinated debentures, up to an aggregate principal amount of 3.5 percent of the LICU's total assets. The subordinated

debentures would be purchased by the Treasury, would have a 13-year maturity, and would 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 subordinated debentures would pay cumulative interest at an annual rate of nine percent. Under certain circumstances, the CDC Program may also require LICUs to secure matching funds from sources other than the Federal Government. SC that LICUs accept pursuant to the CDC Program (“TARP funds”) would be subject to NCUA’s regulation governing secondary capital. §701.34(b). As an additional condition imposed by Treasury, TARP funds accepted as SC under the CDC Program would be senior to any required matching SC from an alternative source with respect to covering losses.

3. Effect on LICUs

Without this interim final rule, NCUA’s regulation prevents a Regional Director from approving early redemption of SC outside of the restrictions of the redemption schedule of § 701.34(d)(3). §701.34(d)(1)-(2). To obtain approval, a LICU must demonstrate six eligibility requirements to the Regional Director’s satisfaction. *Id.* If successful, the Regional Director’s authority to approve early redemption would remain limited as set forth in the schedule of §701.34(d)(3). Under that schedule, a LICU can redeem a maximum of 20 percent of the original balance of a SC account per year, beginning at five years remaining maturity. *Id.*

Thus, without an amendment, LICUs that choose to accept TARP funds in the form of SC will be required to hold an annually-decreasing percentage of TARP funds at nine

percent interest over five years, a rate potentially higher than other rates that would become available on SC accounts. A similar concern would arise in instances where a LICU might accept matching SC for the TARP funds at a rate higher than it otherwise would in order to benefit from the two-percent rate applicable to TARP funds. The pre-amendment rule could therefore cause some LICUs to forgo application for the CDC Program because of the risk of holding a considerable portion of TARP funds and any match at interest rates significantly above market rates. These LICUs would lose the opportunity to improve lending capability and capital provided by the modest two-percent interest rate on TARP funds over their first eight years. In addition, NCUA's pre-amendment rule would contradict one of the terms of Treasury's CDC Program. The pre-amendment rule required pro-rata loss distribution among all secondary capital accounts, contrary to the seniority requirement Treasury is imposing.

B. Modifications to Section 701.34

The amended rule exempts all SC accounts funded by the United States Government or any of its subdivisions ("government-funded SC")¹ from the limits of the redemption schedule in §701.34(d)(3). It also exempts SC accepted as a match to the government-funded SC. The exception seeks to accomplish the following: (1) remove any disincentive for LICUs to accept TARP funds; (2) avoid subjecting LICUs that do accept TARP funds to the stepped-up nine-percent interest rate over the last five years to maturity; and (3) avoid subjecting LICUs to potentially high interest rates on SC accepted as a match to TARP funds over an extended period. The exemption language

¹ Government-funded SC refers only to SC funded by the Federal government as opposed to state governments or their subdivisions.

is broad enough to encompass the early redemption of SC accepted under other government-funded programs that could arise in response to adverse economic conditions.

More narrowly, the amended rule changes the loss distribution procedures applicable to SC accounts so that SC accepted from the United States Government or any of its subdivisions under the CDC Program is senior to any matching SC accepted from an alternative source that the CDC Program requires. This amendment was necessary to conform NCUA regulations to the seniority terms on which Treasury is offering TARP funds under the CDC Program. The amended language allows a LICU to choose between two different methods of subordinating matching SC to SC accepted under the CDC Program.

The first method excludes CDC Program SC from the pro-rata loss distribution procedures until all of its matching SC has been depleted or properly redeemed. Under this method, the pro-rata loss distribution calculation will cause all other SC on deposit at the time a loss is realized to be depleted before the CDC Program SC covers a loss. The first method will be available only if its seniority implications are not inconsistent with agreements governing other SC on deposit at the time a loss is realized.

The second method is available regardless of any agreements governing other SC and must be followed if a LICU cannot apply the first method in light of other SC agreements. This method combines the CDC Program SC and any of its remaining

matching SC for purposes of the pro-rata loss distribution procedure. The pro-rata loss apportioned to this combined account is first applied to the matching SC portion. The CDC Program SC becomes available to cover a loss under this method only once all of the matching SC has been depleted or properly redeemed. In effect, this will cause the CDC Program's matching SC to suffer a greater loss in the pro-rata calculation than other SC on deposit.

While the possibility an investor contributing matching SC might suffer a greater loss sooner may make it more difficult for some LICUs to recruit matching SC if it is required under the CDC Program, there may be circumstances where this is the only option available to ensure the matching SC is subordinate to the CDC Program SC while also ensuring the subordination method does not cause a violation of any agreements governing other SC on deposit at the time a loss is realized. Following one of these two methods is necessary because Treasury's terms direct that any matching SC required under the Program be subordinate to the CDC Program SC. These two subordination methods only need to be applied to government-funded SC accepted under the CDC Program of 2010 and not to other government-funded SC that does not require seniority status.

All other requirements of §701.34 remain unchanged and applicable to government-funded SC and its matching SC. The interim final rule continues to require that the appropriate Regional Director approve any request for partial or full redemption pursuant to the procedures of §701.34(d)(1)-(2). All six eligibility requirements of that

section must be met to obtain approval, including that the LICU must have had the SC on deposit for at least two years. In fact, the amended language expressly incorporates the two-year deposit requirement, which is intended to facilitate financial stability and encourage implementation of strategic business plans and budget objectives. See 70 FR at 43790. In the case of state-chartered LICUs, §741.204(d) continues to require that the LICU obtain the approval of its State Supervisory Authority with the concurrence of the appropriate NCUA Regional Director.

Clarifying the criteria for approval of SC redemption, the amended rule states that all government-funded SC is eligible for redemption along with its matching SC, regardless of whether the SC has been discounted pursuant to the net worth schedule of §701.34(c)(2). This language seeks to avoid any ambiguity that could otherwise arise by inclusion of the term “discounted secondary capital” in the approval procedures of §701.34(d)(1)-(2). For purposes of the approval procedures under the amended rule, the SC need not have been discounted to be eligible for early redemption, as is still required for non-government-funded SC that does not constitute a match to government-funded SC. Nevertheless, a LICU that accepts government-funded SC must still follow the schedule for discounting net worth as set forth in §701.34(c)(2) if the SC and its match, if any, is not redeemed prior to the last five years to maturity.

If government-funded SC and its matching SC are redeemed prior to the last five years to maturity, LICUs would entirely avoid the net worth schedule, which resurrects risks the schedule was originally designed to hedge against. These include the risk that a

LICU could place overreliance on the availability of the SC as it approaches its approved early redemption date and the risk that the LICU could neglect to plan to replenish the SC to the extent needed as the early redemption date nears. 61 FR at 3789. However, the eligibility criteria the LICU is required to demonstrate to the Regional Director will continue to guard against those risks, particularly the requirements that the LICU demonstrate it will “have a post-redemption net worth classification of ‘adequately capitalized’” and that the SC “will not be needed to cover losses prior to the final maturity of the account.” §701.34(d)(1)(i), (iii). Other approval eligibility requirements could come into play as well, depending on relevant circumstances at the time approval is requested or any conditions imposed on interdependent SC accounts.

If the eligibility requirements are met, the rule would allow redemption of matching SC on the same or a different schedule or rate than the government-funded SC if not otherwise restricted.² For example, if the matching SC bears a more favorable interest rate than its paired government-funded SC, a LICU may choose to hold the matching SC for a longer period. Similarly, a Regional Director may disallow an application for early redemption of matching SC, despite allowing it for government-funded SC, if the Regional Director determines such would be appropriate under the approval criteria. In circumstances where the government-funded SC has been redeemed, the SC originally accepted as a match for the government-funded SC, through maturity, would remain

² In some instances, matching SC might be eligible for redemption before the government-funded SC it is matched with, depending on the conditions imposed by the program under which the government-funded SC was accepted.

eligible for early redemption pursuant to the exception rather than the schedule of §701.34(d)(3).

The amended rule is not intended to 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. Interim Final Rule and Immediate Effective Date

NCUA is issuing this rulemaking as an interim final rule effective upon publication. The Administrative Procedure Act (APA), 5 U.S.C. §553, requires that before a rulemaking can be finalized it must first be published as a notice of proposed rulemaking with the opportunity for public comment, unless the agency for good cause finds that notice and public comment are impracticable, unnecessary, or contrary to the public interest. Additionally, the APA requires that, once finalized, a rulemaking must have a delayed effective date of 30 days from the date of publication, except for good cause.

In this regard, NCUA invokes the good cause exception to the requirements of the APA. NCUA believes good cause exists for issuing these amendments as an interim final rule effective immediately. Due to Treasury's announcement of the CDC Program and the short deadline by which LICUs must submit applications for the Program, it is imperative that NCUA immediately remove any regulatory disincentive for LICUs to apply. An immediate amendment is also necessary to avoid the former rule's conflict with Treasury's SC seniority requirement.

The interim final rule makes clear to LICUs that if they apply for TARP funds through the CDC Program, they will have an opportunity to avoid the accelerated nine-percent interest rate as the TARP funds approach maturity. The rule will provide a similar opportunity with respect to any matching funds that may be required. Finally, the interim rule is limited in scope and does not impose any regulatory burden; rather, the rule provides greater flexibility for LICUs to assist their members.

For these reasons, NCUA has determined that the public notice and participation that the APA ordinarily requires before a regulation may take effect would, in this case, be contrary to the public interest and, further, that good cause exists for waiving the customary 30-day delayed effective date. Nevertheless, NCUA would like the benefit of public comment before adopting a permanent final rule and invites interested parties to submit comments during a 30-day comment period. In adopting the final regulation, NCUA will revise the interim rule in light of the comments received, if appropriate.

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). The interim final rule allows LICUs 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, without imposing any additional regulatory burden. 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 that 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 that the 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 APA, 5 U.S.C. §551. NCUA does not believe this interim final rule is a “major rule” within the meaning of the relevant sections of SBREFA. NCUA has submitted the rule to the Office of Management and Budget for its determination in that regard.

List of Subjects in 12 CFR Part 701

Credit, Credit unions, Mortgages.

By the National Credit Union Administration Board, this 9th day of February, 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 OPERATIONS 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 adding a sentence and two subparagraphs to the end of paragraph (b)(7) and adding a new paragraph (d)(4) to read as follows:

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

* * * * *

(b) * * *

(7) * * * In instances where a LICU accepts secondary capital from the United States Government or any of its subdivisions under the Community Development Capital Program of 2010 (“CDCP secondary capital”) and matching funds are required under the Program 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 the CDCP secondary capital and its matching secondary capital 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 CDC secondary capital may be excluded from the calculation of the pro-rata loss distribution until all of its matching secondary capital has been depleted or properly redeemed, thereby causing the CDC secondary capital to be held as senior to all other secondary capital until its matching secondary capital is exhausted. The CDCP 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 or properly redeemed.

(ii) Regardless of any agreements applicable to other secondary capital, the CDCP 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 CDCP secondary capital to be held as senior to its matching secondary capital. The CDCP secondary capital is available to cover the loss only after all of its matching secondary capital has been depleted or properly redeemed.

* * * * *

(d) * * *

(4) Early redemption exception. Subject to the written approval of the appropriate Regional Director obtained pursuant to the requirements of paragraphs (d)(1) and (2) of this section, a LICU can 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. If the secondary capital was accepted under conditions that required matching secondary capital from a source other than the Federal Government, the matching secondary capital may also be redeemed in the manner set forth in the preceding sentence. For purposes of obtaining the appropriate Regional Director's approval, all secondary capital a LICU accepts from the United States Government or any of its subdivisions, as well as its matching secondary capital, if any, is eligible for early redemption regardless of whether any part of the secondary capital has been discounted pursuant to paragraph (c)(2) of this section.

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