

Newtek
Business Services, Inc.

11200 Rockville Pike, Suite 301
Rockville, Maryland 20852
(202)466-0654

Fax: (202) 223-1146

mash@newtekbusinessservices.com

**Chief Legal Officer
Secretary**

February 7, 2012

Mary Rupp
Secretary to the Board
National Credit Union Administration
1775 Duke Street
Alexandria, VA 22314-3428

Re: Proposed Rule on Loan Participations
12 CFR Parts 701 and 741
76 Federal Register 79548

Dear Ms. Rupp:

Newtek Business Services, Inc. (Newtek) is a national provider of financial services to small businesses, operating under the name of *The Small Business Authority*. For many years Newtek has provided to credit unions throughout the country, and with them to their members, one or more of its services, among which are property and casualty insurance, small business lending, electronic payment processing and web site design, hosting and related services. These services have been provided directly to credit unions and to the members of participating credit unions.

Newtek's subsidiary, Newtek Small Business Finance, Inc., is licensed as a "small business lending corporation" by the United States Small Business Administration (SBA) and, during the first 9 months of 2011 it was the largest non-bank lender in the country in terms of SBA 7(a) small business acquisition and operating loans by number. In working with various credit unions, we have explored the possibility of making our expertise in these loans available to them and permit them to invest available funds in participations in these loans which are highly beneficial to small businesses and the economy generally. As such, the attention of the National Credit Union Administration (NCUA) to the issue of loan participations is very welcome as we believe that clarifying the ability of credit unions to participate in such loans will make a valuable asset management tool more accessible to them.

Overall, we believe the proposed regulation to be effective and, from the perspective of a possible originator-seller of participations, manageable and easy to work with. We do offer some specific comments as follows:

1. First and foremost, the definition of an entity which may sell a participation to a credit union (an “eligible organization”) relates back to the definition of a “financial organization.” As currently worded, this definition would exclude a whole class of federally licensed and supervised lenders: those licensed by the SBA (such as Newtek) and those licensed by the United States Department of Agriculture – Rural Development program. This is because it limits financial organizations eligible to sell participations to credit unions to those that are “federally chartered or federally insured.” Both of these types of lenders are neither federally-chartered nor insured; they are organized under state law and while they do not accept deposits, they are nonetheless subject to extensive regulations in the conduct of their lending and related business operations. Both are also subject to extensive and periodic audit and examination by agency representatives.

As such, they should not be excluded from those eligible to sell participations to credit unions, especially since the participations would otherwise meet the requirements set forth in the new regulations at §701.22. This would be accomplished by adding “federally-licensed lenders” to the definition of “financial organization” in §701.22(a).

2. The introductory language of proposed regulation in §701.22 indicates that it “...applies only to a federally insured credit union’s purchase of a loan participation where the borrower is not a member of that credit union.” As such, the reference to the “member” in the definition of *Originating lender* should be changed to “borrower”.
3. Related to the foregoing is a problem reflected in paragraph (4) of §701.22(b). As the criteria of a loan participation set out in §701.22(b) is a part of the regulation addressing a credit union’s purchase of a participation “...where the borrower is **not a member** of that credit union,” the criterion set out in §701.22(b)(4) is inconsistent. This is because subparagraph (4) specifies that a credit union may purchase a participation **only if the borrower was a member** of the credit union before the loan was made. We believe this is unintentional and that this subparagraph should be deleted.
4. A further change to reflect the foregoing distinction between the authority for member and non-member loan participations should also be made to proposed language to be added to §701.23. While the introductory language to revised §701.22 applies to the purchase of participations “...where the borrower is not a member of that credit union,” and §701.23 is indicated to apply to the “purchase of all or part of a loan made to one of [the credit union’s] members, the new language proposed for §701.23 makes it impossible for a credit union to buy anything other than a whole loan. This is because of the reference to purchases “...where no continuing contractual obligation between the seller and purchaser is contemplated.”

In a normal participation transaction, the originating lender must retain a portion of the loan and usually the servicing responsibilities. As such, there must always be a continuing contractual relationship between the lender and the participation purchaser. The current language proposed for the introduction of §701.23 would thus allow the

purchase of a whole loan made to a credit union's member but not a participation to that member. We believe this is directly contrary to what was intended, that §701.23 would in fact govern purchases of "all or part" of a loan to a member of the credit union (and §701.22 would govern participations in loans to non-members). This should be corrected by deleting the quoted language: "...where no continuing contractual obligation between the seller and purchaser is contemplated."

5. Finally, the condition that the originating lender of a participation sold to a credit union must retain a minimum interest in the loan throughout the life of the loan is appropriate and will help to ensure reduced risk. However, setting that amount at ten percent (10%) we believe is too high and is inconsistent at least with the requirements of the SBA. As a licensed lender, Newtek is required to retain a five percent (5%) interest and we believe that would be an appropriate level to peg for participations sold to credit unions. In cases where loans are made with 90 percent government guarantees and these guaranteed portions are sold (into the secondary market established and supervised by the SBA) the originating lender would be left with 10% of the loan. However it would then be impossible for the originating lender to sell a participation to a credit union in the remaining portion if the holding requirement is set at 10 percent. If the minimum requirement in general, or only for government insured loans, were set at 5% the originating lender would still retain a substantial interest in the loan.

Please do not hesitate to contact us if there are any questions regarding the foregoing comments. Thank you very much.

NEWTEK BUSINESS SERVICES, INC.

By: 
Matthew G. Ash, Chief Legal Officer