

7535-01-U

NATIONAL CREDIT UNION ADMINISTRATION

12 CFR Parts 701 and 705

RIN 3133-AC98

The Low-Income Definition

AGENCY: National Credit Union Administration (NCUA).

ACTION: Final rule.

SUMMARY: NCUA is amending the definition of “low-income members” to use median family income (MFI) to determine if a credit union qualifies for a low-income designation and eligible for assistance from the Community Development Revolving Loan Fund (CDRLF). The amendment will eliminate the confusion associated with adjusting median household income in metropolitan areas with higher costs of living. Additionally, it will better align NCUA criteria for a low-income credit union (LICU) designation with the criteria for the addition of an underserved area to a federal credit union (FCU) field of membership and certification as a Community Development Financial Institution (CDFI).

DATES: The rule is effective January 1, 2009.

FOR FURTHER INFORMATION CONTACT: Moissette Green, Staff Attorney, Office of General Counsel, National Credit Union Administration, 1775 Duke Street, Alexandria, Virginia 22314-3428, or telephone: (703) 518-6540.

SUPPLEMENTARY INFORMATION:

Background

The Federal Credit Union Act (Act) authorizes the NCUA Board (Board) to define “low-income members” so that credit unions with a membership consisting of predominantly low-income members can benefit from certain statutory relief and receive assistance from the CDRLF. 12 U.S.C. 1752(5), 1757a(b)(2)(A), 1757a(c)(2)(B), 1772c-1. NCUA currently defines “low-income members” in parts 701 and 705 of its regulations generally as meaning members whose annual household income falls at or below 80% of the national median household income and provides a differential for certain geographic areas with higher costs of living. 12 CFR 701.34(a)(2), 705.3(a)(1). Federally-insured, state-chartered credit unions (FISCUs) may also receive a LICU designation if they meet the qualifications in §701.34(a); state regulators make or remove the designation on the basis provided in §701.34(a) with the concurrence of the appropriate NCUA regional director. 12 CFR 741.204(b). Therefore, references in this preamble to FCUs includes FISCUs to the extent that state law permits a LICU designation and permits FISCUs with the LICU designation to accept nonmember

accounts and secondary capital as contemplated by NCUA regulations. 12 CFR 741.204(b)-(d).

In April 2008, NCUA proposed revising the definition of “low-income members” in §§701.34(a)(2) and 705.3(a)(1) to base the determination on MFI or median earnings for individuals instead of median household income. 73 FR 22836 (April 28, 2008). For metropolitan areas, the proposal defined “low-income members” as those living in a geographic area where the income is at or below 80% of either the metropolitan area or national metropolitan area income standard, whichever is greater. For members living outside a metropolitan area, the proposal defined low-income members as those living in a geographic area where the income is at or below 80% of either the statewide, non-metropolitan area or national, non-metropolitan area median family income, whichever is greater. The proposed rule also contained grandfather provisions and appeal procedures for FCUs that no longer qualify for a LICU designation.

Comments

NCUA received comments from three credit unions, six trade associations, and one individual. Of those who commented on the rule generally, all but one supported using the MFI standard. Eight commenters had additional suggestions. One commenter suggested NCUA should ensure LICUs are actually serving low-income members instead of changing the low-income rule.

Three commenters suggested clarifying the rule so that members who do not live in a low-income area, but are low-income, are included in the definition of “low-income members.” As discussed below, the final rule provides that NCUA will estimate member earnings based on data from the U.S. Census Bureau about the geographical area where members live, but permits FCUs to present actual member income information, for example, from loan applications or a survey.

One commenter stated it was unclear from which sources NCUA would obtain the MFI and median earnings for individuals and questioned the reliability of Census Bureau data. The final rule includes the website address for the Census Bureau where the data is available. The American FactFinder on the Census Bureau’s webpage, http://factfinder.census.gov/home/saff/main.html?_lang=en, provides statistics and data from the decennial census and other annual surveys. Decennial census statistics for MFI are currently recorded in table P77 for each geographic area, and table P85 records the median earnings for individuals. The Census Bureau also collects information on the U.S. population, employment, and housing annually through the American Community Survey (ACS). MFI statistics collected through the ACS are reported in table B19113. Table B20002 records median earnings for individuals. NCUA will use the decennial census or ACS data, whichever is most beneficial to an FCU, when determining whether it qualifies for a LICU designation. When ACS data is not available for a geographic area, decennial census data will be used. Regarding the reliability of the data, the Census Bureau is charged with collecting information on the U.S. population, employment, and housing. See 13 U.S.C. 41. The final rule better

aligns the low-income definition with the criteria for underserved areas and CDFIs, which rely on data from the Census Bureau. 12 U.S.C. 1759(c)(2); 12 CFR 1805.201. Therefore, the Board believes the Census Bureau is the appropriate source for data about MFI and median earnings for individuals.

Three commenters recommended NCUA develop a process to permit FCUs to qualify using other criteria, such as unemployment rates. In line with its statutory authority to designate low-income credit unions, the Board believes the criteria should be based on income. 12 U.S.C. 1752(5), 1757a(b)(2)(A), 1757a(c)(2)(b). Additionally, the Board notes the parallel relationship between member income and unemployment rates.

Two commenters were concerned the rule would require credit unions to reapply for the LICU designation annually and stated NCUA should assist CUs to obtain the data necessary to qualify as a LICU. As explained below, under the final rule, credit unions are not required to apply for a LICU designation. Instead, based on data obtained through examinations, a regional director will notify an FCU that it qualifies for a low-income designation, and FCUs that accept the designation will continue to have the designation, without any need to re-apply, as long as they meet the rule's criteria.

Five commenters stated NCUA should permit current LICUs to maintain the designation permanently and only apply the new rule to new LICU designations. One commenter suggested the five-year grandfather period is insufficient because secondary capital investments are usually for a seven- to ten-year term. The Board does not believe the

LICU designation should be permanent because LICUs need to continue to be serving low-income members to fulfill the Act's intent. Nevertheless, the Board appreciates the need for transition periods. Current LICUs that do not meet the criteria of the final rule or those that lose the designation after initially qualifying will not immediately lose their designation. They will have five years to meet the LICU criteria or otherwise comply with the Act and NCUA regulations. The final rule also permits a regional director to extend the adjustment period when an FCU has secondary capital or nonmember deposit accounts with a maturity beyond the five-year grandfather provision.

One commenter was concerned there may be unintended adverse consequences if the rule is finalized and suggested NCUA monitor the rule's effect on LICUs. NCUA staff has analyzed the impact the final rule will have on current LICUs and potential designees and determined more FCUs will likely qualify for the low-income designation under this final rule than under the current rule. Further, with the possible exception of one or two FCUs, the Board does not anticipate the final rule will adversely affect current LICUs. Additionally, this commenter stated LICUs losing the designation because of the change in income standard should have the right to appeal the removal to the Board. An FCU may appeal to the Board a regional director's determination that it no longer meets the criteria for a LICU designation, but not the loss of the LICU designation because of the change in the income standard.

One commenter raised a concern that the rule does not adequately address LICUs that are not geographically based, e.g. single common bond CUs, multiple common bond

CUs. Under the final rule, FCUs can qualify for a LICU designation under the new procedure regardless of their charter type.

A commenter suggested NCUA consult with state supervisory authorities on implications of the regulation. The final rule does not change the state supervisory authorities' procedures for designating LICUs.

Another commenter suggested NCUA coordinate this rule with recently proposed amendments to NCUA's Chartering and Field of Membership Manual regarding underserved areas to ensure consistency and facilitate outreach to underserved areas and low-income members. 73 FR 34366 (June 17, 2008). As explained in the preamble to the proposed rule, NCUA is amending the low-income definition to, among other reasons, better align NCUA criteria for a low-income designation with the criteria for the addition of an underserved area to an FCU field of membership and certification as a CDFI. See 73 FR 22836 (April 28, 2008).

Under the current rule, NCUA uses median household income to determine if a credit union qualifies for the LICU designation, and this is inconsistent with the field of membership (FOM) provisions and criteria for CDFI certification. Multiple common-bond FCUs may add an underserved area to their FOMs if, among other requirements, the area meets the definition of an "investment area," as defined in §103(16) of the Community Development Banking and Financial Institutions Act of 1994. 12 U.S.C. 1759(c)(2)(A)(i); NCUA Chartering and Field of Membership Manual, Chapter 3, II.A.,

Interpretive Rulings and Policy Statement (IRPS) 03-1, 68 FR 18334 (April 15, 2003) (as amended by IRPS 06-1, 71 FR 36667 (June 28, 2006)). Treasury Department regulations, implementing the Community Development Banking and Financial Institution Act of 1994, include an MFI at or below 80 percent of the MFI for corresponding metropolitan area as a factor supporting the determination that an area is an investment area. 12 C.F.R. 1805.201(b).

Additionally, The Treasury Department's CDFI Fund, through monetary awards and other benefits, helps promote access to capital and local economic growth in urban and rural low-income communities across the nation. Qualifying credit unions obtain assistance from the CDFI Fund to offer financial services to and further economic development of low-income members. The CDFI Fund uses MFI to implement the Community Development Banking and Financial Institutions Act of 1994, as described above.

The use of MFI as a standard to determine low-income status will bring uniformity and consistency to the regulations, and should eliminate industry confusion regarding the low-income designation and application for an underserved area. Additionally, because credit unions may apply for financial assistance from the CDFI Fund, the Board believes it would be beneficial to align the low-income formula with the CDFI Fund criteria. This would reduce the regulatory burden on credit unions attempting to qualify for the advantages of receiving a LICU designation and benefits from the CDFI Fund.

Two commenters suggested the Board should expand the rule to enable more FCUs to serve low-income and underserved people. As noted above, the final rule will likely allow more FCUs to obtain the low-income designation. The Board notes the rule does not limit service to low-income or underserved people, and all FCUs are encouraged to serve low-income and underserved people within their applicable fields of membership, regardless of whether they receive a LICU designation.

The Final Rule

In order for an FCU to qualify as a LICU, a majority of its actual members must meet the definition of “low-income members.” The final rule amends the definition of low-income members and clarifies the procedures for designating an FCU as a LICU and removing the designation.

Under the final rule, low-income members are those who earn 80% of the metropolitan area MFI or less. NCUA will make the determination of whether a majority of an FCU’s members are low-income based on data it obtains during the examination process.

This will involve linking member address information to publicly available information from the U.S. Census Bureau to estimate member earnings.¹ Using automated, geocoding software, NCUA will use member street addresses collected during FCU

¹ Using Census Bureau reports, NCUA can obtain income information for various types of geographic areas, including a “census block.” A census block is the smallest geographic area for which the Census Bureau collects and tabulates decennial census data and is an area bounded on all sides by visible features, such as streets, roads, streams, and railroad tracks, and by invisible boundaries, such as city, town, township, and county limits, property lines, and short, imaginary extensions of streets and roads. A census block may be the size of a city block, or many square miles of territory in rural areas.

examinations to determine the geographic area² and metropolitan area³ for each member account. NCUA will then use income information for the geographic area from the Census Bureau and assign estimated earnings to each member. Using this method, if a majority of an FCU's members have estimated earnings equal to or less than 80% of the MFI for the metropolitan area, the FCU will qualify for a LICU designation.

To ensure all eligible FCUs qualify for the LICU designation under the new procedure, median earnings for individuals may be substituted for MFI, and non-metropolitan area MFI data will be used when a member lives outside a metropolitan area. NCUA recognizes this approach means different MFI levels will apply in different parts of the country. This approach recognizes the concept of low-income as related to the cost of living and salaries in geographic areas. The Census Bureau, however, provides national statistics in addition by geographical areas and, to ameliorate potential disparity among geographic areas, the rule provides an FCU will also qualify for a LICU designation if a majority of its members are considered low-income when compared to the national metropolitan MFI.

² A "geographic area" is any State, the District of Columbia, American Samoa, Guam, the Northern Mariana Islands, Puerto Rico, the Virgin Islands, or any territory of the United States or a geographic unit that is a county or equivalent area, a unit of a local government, incorporated place, census tract, census block, Zip Code Tabulation Area, block group, or Native American, American Indian, or Alaskan Native area, as such units are defined or reported by the U.S. Census Bureau.

³ A "metropolitan area" is an area designated by the Office of Management and Budget pursuant to 31 U.S.C. 1104(d), 44 U.S.C. 3504(c), and Executive Order 10253, 16 FR 5605 (June 13, 1951) (as amended).

The rule also provides an alternative basis for an FCU to qualify for a LICU designation. An FCU may be able to demonstrate the actual income of its members based on data it has, for example, from loan applications or surveys of its members. An FCU may qualify as a LICU if it can establish a majority of its members meet the low-income formula. For example, an FCU with 1,000 members may be able to show the actual income of 501 or more of its members is equal to or less than 80% of the MFI for the metropolitan area(s) where they live. As a practical matter, the Board thinks few FCUs will need this option because NCUA's approach of matching member residential information with Census Bureau income information will provide an estimate very close to members' actual income.

The proposed rule stated that a regional director "will designate" an FCU as a LICU "if a majority of its membership qualifies as low-income members" but did not indicate how an FCU would be informed of the designation, how an FCU would indicate that it wanted the designation, or whether an FCU could refuse the designation. The final rule clarifies that a regional director will notify an FCU that it qualifies, and an FCU will then have 30 days to notify the regional director that it wants to receive the designation. Thus, the final rule permits an FCU to refuse a low-income designation simply by opting not to notify the regional director that it wants to receive the designation. The final rule does not require state supervisory authorities to change the process or procedures they currently use for FISCUs to receive the LICU designation from state regulators.

Additionally, the final rule clarifies the process for removing a low-income designation. If a regional director determines an FCU no longer meets the criteria for the LICU designation, the regional director will notify the FCU in writing. The FCU will have five years after the date of the notice to either requalify as a LICU or come into compliance with regulations applicable to credit unions that do not have a low-income designation. If an FCU does not requalify and has secondary capital or nonmember deposit accounts with a maturity that extends beyond the five-year adjustment period, a regional director may give the credit union additional time to satisfy the terms of any account agreements.

An FCU may appeal to the Board a regional director's determination that it no longer meets the criteria for the LICU designation. The rule states an appeal must be filed within 60 days of the date of the regional director's notice. An FCU will submit its appeal through the appropriate regional office. On appeal, the Board will determine whether the regional director correctly applied the regulatory criteria. An FCU may not, however, appeal the loss of the LICU designation to the Board solely because of the change in the income standard in this rule.

In addition to streamlining the proposed rule based on the comments, the final rule also revised some of the provisions in the proposal for clarity. The proposed rule noted, with a cross-reference to §701.32, that LICUs may receive shares from nonmembers. The final rule has eliminated this statement as unnecessary. The proposed rule also defined the term "geographic areas" and defined low-income members in terms of meeting the

MFI criteria on the basis of earning or the geographic areas where members live. The final rule has deleted the definition of geographic areas as unnecessary. As proposed, the alternatives of earning or residence were, in effect, redundant. As provided in the final rule, the LICU designation is based on calculating members' estimated earnings based on where they live, using data from the Census Bureau, and defining geographic areas in the rule is unnecessary as this is part of the data available from the Census Bureau.

Finally, the final rule makes a conforming amendment to §705.3 and clarifies that FCUs qualifying for the low-income designation under §701.34 may apply for assistance from the CDRLF. Part 705 and §701.34 continue to apply to state-chartered credit unions in accordance with §741.204. As stated above, there is no change in the process or procedures for FISCUs.

Regulatory Procedures

Regulatory Flexibility Act

The Regulatory Flexibility Act requires NCUA to prepare an analysis to describe any significant economic impact any regulation may have on a substantial number of small entities. 5 U.S.C. 603(a). For purposes of this analysis, NCUA considers credit unions having under \$10 million in assets small entities. Interpretive Ruling and Policy Statement 03-2, 68 FR 31949 (May 29, 2003). As of December 31, 2007, out of approximately 8,410 federally insured credit unions, 3,599 had less than \$10 million in assets.

This final rule directly affects all low-income credit unions, of which there are approximately 1,087. NCUA estimates approximately 692 low-income credit unions are small entities. Therefore, NCUA has determined this final rule will have an impact on a substantial number of small entities.

NCUA has determined, however, the economic impact on entities affected by the final rule will not be significant. The rule aligns criteria for a low-income designation with the criteria for the addition of an underserved area to a federal credit union field of membership under Interpretive Rulings and Policy Statement (IRPS) 03-1, 68 FR 18334 (April 15, 2003) (as amended by IRPS 06-1, 71 FR 36667 (June 28, 2006)) and certification as a CDFI. The final rule establishes one income standard for determining a low-income designation, underserved areas, and investment areas. It also eliminates the confusion within the credit union industry due to the use of different income standards. NCUA believes the final rule reduces the regulatory burden for LICUs and minimizes any economic impact. Additionally, the final rule contains a five-year period for affected LICUs to make necessary operational adjustments. Accordingly, the Board certifies this rule does not have a significant economic impact on a substantial number of small entities.

Small Business Regulatory Enforcement Fairness Act

The Small Business Regulatory Enforcement Fairness Act (SBREFA) of 1996, Pub. L. 104-121, 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 Procedures Act. 5 U.S.C. 551. The Office of Information and Regulatory Affairs, an office within OMB, has determined that, for purposes of SBREFA, this is not a major rule.

Paperwork Reduction Act

In accordance with the Paperwork Reduction Act of 1995 (PRA), 44 U.S.C. 3501 et seq., NCUA may not conduct or sponsor, and a person is not required to respond to, an information collection unless it displays a currently valid Office of Management and Budget (OMB) control number. The final rule now provides for FCUs, once they are notified that they qualify for the low-income designation, to notify the appropriate regional director that they wish to accept the designation. Although, in the past, FCUs have requested the designation from regional offices, the regulation did not address application procedures. The final rule, like the proposed, provides that NCUA will make the determination without requiring FCUs to apply. As FCUs will, however, be required to notify regional directors that they wish to accept the designation, NCUA believes this notification is a “collection of information” within the meaning of section 3502(3) of the PRA. Additionally, FCUs that do not receive notification from the regional director but believe they qualify for the LICU designation may submit information to demonstrate they meet the criteria. NCUA believes this voluntary submission is also an information collection. NCUA has submitted the requirements of the information collections contained in the final rule to OMB for review and approval under section 3507 of the

PRA and §1320.11 of OMB's implementing regulations. 5 CFR §1320.11. OMB approval is pending.

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 final rule will not have 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 this final 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

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, Pub. L. 105-277, 112 Stat. 2681 (1998).

List of Subjects

12 CFR Part 701

Credit unions, Federal credit unions, Low income, Nonmember deposits, Secondary capital, Shares

12 CFR Part 705

Community development, Credit unions, Loans, Low income, Technical assistance.

By the National Credit Union Administration Board, on November 20, 2008.

Mary F. Rupp

Secretary of the Board

For the reasons stated above, NCUA amends 12 CFR parts 701 and 705 as follows:

PART 701 — ORGANIZATION AND OPERATIONS OF FEDERAL CREDIT UNIONS

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

Authority: 12 U.S.C. 1752(5), 1757, 1765, 1766, 1781, 1782, 1787, 1789; Title V, Pub. L. 109-351, 120 Stat. 1966.

2. Amend § 701.34 by revising paragraph (a) to read as follows:

§701.34 [Amended]

- (a) Designation of low-income status.

(1) Based on data obtained through examinations, a regional director will notify a federal credit union that it qualifies for designation as a low-income credit union if a majority of its membership qualifies as low-income members. A federal

credit union that wishes to receive the designation will notify the regional director in writing within 30 days of receipt of the regional director's notification.

(2) Low-income members are those members who earn 80% or less than the median family income for the metropolitan area where they live or national metropolitan area, whichever is greater. A regional director may use total median earnings for individuals instead of median family income if it is more beneficial to a federal credit union when determining if the credit union qualifies for a low-income credit union designation. A regional director will use the statewide or national, non-metropolitan area median family income instead of the metropolitan area or national metropolitan area median family income for members living outside a metropolitan area. Member earnings will be estimated based on data reported by the U.S. Census Bureau for the geographic area where the member lives. The term "low-income members" also includes those members enrolled as students in a college, university, high school, or vocational school.

(3) Federal credit unions that do not receive notification that they qualify for a low-income credit union designation but believe they qualify may submit information to the regional director to demonstrate they qualify for a low-income credit union designation. For example, federal credit unions may provide actual member income from loan applications or surveys to demonstrate a majority of their membership is low-income members.

(4) If the regional director determines a low-income designated federal credit union no longer meets the criteria for the designation, the regional director

will notify the federal credit union in writing, and the federal credit union must, within five years, meet the criteria for the designation or come into compliance with the regulatory requirements applicable to federal credit unions that do not have a low-income designation. The designation will remain in effect during the five-year period. If a federal credit union does not requalify and has secondary capital or nonmember deposit accounts with a maturity beyond the five-year period, a regional director may extend the time for a federal credit union to come into compliance with regulatory requirements to allow the federal credit union to satisfy the terms of any account agreements. A federal credit union may appeal a regional director's determination that the credit union no longer meets the criteria for a low-income designation to the Board within 60 days of the date of the notice from the regional director. An appeal must be submitted through the regional director.

(5) Any credit union with a low-income credit union designation on January 1, 2009 will have five years from that date to meet the criteria for low-income designation under paragraph (a)(1) of this section, unless the regional director determines a longer time is required to allow the low-income credit union to satisfy the terms of a secondary capital or nonmember deposit account agreement.

(6) Definitions. The following definitions apply to this section:

Median family income and total median earnings for individuals are income statistics reported by the U.S. Census Bureau. The applicable income data can be obtained via the American FactFinder on the Census

Bureau's webpage at

http://factfinder.census.gov/home/saff/main.html?_lang=en.

Metropolitan area means an area designated by the Office of Management and Budget pursuant to 31 U.S.C. 1104(d), 44 U.S.C. 3504(c), and Executive Order 10253, 16 FR 5605 (June 13, 1951) (as amended).

* * * * *

PART 705 — COMMUNITY DEVELOPMENT REVOLVING LOAN FUND FOR CREDIT UNIONS

3. The authority for part 705 continues to read as follows:

Authority: 12 U.S.C. 1772c-1; 42 U.S.C. 9822 and 9822 note.

4. Amend § 705.3 by revising paragraph (a) to read as follows:

§ 705.3 Definitions.

(a) The term “low-income members” means those members defined in §701.34 of this chapter.

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