

7535-01-U

NATIONAL CREDIT UNION ADMINISTRATION

12 CFR Parts 700, 701, 741, 747, and 750

RIN 3133-AD97

Definition of Troubled Condition

AGENCY: National Credit Union Administration (NCUA).

ACTION: Final rule.

SUMMARY: The NCUA Board (Board) is issuing a final rule amending the definition of “troubled condition” as that term is used to trigger the statutory requirement to give the Board notice and an opportunity to disapprove a change of credit union officials, and as that term appears elsewhere in NCUA’s regulations. Generally, the current definition allows only a state supervisory authority (SSA) to declare a federally insured, state-

chartered credit union (FISCU) to be in “troubled condition.” The final rule amends the definition to allow either NCUA or an SSA to declare a FISCU in “troubled condition.” NCUA is adopting the amended definition of “troubled condition” as proposed.

DATES: This rule is effective [INSERT DATE 30 DAYS AFTER PUBLICATION IN THE FEDERAL REGISTER].

FOR FURTHER INFORMATION CONTACT: Frank Kressman, Associate General Counsel, or Steven W. Widerman, Staff Attorney, at (703) 518-6557.

SUPPLEMENTARY INFORMATION:

1. **Background**
2. **Proposed Rule**
3. **Discussion of Comments on Proposed Rule**
4. **Regulatory Procedures**

1. Background

a. Why is NCUA Adopting this Rule? The Board is adopting this rule to fully utilize the combined resources of NCUA and SSAs to identify FISCUs in “troubled condition” at the earliest possible juncture. The Federal Credit Union Act (the Act) requires a credit union in “troubled condition” to give NCUA notice and an opportunity to disapprove a change of credit union officials. Currently, only SSAs can make this determination for a FISCU. The rule permits either NCUA or an SSA to designate a FISCU in “troubled

condition” for this purpose, thus expanding NCUA’s opportunity to act preemptively to ensure that the officials who take control of a FISCO in “troubled condition” are qualified to address its troubles. This gives the National Credit Union Share Insurance Fund (NCUSIF) a further measure of protection against the risk of loss.

b. Statutory Framework. In 1989, Congress amended the Act to require a federally insured credit union “in troubled condition, as determined on the basis of such credit union’s most recent report of condition or report of examination,”¹ to notify NCUA prior to adding or replacing any individual serving as a member of the board of directors or a committee, or employed as a senior executive officer (each, an official).²

The amendment to the Act bars an insured credit union in troubled condition from adding or replacing an official if NCUA issues a Notice of Disapproval in response to a notification of a change in officials.³ NCUA may disapprove an individual when “the competence, experience, character, or integrity of the individual . . . indicates that it would not be in the best interests” of the credit union’s members or the public for the individual to serve.⁴ The individual or the credit union may appeal the disapproval to the Board.⁵

¹ 12 U.S.C. 1790a(a)(2)

² 12 U.S.C. 1790a.

³ 12 U.S.C. 1790a(b).

⁴ 12 U.S.C. 1790a(e).

⁵ 12 CFR §747.904.

c. Historical Definition of “Troubled Condition.” To implement the amendment to the Act, Congress directed NCUA to define by regulation the term “troubled condition.”⁶

Since 1990, NCUA has defined a natural person credit union in “troubled condition” as:

(1) a federal credit union that has been assigned a “4” or “5” composite CAMEL rating by NCUA;

(2) a FISCU that has been assigned a “4” or “5” composite CAMEL rating by its SSA;

(3) a FISCU that has been assigned a “4” or “5” composite CAMEL rating by NCUA based on core workpapers received from an SSA; or

(4) a federal credit union or FISCU that has received special assistance under sections 208 or 216 of the Act to avoid liquidation.⁷

In 1999, the Board adopted a separate definition of “troubled condition” for corporate credit unions to conform to the Corporate Risk Information System (“CRIS”).⁸ Under that definition, a corporate credit union is in “troubled condition” if:

(1) a corporate federal credit union is assigned a “4” or “5” CRIS rating by NCUA in either the Financial Risk or Risk Management composites;

⁶ 12 U.S.C. 1790a(f).

⁷ 12 CFR §701.14(b)(3); 55 FR 43086 (Oct. 26, 1990).

⁸ 64 FR 28715 (May 27, 1999).

(2) a corporate FISCU is assigned a “4” or “5” CRIS rating by its SSA in either the Financial Risk or Risk Management composites or, if the state has not adopted CRIS, is assigned a “4” or “5” composite CAMEL rating by its SSA;

(3) a corporate FISCU is assigned a “4” or “5” CRIS rating in either the Financial Risk or Risk Management composites by NCUA based on core workpapers received from a state that does not use either the CRIS or CAMEL rating systems; or

(4) a corporate federal credit union or corporate FISCU receives special assistance under sections 208 or 216 of the Act to avoid liquidation.⁹

The “troubled condition” definitions for natural person credit unions and corporate credit unions have since been incorporated by reference in other parts of NCUA’s regulations.

2. Proposed Rule

The proposed rule defined a FISCU in “troubled condition” not just when its SSA assigns it a “4” or “5” composite CAMEL or CRIS rating, but when *either* its SSA or NCUA assigns such a rating.¹⁰ This expanded definition was intended to enhance NCUA’s ability to administer and protect the NCUSIF. Additionally, the proposed rule

⁹ 12 CFR §701.14(b)(4).

¹⁰ 77 FR at 45285 (July 31, 2012).

made technical and conforming amendments to update the rule and the cross-references to “troubled condition” that appear elsewhere in NCUA’s regulations.¹¹

3. Discussion of Comments on Proposed Rule

NCUA received 48 comment letters in response to the proposed rule: 21 from FISCUs, 16 from state credit union leagues, 5 from state credit union regulators, 4 from credit union trade associations, and 2 from individuals. All of the commenters opposed the proposed rule, noting various concerns.

Approximately half of the commenters objected that the rule constitutes excessive federal oversight that will undermine or destabilize the dual chartering system.

The Board disagrees with these conclusions. The rule’s primary purpose is to help NCUA, as administrator of the NCUSIF, to minimize losses to the NCUSIF by instituting a regulatory framework that more fully utilizes state and federal resources. The rule does not supplant an SSA’s authority with NCUA’s, nor does it substitute NCUA’s judgment for that of an SSA. Rather, the Board views it as a cooperative effort between NCUA and SSAs. Under the rule, NCUA acknowledges that SSAs are the primary regulators of FISCUs. Further, SSAs maintain all of their regulatory and supervisory authorities with no diminution of responsibilities. Accordingly, the Board believes the rule reflects its commitment to the dual chartering system and, as noted below, is consistent with federalism policymaking criteria.

¹¹ The definition of “troubled condition” in §701.14(b) is incorporated by reference in parts 711 [management official interlocks], 741 [requirements for insurance], 747 [challenge to disapproval of change in officials] and 750 [golden parachute and indemnification payments] of NCUA’s regulations. 12 CFR Parts 711, 741, 747, and 750.

Five commenters interpreted the rule as implying doubt that SSAs are qualified to assess their own FISCUs, and that NCUA's judgment is superior. A few others condemned the implication of doubt as a pretext to diminish an SSA's regulatory responsibility in favor of federal authority. The Board finds no merit in these comments. In the final rule, the Board in no way intends to diminish an SSA's role or disparage the high quality work performed by state examiners. In fact, the final rule simply levels the playing field by deferring to whichever regulator – state or federal – assigns a CAMEL 4 or 5 rating to a FISCU. In instances where an SSA rates a FISCU as a CAMEL 4 or 5 but NCUA does not, the SSA's rating prevails. In such cases, even if NCUA rates that FISCU as a CAMEL 1, 2, or 3, NCUA will defer to the SSA's CAMEL 4 or 5 rating and will classify that FISCU as being in "troubled condition."

Additionally, the scope of the rule is limited to changes in FISCU officials and does not affect other aspects of an SSA's relationship with its credit unions.

Seventeen commenters found a lack of sufficient justification to support the rule, with eight maintaining that NCUA did not document enough cases where the discrepancy between NCUA's and an SSA's rating made a difference. From cases arising in the recent financial crisis, NCUA has learned that it must be able to respond quickly when problems are discovered in the credit unions that it insures. Failing to timely identify a credit union in "troubled condition" can have significant consequences for the NCUSIF. In some cases during the crisis, it was not possible to respond quickly enough when

NCUA's CAMEL rating of a FISCO differed from the SSA's. In 4 of 8 cases since 2008 that yielded a loss to the NCUSIF, the SSA assigned a CAMEL rating that did not trigger "troubled condition" status.¹²

Although ratings discrepancies between NCUA and SSAs affecting whether a FISCO is deemed in "troubled condition" are not routine, they do occur. Such ratings discrepancies between NCUA and SSAs averaged 7.7 percent among regular examinations of FISCUs and on-site supervision contacts conducted from 2009 through 2011. More recently, NCUA has observed a significant increase in the discrepancy rate. Among regular examinations of FISCUs and on-site supervision contacts in 2012, the CAMEL rating variance between "troubled condition" and not was 10 percent through the third quarter.

When NCUA's rating is inconsistent with an SSA's, NCUA's practice is to work cooperatively with state examiners to resolve the discrepancy. Further, pursuant to NCUA policy, NCUA will not designate a FISCO to be in "troubled condition" without first making an on-site contact at that FISCO. This on-site contact will typically consist of a joint examination by NCUA and state examiners.

Eleven commenters contended that requiring an SSA to defer to NCUA's lower CAMEL rating to designate a FISCO in "troubled condition" would diminish and encroach on an

¹² The four credit unions ultimately failed due to various causes, together producing a loss of \$235 million to the NCUSIF.

SSA's authority as primary regulator. As explained above, the Board maintains that the single, narrow purpose of the rule is not an encroachment on, or diminution of, an SSA's authority over its FISCUs.

Three commenters complained that the rule is inconsistent with applicable federalism policymaking criteria, alleging that NCUA did not identify a problem of national significance to justify the rule, and did not assess its impact on the states. The Board disagrees, as explained in the discussion of Executive Order 13132 in section 4 below.

Finally, eight commenters argued that the rule is unnecessary because the Act gives NCUA other remedies to deal with issues relating to FISCU officials. Further, six commenters maintained that a FISCU's change of officials should be the exclusive province of the SSA and NCUA should have no role at all. The Board notes, however, that, in 1989, Congress granted NCUA the authority to disapprove a change of officials of an insured credit union (including a FISCU) in "troubled condition." This Congressional action is the foundation of NCUA's position that it need not limit itself to existing "other remedies" to deal with FISCU officials and, further, that deciding who is qualified to serve as a FISCU official is not the "exclusive province" of an SSA.

Apart from the CAMEL and CRIS ratings-based criteria for "troubled condition," the Board on its own initiative is adding language to the final rule to clarify the "troubled condition" criterion that is based on a credit union's receipt of cash assistance from NCUA. The proposed rule, like the existing rule, provided that an insured credit union is

in “troubled condition” if it “has been granted assistance under section 208” of the Act.¹³ This incorrectly suggests that a credit union, once granted such assistance, remains in “troubled condition” even after it has satisfied its repayment obligation to NCUA. To clarify that an insured credit union is no longer in “troubled condition” once it has met this obligation, the final rule provides that an insured credit union is in “troubled condition” if it “has been granted assistance under section 208 of the [Act], 12 U.S.C. 1788, that *remains outstanding and unextinguished.*” (emphasis added).

The Board has carefully considered the comments and appreciates the commenters’ concerns. For the foregoing reasons, however, the Board adopts the amended definition of “troubled condition” as proposed with the addition of the substantive change described in the preceding paragraph.¹⁴

4. 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 (less than \$10 million in assets). This rule enables NCUA to better administer the NCUSIF without imposing any additional regulatory burden on credit unions. It will not have a significant economic impact on a substantial number of small credit unions.

¹³ 12 U.S.C. 1788.

¹⁴ As suggested by a commenter, the final rule makes a technical amendment to the cross-reference to “troubled condition” in §747.901 so that it properly refers to the new uniform definition of “troubled condition” in §700.2.

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.

In promulgating this rule, the Board has carefully limited its scope. The rule narrowly addresses the definition of a FISCO in “troubled condition” for the sole purpose of better enabling NCUA to administer and protect the NCUSIF. The rule fully recognizes an SSA’s primary regulatory and supervisory authority over its FISCOs. The rule creates a cooperative partnership between primary regulator (SSA) and insurer (NCUA) and in no way diminishes an SSA’s power or authority. For these reasons, NCUA believes this rule will 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.¹⁵ The Office of Management and Budget has determined that this rule is not a “major rule” for purposes of SBREFA.

List of Subjects

12 CFR Part 700

Credit unions, Definitions.

12 CFR Part 701

Credit unions, Reporting and recordkeeping requirements.

12 CFR Part 741

Credit unions, Requirements for insurance.

¹⁵ 5 U.S.C. 551.

12 CFR Part 747

Administrative Practice and Procedure, Bank Deposit Insurance, Claims, Credit Unions, Crime, Equal Access to Justice, Hearing Procedures, Investigations, Lawyers, Penalties.

12 CFR Part 750

Credit unions, Golden parachute payments, Indemnity payments.

By the National Credit Union Administration Board on January 10, 2013.

Mary Rupp

Secretary of the Board

For the reasons set forth above, 12 CFR parts 700, 701, 741, 747, and 750 are amended as follows:

PART 700 -- DEFINITIONS

1. The authority citation for part 700 continues to read as follows:

Authority: 12 U.S.C. 1752, 1757(6), 1766.

2. Amend §700.2 by inserting a new definition of “troubled condition” in alphabetical order to read as follows:

§700.2 Definitions.

* * * * *

Troubled condition means:

(1) in the case of an insured natural person credit union:

(i) a federal credit union that has been assigned a 4 or 5 CAMEL composite rating by NCUA; or

(ii) a federally insured, state-chartered credit union that has been assigned a 4 or 5 CAMEL composite rating by either NCUA, after an on-site contact, or its state supervisor; or

(iii) a federal credit union or a federally insured, state-chartered credit union that has been granted assistance under section 208 of the Federal Credit Union Act, 12 U.S.C. 1788, that remains outstanding and unextinguished.

(2) in the case of an insured corporate credit union:

(i) a federal credit union that has been assigned a 4 or 5 Corporate Risk Information System rating by NCUA in either the Financial Risk or Risk Management composites; or

(ii) a federally insured, state-chartered credit union that has been assigned a 4 or 5 Corporate Risk Information System rating by either NCUA, after an on-site contact, or its state supervisor in either the Financial Risk or Risk Management composites; or

(iii) a federal credit union or a federally insured, state-chartered credit union that has been granted assistance under section 208 of the Federal Credit Union Act, 12 U.S.C. 1788, that remains outstanding and unextinguished.

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PART 701 – ORGANIZATION AND OPERATIONS OF FEDERAL CREDIT UNIONS

3. 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. 1601, et seq.; 42 U.S.C. 1981 and 3601-3610, section 701.35 is also authorized by 42 U.S.C. 4311-4312.

4. Revise §701.14(b)(3) and §701.14(b)(4) to read as follows:

§701.14 Change in official or senior executive officer in credit unions that are newly chartered or are in troubled condition.

* * * * *

(b) * * *

(3) In the case of an insured natural person credit union, *Troubled condition* means:

(i) a federal credit union that has been assigned a 4 or 5 CAMEL composite rating by NCUA; or

(ii) a federally insured, state-chartered credit union that has been assigned a 4 or 5 CAMEL composite rating by either NCUA, after an on-site contact, or its state supervisor; or

(iii) a federal credit union or a federally insured, state-chartered credit union that has been granted assistance under section 208 of the Federal Credit Union Act, 12 U.S.C. 1788, that remains outstanding and unextinguished.

(4) In the case of an insured corporate credit union, *Troubled condition* means:

(i) a federal credit union that has been assigned a 4 or 5 Corporate Risk Information System rating by NCUA in either the Financial Risk or Risk Management composites; or

(ii) a federally insured, state-chartered credit union that has been assigned a 4 or 5 Corporate Risk Information System rating by either NCUA, after an on-site contact, or its state supervisor in either the Financial Risk or Risk Management composites; or

(iii) a federal credit union or a federally insured, state-chartered credit union that has been granted assistance under section 208 of the Federal Credit Union Act, 12 U.S.C. 1788, that remains outstanding and unextinguished.

PART 741 – REQUIREMENTS FOR INSURANCE

5. The authority citation for part 741 continues to read as follows:

Authority: 12 U.S.C. 1757, 1766, 1781—1790, and 1790d. Section 741.4 is also authorized by 31 U.S.C. 3717.

6. Amend §741.205 by revising the last two sentences to read as follows:

§741.205 Reporting requirements for credit unions that are newly chartered or in troubled condition.

* * * NCUA will consult with the state supervisor before making its determination. NCUA will notify the state supervisor of its approval/disapproval no later than the time that it notifies the affected individual.

PART 747 – ADMINISTRATIVE ACTIONS, ADJUDICATIVE HEARINGS, RULES OF PRACTICE AND PROCEDURE, AND INVESTGATIONS

7. The authority citation for part 747 continues to read as follows:

Authority: 12 U.S.C. 1766, 1782, 1784, 1785, 1786, 1787, 1790a, 1790d; 42 U.S.C. 4012a; Pub. L. 101-410; Pub. L. 104-134; Pub. L. 109-351; 120 Stat. 1966.

8. Amend §747.901 by deleting the citation to “§701.14” at the end of the first sentence and inserting in its place “§700.2”.

PART 750 – GOLDEN PARACHUTE AND INDEMNIFICATION PAYMENTS

9. The authority citation for part 750 continues to read as follows:

Authority: 12 U.S.C. 1786(t).

10. Amend section 750.1(e)(1)(ii) to read as follows:

§750.1 Definitions.

* * * * *

(ii) * * *

(C) The federally insured credit union is in troubled condition as defined in section 700.2(j) of this chapter; or

(D) In the case of a corporate credit union, the federally insured credit union is undercapitalized as defined in section 704.4 of this chapter; or

(E) The federally insured credit union is subject to a proceeding to terminate or suspend its share insurance; and

* * * * *

11. Remove paragraph (I) of section 750.1.