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National Association of Federally-Insured Credit Unions

April 2, 2018

Gerard Poliquin
Secretary of the Board
National Credit Union Administration
1175 Duke Street
Alexandria, Virginia 22314

RE: Involuntary Liquidation of Federal Credit Unions and Claims Procedures

Dear Mr. Poliquin:

On behalf of the National Association of Federally-Insured Credit Unions (NAFCU), the only national trade association focusing exclusively on federal issues affecting the nation's federally-insured credit unions, I am writing to share our comments regarding NCUA's proposed rule on "Involuntary Liquidation of Federal Credit Unions and Claims Procedures." NAFCU agrees that there is a need to reconcile the tension between Sections 750.7 and 709.5 of NCUA's regulations, which set forth respectively the restrictions and priorities that apply to claims paid from a credit union's liquidation estate. However, NAFCU is concerned that restrictions on the provability of separately negotiated executive severance agreements will impair credit unions' ability to recruit, motivate, and retain talented managers and executives.

To motivate key employees, whose individual contributions underlie the success and vitality of the credit union industry, credit unions must be afforded the flexibility to offer contingent benefits or severance pay. Post-employment compensation arrangements also help credit unions retain key employees, particularly during times of financial hardship. The ability to provide such arrangements enhances the safety and soundness of the credit union system at a fundamental level. However, current regulations call into question the provability of severance claims in the event that a federally insured credit union is involuntarily liquidated or conserved. Specifically, current Section 750.7 permits the liquidating agent or conservator of any failed federally insured credit union to repudiate *any claim* for employee welfare benefits—including severance—that is contingent at the time a liquidating agent or conservator is appointed.

In general, severance should be an allowable claim in liquidation. Accordingly, NAFCU appreciates NCUA's effort to clarify that the language in Section 750.7 restricting payments to institution affiliated parties upon termination of their employment should not operate to exclude all claims for post-employment benefits under Section 709.5. Credit union staff should have certainty that the terms of their employment agreement will be honored, even if the credit union enters involuntary liquidation. However, NAFCU remains concerned with the proposal's approach to restricting the provability of severance claims or other contingent obligations that are separately negotiated with executive level employees.

Proposed Section 709.5 would limit claims for vacation, severance, and sick leave pay if the entitlement does not meet certain criteria—namely, that the entitlement be calculable in accordance with an objective formula, made available to all employees who meet applicable eligibility requirements, and provided for in a written credit union record. The proposal also states that NCUA intends for the current provisions in part 750 to continue to restrict the provability of severance claims in cases that involve executive level employees with separately negotiated employment contracts or similar benefit plans that are not generally available to all employees on a non-discriminatory basis.

Restrictions on executive severance claims could prove detrimental in circumstances where the retention of key employees is essential to preserving the health of a troubled credit union. To guard against employee attrition during times of financial stress, credit unions may find it necessary to use separate eligibility criteria when negotiating post-employment benefits arrangements with executives. The proposal appears to partially recognize the need for such flexibility when structuring incentives or other contingent benefits; the entitlement must be made available to all employees who meet *applicable* eligibility requirements. Accordingly, NAFCU recommends that NCUA clarify what it means by applicable eligibility requirements to ensure consistency with part 750, which refers to reasonable and customary eligibility requirements, and reconsider restrictions on the provability of severance claims arising from separately negotiated executive employment contracts. NCUA should also review part 750 of its regulations, which were drafted in response to the financial crisis, to determine whether credit unions may benefit from additional flexibility when offering post-employment benefits.

Conclusion

NAFCU commends NCUA for seeking to reconcile existing tension in NCUA's regulations related to the provability of claims for severance and other contingent benefits paid from a credit union's liquidation estate. However, NAFCU disagrees that executive claims should be treated differently than other employee claims if they are separately negotiated. Impairments to post-employment entitlements for executives could undermine credit unions' ability to recruit or retain key employees, who are fundamental drivers of a credit union's health and success.

NAFCU appreciates the opportunity to provide its comments regarding NCUA's proposed rule. If you have any questions or concerns, please do not hesitate to contact me at (703) 842-2266 or amorris@nafcu.org.

Sincerely,

A handwritten signature in black ink that reads "Andrew Morris". The signature is written in a cursive, flowing style.

Andrew Morris
Regulatory Affairs Counsel