

7535-01-U

NATIONAL CREDIT UNION ADMINISTRATION

12 CFR Part 709

RIN 3133-AE82

Involuntary Liquidation of Federal Credit Unions and Claims Procedures

AGENCY: National Credit Union Administration (NCUA).

ACTION: Proposed rule.

SUMMARY: The NCUA Board (Board) proposes to amend part 709 of its rules to update and clarify the procedures that apply to claims administration for federally insured credit unions that enter involuntary liquidation. Specifically, the proposal would amend the current rule's payout priority provision by specifying the conditions that claims in the nature of severance must meet to be allowed as provable claims.

DATES: Comments must be received on or before [INSERT DATE 60 DAYS AFTER 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: <https://www.ncua.gov/regulation-supervision/Pages/rules/proposed.aspx>. Follow the instructions for submitting comments.
- E-mail: Address to regcomments@ncua.gov. Include “[Your name] Comments on ‘Involuntary Liquidation of Federal Credit Unions and Claims Procedures’” in the e-mail subject line.
- Fax: (703) 518-6319. Use the subject line described above for e-mail.
- Mail: Address to Gerard Poliquin, 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/RegulationsOpinionsLaws/comments> 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 Ian Marenga, Senior Trial Attorney, at 1775 Duke Street, Alexandria, Virginia 22314, or telephone: (703) 518-6540.

Supplementary Information

I. Background

Section 1217 of the Financial Institutions Reform, Recovery and Enforcement Act of 1989 (FIRREA)¹ amended the Federal Credit Union Act (FCU Act) by adding Section 207(b), thereby creating a comprehensive statutory framework for the liquidation of federally insured credit unions.² Section 207(b)(4) authorizes the Board to “prescribe regulations regarding the allowance or disallowance of claims by the liquidating agent and providing for administrative determination of claims and review of such determination.”³ In accordance with this authority, the Board adopted part 709 in 1991.⁴

The Board is proposing changes to part 709 to clarify how severance claims will be treated in involuntary liquidations. Specifically, the proposed rule would create an exception to the generally applicable limitation on provability for severance claims as set out in the Board’s regulation governing golden parachute payments.⁵

¹ Sec. 1217(a)(3), (4), Pub. L. No. 101-73. Sec. 1217(a)(3), (4).

² 12 U.S.C. 1787(b).

³ 12 U.S.C. 1787(b)(4).

⁴ 56 Fed. Reg. 56925 (Nov. 7, 1991).

⁵ 12 C.F.R. part 750.

II. Summary of proposed changes.

Priority accorded wages, including vacation pay, sick leave, and severance. Section 709.5 sets forth the priorities by which claims will be paid from the liquidation estate. Currently, §709.5(b)(2) accords second priority to claims for wages, including vacation pay, sick leave, and severance, subordinate among unsecured claims only to administrative costs and expenses of liquidation. This section operates to protect those employees whose employment is terminated as a result of the appointment of the liquidating agent, but who may have worked some or all of the pay period immediately preceding the date of liquidation for which they had not been paid. The regulation contemplates that such an employee's final paycheck may include compensation for hours worked as well as accrued but unpaid sick leave and vacation time, as well as any severance to which he or she is entitled.

This provision may be in tension with NCUA's separate regulatory authority to control the types and amounts of payments that may be made by federally insured credit unions to institution affiliated parties upon termination of their employment. Under the FCU Act, the Board is authorized to prohibit or limit "golden parachute payments," defined to include payments that are contingent on the termination of the party's employment at the credit union and that are made when the credit union is in troubled financial condition.⁶ In addition, part 750 of NCUA's regulations contains explicit limitations on the ability of an institution affiliated party to pursue a severance claim with the liquidating agent after a credit union has become insolvent and is placed in conservatorship or liquidation.⁷

⁶ 12 U.S.C. 1786(t)(4); 12 C.F.R. 750.1(d).

⁷ 12 CFR 750.7.

Thus, part 750 expressly provides that any claim for “employee welfare benefits” or other benefits that are contingent at the time of liquidation are not provable claims against the liquidating agent or payable as damages if the conservator or liquidating agent repudiates the relevant contract under 12 U.S.C. 1787(c). This bar covers claims for severance or other employee welfare benefits that are contingent at the time of liquidation, even if otherwise vested, including any contingency for termination of employment.⁸ This language is broad enough to extend to virtually any claim to benefits or entitlements (other than earned but unpaid wages) that remains unpaid as of the date of liquidation.

Given the breadth of the language in §750.7, the Board believes clarification concerning the interplay with part 709 is necessary and appropriate. Claims for unpaid wages or salary earned during the pay period immediately prior to the appointment of the conservator or liquidating agent will be allowed and accorded the second priority level under §709.5(b). Employees are also allowed to claim earned but unused paid time off as of the liquidation date, provided that the credit union had a written policy, as reflected in the employee handbook or other similar credit union record, permitting departing employees to receive payment for earned but unused paid time off with their last paycheck. Employees may also claim severance pay, provided that the amount of entitlement is determined under an objective formula made available to all employees and is specified in a written policy, as reflected in the employee handbook or other similar credit union record.

⁸ Id.

The documentary evidence requirement reflects the standard for agreement-based claims against the liquidation estate and is intended to provide the liquidating agent an appropriate basis to determine that the credit union agreed to provide the benefits.⁹ Because not every credit union may have an employee handbook, the proposed rule would allow for other credit union records that evidence entitlement to the benefits.

The Board intends for the provisions in part 750 restricting the provability of certain severance claims to be applicable 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. In such cases, the Board anticipates that the liquidating agent will exercise its power of repudiation¹⁰ concerning the employment contract and/or benefit plan, with the result being that neither the severance claim itself nor any claim for damages arising from the repudiation will be allowed as provable in the liquidation, pursuant to part 750. It should be noted that these limitations on provability are applicable whether or not the arrangement in question would be considered a prohibited golden parachute under part 750 for an open credit union.

Accordingly, the Board proposes to amend §709.5(b)(2) to provide that claims seeking employee benefits other than earned but undisbursed salary or wages, including earned but unused paid time off and severance pay, will be allowed to the extent that the credit union has adopted a

⁹ See 12 U.S.C. 1787(b)(9); D'Oench, Duhme & Co. v. Federal Deposit Ins. Corp., 315 U.S. 447 (1942). Under the FCU Act and relevant case law, a claimant may not sustain a claim against the liquidating agent based on an agreement unless the agreement was in writing, was executed by the credit union and the claimant, was approved by the credit union's board, and has continuously been an official credit union record.

¹⁰ 12 U.S.C. 1787(c).

written policy, as reflected in the employee handbook or other similar record, that establishes a right to such payments and that the amount of such payment is determined in accordance with an objective, non-discriminatory formula made available to all employees. The proposed rule also recognizes that state law may require such payments and accommodates this possibility.

III. 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 \$100 million in assets). The severance provision imposes no new requirements on credit unions. Instead, it would provide a limited exception to an existing regulation that applies to liquidated credit unions. Accordingly, the proposed rule will not have a significant economic impact on a substantial number of small credit unions, and therefore, no regulatory flexibility analysis is required.

Paperwork Reduction Act

The Paperwork Reduction Act of 1995 (PRA) applies to rulemakings in which an agency by rule creates a new paperwork burden on regulated entities or modifies an existing burden. 44 U.S.C. 3507(d). For purposes of the PRA, a paperwork burden may take the form of either a reporting or a recordkeeping requirement, both referred to as information collections. Part 709 only

concerns credit unions that have failed and imposes no information collection requirements on existing credit unions. Accordingly, there are no PRA implications.

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. This proposed rule would clarify certain procedures for NCUA's administration of liquidated federally insured credit unions. This proposed rule will not have a 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. The Board has determined that this proposed 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 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 in

12 CFR Part 709

Credit unions, Involuntary liquidation

By the National Credit Union Administration Board, this ____ day of _____, 201__.

Gerard Poliquin
Secretary of the Board

For the reasons discussed above, NCUA proposes to amend 12 CFR part 709 as follows:

**PART 709 — INVOLUNTARY LIQUIDATION OF FEDERAL CREDIT UNIONS AND
ADJUDICATION OF CREDITOR CLAIMS INVOLVING FEDERALLY INSURED
CREDIT UNIONS IN LIQUIDATION**

1. The authority citation for part 709 is revised to read as follows:

Authority: 12 U.S.C. 1757, 1766, 1767, 1786(h), 1786(t), and 1787(b)(4), 1788, 1789, 1789a.

§709 [Amended]

2. Revise paragraph (b)(2) of § 709.5 to read as follows:

§ 709.5 Payout priorities in involuntary liquidation.

* * * * *

(b) * * *

(2) Claims for wages and salaries, including vacation, severance, and sick leave pay; *provided, however,* that, in accordance with § 750.7 of this Chapter, no claim for vacation, severance, or sick leave pay is provable unless entitlement to the benefit is provided for in the credit union employee handbook or other written credit union record, is calculable in accordance with an objective formula, and is available to all employees who meet applicable eligibility requirements, such as minimum length of service, or if such payment is required by applicable state or local law.

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