

7535-01-U

NATIONAL CREDIT UNION ADMINISTRATION

12 CFR Parts 721 and 741

RIN 3133-AE29

Asset Securitization

AGENCY: National Credit Union Administration (NCUA).

ACTION: Proposed rule.

SUMMARY: The NCUA Board (Board) proposes to amend its regulations to clarify that a natural person federal credit union (FCU) is authorized to securitize loans that it has originated, as an activity incidental to the business for which an FCU is chartered, provided the transaction meets certain requirements. The proposed rule would also apply those requirements to federally insured, state-chartered credit unions (FISCU) that are permitted by state law to securitize their assets.

DATES: Comments must be received on or before [INSERT DATE 60 DAYS FROM DATE OF PUBLICATION IN 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:
http://www.ncua.gov/RegulationsOpinionsLaws/proposed_regs/proposed_regs.html.
Follow the instructions for submitting comments.
- E-mail: Address to regcomments@ncua.gov. Include “[Your name] – Comments on Proposed Rule – Asset Securitization” 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.

FOR FURTHER INFORMATION CONTACT: Dale Klein, Senior Capital Markets Specialist, Office of Examination and Insurance, at the above address or telephone (703) 518-6360; Jeremy Taylor, Senior Capital Markets Specialist, Office of National Examinations and Supervision, at the above address or telephone (703) 518-6640; or Lisa Henderson, Staff Attorney, Office of General Counsel, at the above address or telephone (703) 518-6540.

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I. Background

1. Federal credit union authority to securitize assets.

For purposes of this rule, “securitizing assets” means acting as a sponsor of a securitization, *i.e.*, organizing and initiating a securitization transaction by transferring financial assets to an entity that will issue obligations supported by such assets. While the Federal Credit Union Act (the Act) explicitly authorizes an FCU to sell its loans,¹ it provides no express authority to securitize them. The Act does, however, authorize an FCU to “exercise such incidental powers as shall be necessary or requisite to enable it to carry on effectively the business for which it is incorporated.”² Under NCUA regulations, an activity meets the definition of an incidental power activity if it meets a three-part test.³ As discussed below, the Board has determined that securitizing assets meets that test as long as the assets being securitized are in the form of loans originated by the sponsoring FCU to its members.

Under the first prong of the test, an activity must be convenient or useful in carrying out the mission or business of credit unions consistent with the Act. One of the fundamental purposes of

¹ 12 U.S.C. 1757(13).

² 12 U.S.C. 1757(17).

³ 12 CFR 721.2.

credit unions is making loans to members.⁴ Credit unions must have sufficient liquidity to make loans, and the Act provides a number of means for FCUs to obtain cash to fund lending, including receiving shares, investing excess funds, borrowing, and selling eligible obligations.⁵ Securitizing assets is another means of obtaining cash to fund lending. As such, it is convenient and useful in carrying out a credit union's central mission.

Under the second part of the test, the activity must be the functional equivalent or logical outgrowth of activities that are part of the mission or business of credit unions. FCUs already make loans and either hold them on their books or sell them, or sell a participation interest in them, into the secondary market. Selling loans by repackaging them as securities is a logical outgrowth of an FCU's mission and business.

Finally, the activity must involve risks similar in nature to those already assumed as part of the business of credit unions. Risk is fundamental to the operation of a credit union, and credit unions must balance risk and reward responsibly. Making and selling loans present FCUs with, at a minimum, reputation risk, strategic risk, credit risk, transaction risk, liquidity risk, and compliance risk. While securitizing loans introduces more complex legal and operational risks, these risk types are inherent in other credit union activities and are thus similar in nature to those already assumed as part of the business of credit unions. Accordingly, NCUA has concluded that FCUs have the incidental power to securitize assets.

⁴ 12 U.S.C. 1752(1).

⁵ 12 U.S.C. 1757(6), (7), (9), and (13).

2. *Why is NCUA proposing this rule?*

The Board proposes to amend its regulations to clarify that, under certain circumstances, an FCU has the incidental authority to securitize loans that it has originated. The Board believes that there are a number of potential benefits of securitization. First, securitization provides originators with an additional source of funding or liquidity to meet members' needs. Second, securitization may be used to reduce interest rate risk by converting fixed-rate assets into cash. Finally, the sale of assets may reduce an FCU's regulatory costs by allowing it to optimize its capital management. The details of how an FCU may operate an asset securitization program are discussed in more detail below.

II. Proposed Rule

1. *Part 721—Incidental powers.*

The proposed rule adds a new provision to Part 721 of NCUA's regulations, which addresses the incidental powers of FCUs. Section 721.3 enumerates the categories of activities that are preapproved as incidental powers of an FCU. The proposed rule adds a new paragraph (n) to §721.3 to establish securitizing loans as a preapproved incidental power.

2. *Asset securitization activities.*

Paragraph (1) of the proposed rule labels the newly approved category “asset securitization activities” in which an FCU acts as the sponsor of an asset-backed security. Paragraph (2) defines “sponsor,” “asset-backed security,” and other relevant terms.

3. Loans the FCU has originated.

Paragraph (3) of the proposed rule provides that an FCU may securitize and sell loans it has originated. As discussed above, securitizing loans presents more complex risks than simply making and selling loans. Allowing FCUs to purchase loans for the purpose of issuing asset-backed securities would add an additional layer of risk, in an area that is uncharted for both FCUs and NCUA. Accordingly, for safety and soundness reasons, the proposed rule limits FCUs to securitizing only loans it has originated.⁶ To avoid confusion, the proposed rule clarifies that the purchase and re-underwriting of a loan does not meet the origination requirement.

4. Authority to create issuing entities.

To securitize assets, a sponsor must be able to create an issuing entity, commonly known as a special purpose vehicle or special purpose entity, to hold the assets collateralizing the asset-backed security. The Board considers an FCU’s authority to create such entities to be included

⁶ The Board notes that this limitation does not prevent FCUs from purchasing loans to complete a pool to be sold on the secondary market, other than through a securitization. 12 CFR 701.23(b).

within the general incidental power to securitize assets, but has made that authority explicit in paragraph (4) of the proposed rule to avoid confusion.⁷ An issuing entity can take the form of a corporation, trust, partnership, or limited liability company, and is a vehicle whose operations are typically limited to the acquisition and financing of specific assets. The proposed rule requires that any issuing entity created by an FCU be bankruptcy remote from the FCU, which means the issuing entity's assets are isolated from any creditors of the FCU should the FCU become insolvent. This can be achieved through a variety of methods, including limiting the issuing entity's purpose, indebtedness, assets, and other liabilities, as well as by ensuring through its corporate governance process that decisions regarding bankruptcy will be made from the point of view of the issuing entity itself, not the FCU.

5. Other minimum requirements.

Paragraph (5) of the proposed rule establishes the following seven minimum safety and soundness requirements for an FCU engaging in securitizing assets:

a. Compliance with all federal and state laws and regulations.

An FCU engaged in securitizing transactions may be subject to numerous registration, disclosure, filing, reporting, and other legal requirements. The complexity of asset securitization transactions requires an FCU that participates in securitization activities to fully investigate all

⁷ The Board notes that NCUA's regulations governing credit union service organizations (CUSOs) do not apply to the creation of issuing entities. 12 CFR 712. Further, acting as an issuing entity is not a preapproved CUSO activity. 12 CFR 712.5.

applicable laws and regulations, to establish policies and procedures to assure legal review of all securitization activities, and to take steps to protect itself from liability in the case of problems with particular asset-backed securitization transactions.

b. Independent risk management.

An FCU engaged in securitizations must have in place independent risk management controls commensurate with the complexity and volume of its securitizations and its overall risk exposures. The risk management controls must ensure that securitization policies and operating procedures, including clearly articulated risk limits, are in place and appropriate for the FCU.

c. Annual audit.

As an added measure of safety and soundness, the proposed rule requires an FCU engaged in securitization transactions to have an annual audit of its financial statements performed in accordance with generally accepted auditing standards by an independent licensed auditor. The proposed rule further requires that the financial statements include all aspects of accounting and disclosure for sponsored securitizations in accordance with generally accepted accounting principles.

d. Board knowledge.

The board of directors of an FCU engaged in securitizations must have a general understanding of the risks and benefits of securitization activities and how those activities fit into the credit union's strategic and business plans.

e. Management expertise.

Senior management responsible for an FCU's securitization activities must possess sufficient expertise to oversee those activities. Unlike many other credit union activities, an FCU engaged in securitizing assets is likely to engage outside parties for much of the required procedures. It is not necessary for the FCU to possess all of the required skills in house. However, senior FCU management must have sufficient understanding and familiarity with the process to competently select and oversee parties hired or engaged to support the activities.

f. Board approved policy.

An FCU engaged in securitizations must have a credit union board approved asset securitization policy that includes or addresses, at a minimum, the following items:

- a statement of the business purpose for engaging in securitization activities, including the general scope of the activities and the level of acceptable risk.
- the governance of securitization activities;
- a written and consistently applied accounting methodology;
- regulatory reporting requirements;

- valuation methods, including those applicable to the FCU's residual interests and retained interests in the securitization transaction, and procedures to formally approve changes to those assumptions;
- the management reporting process; and
- exposure limits and requirements for both aggregate and individual transaction monitoring.

g. Internal controls.

Effective internal controls are essential to an FCU's management of the risks associated with securitization. When properly designed and consistently enforced, a sound system of internal controls will help management safeguard the FCUs resources, ensure that financial information and reports are reliable, and comply with contractual obligations, including securitization covenants. It will also reduce the possibility of significant errors and irregularities, as well as assist in their timely detection when they do occur. Internal controls typically: (1) limit authorities, (2) safeguard access to and use of records, (3) separate and rotate duties, and (4) ensure both regular and unscheduled reviews, including testing.

6. Residual interests and retained interests.

The sponsor of an asset-backed security typically retains an interest in a securitization. Except in certain limited circumstances, NCUA regulations prohibit an FCU from investing in stripped

mortgage backed securities and residual interests in collateralized mortgage obligations.⁸

Paragraph (6)(a) of the proposed rule clarifies that those prohibitions do not apply to interests retained in the course of sponsoring a securitization transaction.

Paragraph (6)(b) of the proposed rule requires an FCU to use reasonable and supportable assumptions and modeling methodologies to assign values to residual interests and retained interests. These assumptions and methodologies must be fully documented. The key assumptions in all valuation analyses include prepayment or payment rates, default rates, loss severity factors, and discount rates. Paragraph 6(b) also requires an FCU to recognize credit impairment for all residual interests and retained interests in accordance with generally accepted accounting principles.

Residual interests and retained interests concentrate risks to support investor interests. Therefore their value is more susceptible to credit and market risks than the underlying pool of assets. Because of these heightened risks, paragraph (6)(c) of the proposed rule limits the amount of residual interests and retained interests that an FCU may carry to 25% of the FCU's net worth. Residual interests and retained interests in pass-through securities, which generally have the same profile of risk as the underlying assets, are not included in this limitation. The Board specifically requests comment on the appropriateness of this limit, including a detailed rationale for any recommended higher limit.

7. Implicit recourse prohibited.

⁸ 12 CFR 703.16(c) and (d).

Sponsors of asset-backed securities may provide contract-based support for a securitization through, among other things, overcollateralization, maintaining a seller's or transferor's interest, and issuing stand-by letters of credit for cash flow purposes. In addition to these legal obligations, in certain circumstances, an originator may wish to provide post-sale credit support to poorly performing asset pools, commonly referred to as "implicit" recourse. To limit risk, however, paragraph (7) of the proposed rule prohibits FCUs from providing implicit recourse to a securitization.

8. Federally insured, state-chartered credit unions.

The proposed rule amends Part 741 by adding a new §741.226 to extend the proposed securitization requirements to FISCUs. The Board believes that there could be a risk to the National Credit Union Share Insurance Fund if state law permits a FISCU to sponsor a securitization and the state's associated safety and soundness requirements vary from those applicable to FCUs.

III. Safe Harbor

This proposal is related to a companion proposal to amend §709.10, published elsewhere in today's **Federal Register**. Section 709.10 governs the authority of the Board, when acting as conservator or liquidating agent of any federally insured credit union (FICU), to disaffirm or repudiate transfers of financial assets by a FICU in connection with a securitization or participation. Section 709.10 was issued to provide a “safe harbor” by confirming “legal isolation” if all other standards for off balance sheet accounting treatment were met by the transfer in connection with a securitization or a participation. In 2000, when current §709.10 was adopted, satisfaction of legal isolation was vital to securitization transactions because of the risk that the pool of financial assets transferred into the securitization trust could be recovered in bankruptcy or in a credit union liquidation. If the transfer satisfied this condition, the regulation confirmed that the transferred assets were legally isolated from the FICU in an NCUA conservatorship or liquidation.

In 2009, the Financial Accounting Standards Board finalized modifications to generally accepted accounting principles (GAAP) that affected whether an issuing entity must be consolidated for financial reporting purposes, thereby subjecting many issuing entities to GAAP consolidation requirements. As a result of the modifications, legal and accounting treatment of a securitization transaction may no longer be aligned, and the safe harbor provision of current §709.10 may not apply to a transfer in connection with a securitization that does not qualify for off balance sheet treatment. The companion proposal would amend §709.10 to provide safe harbor for transfers in connection with securitizations under the revised accounting standards. The Board requests comment on whether the proposed safe harbor requirements should be included in any final rule that addresses FCU authority to securitize assets.

IV. Regulatory Procedures

1. Regulatory Flexibility Act.

The Regulatory Flexibility Act requires NCUA to prepare an analysis of any significant economic impact any proposed regulation may have on a substantial number of small entities (primarily those under \$50 million in assets).⁹ This proposed rule will only apply to the largest credit unions, as securitizing assets requires significant infrastructure and resources. Accordingly, it will not have a significant economic impact on a significant number of small credit unions.

2. 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 increases an existing burden.¹⁰ For purposes of the PRA, a paperwork burden may take the form of a reporting or recordkeeping requirement, both referred to as information collections. The proposed changes to part 721 impose one new information collection requirement. As required by the PRA, NCUA is submitting a copy of this proposal to OMB for its review and approval. Persons interested in submitting comments with respect to the information collection aspects of the proposed rule should submit them to OMB at the address noted below.

⁹ 5 U.S.C. 603(a); 12 U.S.C. 1787(c)(1).

¹⁰ 44 U.S.C. 3507(d); 5 CFR part 1320.

a. Estimated PRA Burden

The information collection requirement is found in section 721.3(n)(5)(iii) of the proposed rule. That provision requires an FCU that undertakes securitization activities to have a credit union board approved policy stating the purpose and governance of securitization activities. NCUA estimates that it will take 50 hours to develop a securitization policy initially and 10 hours to maintain the policy annually. As NCUA further estimates that only one FCU will undertake asset securitization activities, the initial paperwork burden is 50 hours and ongoing burden is 10 hours.

b. Submission of comments.

NCUA considers comments by the public on this proposed collection of information in:

- evaluating whether the proposed collection of information is necessary for the proper performance of the functions of NCUA, including whether the information will have a practical use;
- evaluating the accuracy of NCUA's estimate of the burden of the proposed collection of information, including the validity of the methodology and assumptions used;
- enhancing the quality, usefulness, and clarity of the information to be collected; and
- minimizing the burden of collection of information on those who are to respond, including through the use of appropriate automated, electronic, mechanical, or other technological

collection techniques or other forms of information technology; *e.g.*, permitting electronic submission of responses.

OMB will make a decision concerning the collection of information contained in the proposed regulation between 30 and 60 days after publication of this document in the Federal Register. Therefore, a comment to OMB is best assured of having its full effect if OMB receives it within 30 days of publication. This does not affect the deadline for the public to comment to NCUA on the substantive aspects of the proposed regulation.

Comments on the proposed information collection requirements should be sent to: Office of Information and Regulatory Affairs, OMB, New Executive Office Building, Washington, DC 20503; Attention: NCUA Desk Officer, with a copy to Tracy Crews at the National Credit Union Administration, 1775 Duke Street, Alexandria, Virginia 22314-3428.

3. Executive Order 13132.

Executive Order 13132 encourages independent regulatory agencies to consider the impact of their actions on state and local interests. NCUA, an independent regulatory agency as defined in 44 U.S.C. 3502(5), voluntarily complies with the executive order to adhere to fundamental federalism principles. The proposed rule does not have substantial direct effects 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. NCUA has, therefore,

determined that this proposal does not constitute a policy that has federalism implications for purposes of the executive order.

4. Assessment of Federal Regulations and Policies on Families.

NCUA has determined that this proposed rule will not affect family well-being within the meaning of § 654 of the Treasury and General Government Appropriations Act, 1999, Pub. L. 105-277, 112 Stat. 2681 (1998).

List of Subjects

12 CFR Part 721

Credit unions, Functions, Implied powers, Reporting and recordkeeping requirements.

12 CFR Part 741

Credit, Credit unions, Reporting and Recordkeeping requirements, Share insurance.

By the National Credit Union Administration Board, on June 19, 2014.

Gerard Poliquin

Secretary of the Board

For the reasons discussed above, the National Credit Union Administration proposes to amend parts 721 and 741 as follows:

PART 721—INCIDENTAL POWERS

1. The authority citation for part 721 continues to read as follows:

AUTHORITY: 12 U.S.C. 1757(17), 1766, 1789.

2. In §721.3, add paragraph (n) to read as follows:

§721.3 What categories of activities are preapproved as incidental powers necessary or requisite to carry on a credit union's business?

* * * * *

(n)(1) *Asset securitization activities.* Asset securitization activities are activities in which a federal credit union acts as the sponsor of an asset-backed security.

(i) *Purpose.* This section authorizes federal credit unions to offer and sell loans they have originated into securitization vehicles and sets minimum safety and soundness standards for securitization transactions.

(ii) *Scope.* This section applies to natural person federal credit unions.

(2) *Definitions.*

As used in this paragraph (n):

Asset-backed security has the same meaning as in section 3(a)(79) of the Securities Exchange Act of 1934 (15 U.S.C. 78c(a)(79)).

Bankruptcy remote means insulated from the consequences of any related party's insolvency.

Financial asset means cash or a contract or instrument that conveys to one entity a contractual right to receive cash or another financial instrument from another entity.

Issuing entity means an entity that owns a financial asset or financial assets transferred by the sponsor and issues obligations supported by such asset or assets. Issuing entities may include, but are not limited to, corporations, partnerships, trusts, and limited liability companies and are commonly referred to as special purpose vehicles or special purpose entities. To the extent a

securitization is structured as a multi-step transfer, the term issuing entity would include both the issuer of the obligations and any intermediate entities that may be a transferee. Notwithstanding the foregoing, a Specified GSE or an entity established or guaranteed by a Specified GSE does not constitute an issuing entity.

Obligation means a debt or equity (or mixed) beneficial interest or security that is primarily serviced by the cash flows of one or more financial assets or financial asset pools, either fixed or revolving, that by their terms convert into cash within a finite time period, or upon the disposition of the underlying financial assets, and by any rights or other assets designed to assure the servicing or timely distributions of proceeds to the security holders issued by an issuing entity. The term may include beneficial interests in a grantor trust, common law trust or similar issuing entity to the extent that such interests satisfy the criteria set forth in the preceding sentence, but does not include LLC interests, partnership interests, common or preferred equity, or similar instruments evidencing ownership of the issuing entity.

Originate means to make an extension of credit.

Recourse means an arrangement in which a credit union retains, in form or in substance, any credit risk directly or indirectly associated with an asset it has sold (in accordance with generally accepted accounting principles) that exceeds a pro rata share of the credit union's claim on the asset.

Residual interest means any on-balance sheet asset that represents an interest created by a transfer of financial assets through a securitization that exposes a federal credit union to credit risk directly or indirectly associated with the transferred assets that exceeds a pro rata share of the credit union's claim on the assets, whether through subordination provisions or other credit enhancement techniques.

Retained interest means an interest in a securitization held by the sponsor or issuing entity.

Securitize means to sponsor a securitization.

Securitization means the issuance by an issuing entity of obligations for which the investors are relying on the cash flow or market value characteristics and the credit quality of transferred financial assets (together with any external credit support permitted by this section) to repay the obligations.

Seller's interest means the ownership interest in the issuing entity's assets that have not been allocated to any investment certificate holder.

Specified GSE means each of the following: (i) the Federal National Mortgage Association and any affiliate thereof; (ii) Federal Home Loan Mortgage Corporation and any affiliate thereof; (iii) the Government National Mortgage Association; and (iv) any federal or state sponsored mortgage finance agency.

Sponsor means a person or entity that organizes and initiates a securitization transaction by transferring financial assets, either directly or indirectly, including through an affiliate, to an issuing entity, whether or not such person owns an interest in the issuing entity or owns any of the obligations issued by the issuing entity.

Transfer means (i) the conveyance of a financial asset or financial assets to an issuing entity; or (ii) the creation of a security interest in such asset or assets for the benefit of the issuing entity.

(3) *Securitization*. As a part of its business, a federal credit union may securitize and sell loans that it has originated. The purchase and re-underwriting of a loan does not constitute origination within the meaning of this paragraph.

(4) *Authority to create issuing entities*. A federal credit union is authorized to create issuing entities for the purpose of securitizing loans that it has originated. Any issuing entity created under this authority must be bankruptcy remote or otherwise isolated for insolvency purposes from the federal credit union.

(5) *Other minimum requirements*. A federal credit union engaged in securitization transactions, as authorized in paragraph (n)(3) of this section, must meet the following requirements.

- (i) The federal credit union must with all applicable federal and state laws and regulations.
- (ii) The federal credit union must put in place a risk management process that is independent of the securitization process to monitor securitization pool performance on an aggregate and individual transaction level.
- (iii) The federal credit union's supervisory committee must obtain an annual audit of the credit union's financial statements performed in accordance with generally accepted auditing standards by an independent licensed auditor. The financial statements subject to audit must include all aspects of accounting and disclosure for sponsored securitizations in accordance with generally accepted accounting principles.
- (iv) The federal credit union's board of directors must possess a general understanding of asset securitization.
- (v) The federal credit union's senior executive officers responsible for securitization activities must possess sufficient expertise to oversee those activities.
- (vi) The federal credit union must have a credit union board approved policy, stating the purpose of securitization activities and establishing principles for their governance.
- (vii) The federal credit union's internal audit or internal risk review function must periodically review data integrity, model algorithms, key underlying assumptions, and the appropriateness of

the valuation and modeling process for the securitized assets retained by the federal credit union, and report the findings of such reviews directly to the federal credit union's board or an appropriate board member.

(6) *Residual interests and retained interests.*

(i) Any provision in part 703 of this chapter that limits a federal credit union's ability to hold a stripped mortgage backed security or residual interest in a collateralized mortgage obligation does not apply to such an instrument retained in the course of sponsoring a securitization transaction.

(ii) A federal credit union must employ reasonable and supportable valuation assumptions and modeling methodologies to establish, evaluate, and adjust the carrying value of residual interests and retained interests on a regular and timely basis and must recognize credit impairment for all residual interests and retained interests in accordance with generally accepted accounting principles.

(iii) A federal credit union must limit the maximum amount of all residual interests and retained interests to 25 percent of net worth. Residual interests and retained interests in pass-through securities, which assume a pro-rata share of risk, are not included in this limitation.

(7) *Implicit recourse prohibited.* A federal credit union may not provide post-sale credit support beyond the contractual obligations entered into at the time of issuance of a securitization transaction.

PART 741—REQUIREMENTS FOR INSURANCE

3. Add §741.226 to read as follows:

§741.226 Asset securitization.

Any credit union that is insured pursuant to Title II of the Act must adhere to the requirements stated in §721.3(n) of this chapter.