

**7535-01-U**

**NATIONAL CREDIT UNION ADMINISTRATION**

**12 CFR Part 750**

**RIN 3133-AD73**

**Golden Parachute and Indemnification Payments – Technical Correction**

**AGENCY:** National Credit Union Administration (NCUA).

**ACTION:** Interim final rule with request for comments.

**SUMMARY:** NCUA is issuing a technical correction to its rule restricting a federally insured credit union (FICU) from making golden parachute and indemnification payments to an institution-affiliated party (IAP), published in the Federal Register of May 26, 2011. The amendment corrects an exception to the definition of golden parachute payment pertaining to plans offered under §457 of the Internal Revenue Code.

**DATES:** Effective on June 27, 2011. Comments must be received by [INSERT DATE 30 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 website:

<http://www.ncua.gov/Resources/RegulationsOpinionsLaws/ProposedRegulations.aspx>.

Follow the instructions for submitting comments.

E-mail: Address to [regcomments@ncua.gov](mailto:regcomments@ncua.gov). Include “[Your name] Comments on “Interim Final Rulemaking for Part 750—Golden Parachute and Indemnification Payments – Technical Correction” in the e-mail subject line.

Fax: (703) 518-6319. Use the subject line described above for e-mail.

Mail: Address to Mary Rupp, 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/Resources/RegulationsOpinionsLaws/ProposedRegulations.aspx> 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 a.m. and 3 p.m. To make an appointment, call (703) 518-6546 or send an e-mail to [OGCMail@ncua.gov](mailto:OGCMail@ncua.gov).

**FOR FURTHER INFORMATION CONTACT:** Pamela Yu, Staff Attorney, Office of General Counsel, or Ross Kendall, Special Counsel to the General Counsel, at the address above or telephone (703) 518-6540.

## **SUPPLEMENTARY INFORMATION**

### **A. Background**

The NCUA published a final rule in the Federal Register on May 26, 2011, at 76 FR 30510, containing a comprehensive framework outlining permissible and impermissible payments that FICUs can make in the nature of golden parachutes and indemnification for IAPs. The final rule requires a technical correction to conform the language concerning one permissible exception involving golden parachute restrictions to the intent of the rule, as described in the preamble to the May 26, 2011 rulemaking.

### **B. Correction**

The intent of the final rule is that post-employment payments having reasonable business purposes should not be prohibited. Accordingly, the rule excludes from the definition of “golden parachute payment” certain qualified retirement plans such as those permitted under §401 of the Internal Revenue Code (IRC). As discussed in the preamble to the final rule, in response to comments the Board intended to provide

similar treatment to retirement plans that are permissible under §457 of the IRC, which are frequently used by credit unions and other tax exempt organizations.

Plans qualifying as eligible deferred compensation plans under §457(b) of the IRC exhibit characteristics that are similar to the more common §401(k) deferred compensation plans that many employers make available to their employees. For example, the amount of income that may be deferred under such a plan is equivalent to that which may be deferred under §401, which for 2011 is \$16,500. As with §401 plans, moreover, manipulation of the timing and amount of the payout are also closely circumscribed by law. For example, these plans may not typically provide for an in-service distribution prior to retirement. Accordingly, the Board intended for §457(b) plans to be treated like §401 plans and excluded from the definition of golden parachute payment.

Although the preamble to the final rule makes reference to plans under subsection (b) and (f) of §457, it does not provide any substantive discussion concerning the differences between them. In fact, however, plans that are permissible under the latter subsection are significantly broader and are accorded much greater flexibility in terms of structure, vesting, etc. The intent of the rule has always been that §457(f) plans must also meet the “bona fide” criteria outlined in §750.1(c) to qualify as exceptions to the otherwise applicable golden parachute restrictions. Because of the limits inherent in §457(b) and the constraints governing plans offered under that subsection, the Board

intended to specify that only §457(b) plans are excluded by definition from the term golden parachute payment.

This interim final rule amends §750.1(e) to clarify that plans offered by FICUs under §457(b) of the IRC are excluded from the definition of golden parachute payment. Plans offered under §457(f), however, must meet the “bona fide” criteria outlined in §750.1(c) to qualify as exceptions to the golden parachute payment definition.

### **C. Interim Final Rule**

NCUA is issuing this rulemaking as an interim final rule effective as of June 27, 2011, which is the date the new part 750 will take effect. 76 FR 30510 (May 26, 2011). The Administrative Procedure Act (APA), 5 U.S.C. 553, generally requires that before a rulemaking can be finalized it must first be published as a notice of proposed rulemaking with the opportunity for public comment, unless the agency for good cause finds that notice and public comment are impracticable, unnecessary, or contrary to the public interest. In this regard, NCUA believes good cause exists for issuing this clarifying amendment as an interim final rule, in order to coordinate with the effective date of the new part 750 as well as eliminate as soon as possible any confusion resulting from preamble language that is inconsistent with, or makes ambiguous, the associated regulatory text. To that extent, NCUA believes issuing this rulemaking as an

interim final rule is in the public interest. NCUA does not anticipate comments on this change and so is allowing only a 30-day comment period.

#### **D. Regulatory Procedures**

##### *Regulatory Flexibility Act*

The Regulatory Flexibility Act requires NCUA to prepare an analysis to describe any significant economic impact any proposed regulation may have on a substantial number of small entities (those under \$10 million in assets). This interim final rule provides clarification regarding the applicability of one of the exceptions to otherwise applicable regulatory restrictions. Accordingly, it will not have a significant economic impact on a substantial number of small credit unions, and therefore, no regulatory flexibility analysis is required.

##### 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).

### 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. 5 U.S.C. 551. NCUA does not believe this final rule is a “major rule” within the meaning of the relevant sections of SBREFA. NCUA has submitted the rule to the Office of Management and Budget for its determination in that regard.

### 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); 5 CFR part 1320. 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. These technical corrections do not impose any new paperwork burden.

### **List of Subjects**

#### **12 CFR Part 750**

Credit Unions, Golden parachute payments, Indemnity payments.

By the National Credit Union Administration Board, this 17<sup>th</sup> day of June, 2011.

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Mary F. Rupp

Secretary of the Board

For the reasons stated in the preamble, the National Credit Union Administration amends 12 CFR part 750 as set forth below:

#### **PART 750—GOLDEN PARACHUTE AND INDEMNIFICATION PAYMENTS**

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

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

2. Revise the definition of “Golden Parachute Payment” in §750.1(e) to read as follows:

**§750.1 Definitions**

\* \* \* \* \*

(e) Golden parachute payment

\* \* \*

2) Exceptions. The term golden parachute payment does not include:

(i) Any payment made pursuant to a deferred compensation plan under section 457(b) of the Internal Revenue Code of 1986, 26 U.S.C. 457(b), or a pension or retirement plan that is qualified or is intended within a reasonable period of time to be qualified under section 401 of the Internal Revenue Code of 1986, 26 U.S.C. 401; or

(ii) \* \* \* \* \*