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to all its members at least once a year, either in the annual report or in some other manner of the corporate's choosing.

(c) *Supplemental information.* In providing the disclosure required by this section, a corporate credit union may also provide supplementary information to put the disclosure in context, for example, salary surveys, a discussion of compensation in relation to other credit union expenses, or compensation information from similarly sized credit unions or financial institutions.

(d) *Special rule for mergers.* With respect to any merger involving a corporate credit union that would result in a material increase in compensation, *i.e.*, an increase of more than 15 percent or \$10,000, whichever is greater, for any senior executive officer or director of the merging corporate, the corporate must:

(1) Describe the compensation arrangement in the merger plan documents submitted to NCUA for approval of the merger, pursuant to §708b of this part; and

(2) In the case of any federally chartered corporate credit union, describe the compensation arrangement in the materials provided to the membership of the merging credit union before the member vote on approving the merger.

§ 704.20 Limitations on golden parachute and indemnification payments.

(a) *Definitions.* The following definitions apply for this section:

(1) *Board* means the National Credit Union Administration Board.

(2) *Benefit plan* means any plan, contract, agreement or other arrangement which is an "employee welfare benefit plan" as that term is defined in section 3(1) of the Employee Retirement Income Security Act of 1974, as amended (29 U.S.C. 1002(1)), or other usual and customary plans such as dependent care, tuition reimbursement, group legal services or cafeteria plans; provided however, that such term does not include any plan intended to be subject to paragraphs (a)(4)(iv)(C) and (E) of this section.

(3) *Bona fide deferred compensation plan or arrangement* means any plan, contract, agreement or other arrangement whereby:

(i) An institution-affiliated party (IAP) voluntarily elects to defer all or a portion of the reasonable compensation, wages or fees paid for services rendered which otherwise would have been paid to the IAP at the time the services were rendered (including a

plan that provides for the crediting of a reasonable investment return on such elective deferrals) and the corporate credit union either:

(A) Recognizes compensation expense and accrues a liability for the benefit payments according to Generally Accepted Accounting Principles (GAAP); or

(B) Segregates or otherwise sets aside assets in a trust which may only be used to pay plan and other benefits, except that the assets of such trust may be available to satisfy claims of the institution's or holding company's creditors in the case of insolvency; or

(ii) A corporate credit union establishes a nonqualified deferred compensation or supplemental retirement plan, other than an elective deferral plan described in paragraph (a)(3)(i) of this section:

(A) Primarily for the purpose of providing benefits for certain IAPs in excess of the limitations on contributions and benefits imposed by Sections 415, 401(a)(17), 402(g) or any other applicable provision of the Internal Revenue Code of 1986 (26 USC 415, 401(a)(17), 402(g)); or

(B) Primarily for the purpose of providing supplemental retirement benefits or other deferred compensation for a select group of directors, management or highly compensated employees (excluding severance payments described in paragraph (4)(ii)(E) of this section and permissible golden parachute payments described in §704.20(d); and

(iii) In the case of any nonqualified deferred compensation or supplemental retirement plans as described in paragraphs (a)(3)(i) and (ii) of this section, the following requirements will apply:

(A) The plan was in effect at least one year prior to any of the events described in paragraph (a)(4)(ii) of this section;

(B) Any payment made pursuant to such plan is made in accordance with the terms of the plan as in effect no later than one year prior to any of the events described in paragraph (a)(4)(ii) of this section and in accordance with any amendments to such plan during such one year period that do not increase the benefits payable thereunder;

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(C) The IAP has a vested right, as defined under the applicable plan document, at the time of termination of employment to payments under such plan;

(D) Benefits under such plan are accrued each period only for current or prior service rendered to the employer (except that an allowance may be made for service with a predecessor employer);

(E) Any payment made pursuant to such plan is not based on any discretionary acceleration of vesting or accrual of benefits which occurs at any time later than one year prior to any of the events described in paragraph (a)(4)(ii) of this section;

(F) The corporate credit union has previously recognized compensation expense and accrued a liability for the benefit payments according to GAAP or segregated or otherwise set aside assets in a trust which may only be used to pay plan benefits, except that the assets of such trust may be available to satisfy claims of the corporate credit union's creditors in the case of insolvency; and

(G) Payments pursuant to such plans must not be in excess of the accrued liability computed in accordance with GAAP.

(4) *Golden parachute payment* means any payment (or any agreement to make any payment) in the nature of compensation by any corporate credit union for the benefit of any current or former IAP pursuant to an obligation of such corporate credit union that:

(i) Is contingent on, or by its terms is payable on or after, the termination of such IAP's primary employment or affiliation with the corporate credit union; and

(ii) Is received on or after, or is made in contemplation of, any of the following events:

(A) The insolvency (or similar event) of the corporate that is making the payment; or

(B) The appointment of any conservator or liquidating agent for such corporate credit union; or

(C) A determination by the Board or the appropriate state supervisory authority (in the case of a state-chartered corporate credit union) respec-

tively, that the corporate credit union is in a troubled condition; or

(D) The corporate credit union is undercapitalized, as defined in § 704.4; or

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

(iii) Is payable to an IAP whose employment by or affiliation with the corporate is terminated at a time when the corporate credit union by which the IAP is employed or with which the IAP is affiliated satisfies any of the conditions enumerated in paragraphs (a)(4)(ii)(A) through (E) of this section, or in contemplation of any of these conditions.

(iv) *Exceptions.* The term *golden parachute payment* does not include:

(A) Any payment made pursuant to a pension or retirement plan which 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

(B) Any payment made pursuant to a benefit plan as that term is defined in paragraph (a)(2) of this section; or

(C) Any payment made pursuant to a bona fide deferred compensation plan or arrangement as defined in paragraph (a)(3) of this section; or

(D) Any payment made by reason of death or by reason of termination caused by the disability of an IAP; or

(E) Any payment made pursuant to a nondiscriminatory severance pay plan or arrangement which provides for payment of severance benefits to all eligible employees upon involuntary termination other than for cause, voluntary resignation, or early retirement; *provided, however*, that no employee will receive any such payment which exceeds the base compensation paid to such employee during the twelve months (or such longer period or greater benefit as the Board will consent to) immediately preceding termination of employment, resignation or early retirement, and such severance pay plan or arrangement must not have been adopted or modified to increase the amount or scope of severance benefits at a time when the corporate credit union was in a condition specified in paragraph (a)(4)(ii) of this section or in

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contemplation of such a condition without the prior written consent of the Board; or

(F) Any severance or similar payment which is required to be made pursuant to a state statute which is applicable to all employers within the appropriate jurisdiction (with the exception of employers that may be exempt due to their small number of employees or other similar criteria); or

(G) Any other payment which the Board determines to be permissible in accordance with § 704.20(d).

(5) *Institution-affiliated party* (IAP) means any individual meeting the criteria specified in section 206(r) of the Act (12 U.S.C. 1786(r)).

(6) *Liability or legal expense* means:

(i) Any legal or other professional fees and expenses incurred in connection with any claim, proceeding, or action;

(ii) The amount of, and any cost incurred in connection with, any settlement of any claim, proceeding, or action; and

(iii) The amount of, and any cost incurred in connection with, any judgment or penalty imposed with respect to any claim, proceeding, or action.

(7) *Nondiscriminatory* means that the plan, contract or arrangement in question applies to all employees of a corporate credit union who meet reasonable and customary eligibility requirements applicable to all employees, such as minimum length of service requirements. A nondiscriminatory plan, contract or arrangement may provide different benefits based only on objective criteria such as salary, total compensation, length of service, job grade or classification, which are applied on a proportionate basis (with a variance in severance benefits relating to any criterion of plus or minus ten percent) to groups of employees consisting of not less than the lesser of 33 percent of employees or 1,000 employees.

(8) *Payment* means:

(i) Any direct or indirect transfer of any funds or any asset;

(ii) Any forgiveness of any debt or other obligation;

(iii) The conferring of any benefit, including but not limited to stock options and stock appreciation rights; or

(iv) Any segregation of any funds or assets, the establishment or funding of any trust or the purchase of or arrangement for any letter of credit or other instrument, for the purpose of making, or pursuant to any agreement to make, any payment on or after the date on which such funds or assets are segregated, or at the time of or after such trust is established or letter of credit or other instrument is made available, without regard to whether the obligation to make such payment is contingent on:

(A) The determination, after such date, of the liability for the payment of such amount; or

(B) The liquidation, after such date, of the amount of such payment.

(9) *Prohibited indemnification payment* means any payment (or any agreement or arrangement to make any payment) by any corporate credit union for the benefit of any person who is or was an IAP of such corporate credit union, to pay or reimburse such person for any civil money penalty, judgment or other liability or legal expense resulting from any administrative or civil action instituted by the Board or any appropriate state regulatory authority that results in a final order or settlement pursuant to which such person:

(i) Is assessed a civil money penalty;

(ii) Is removed from office or prohibited from participating in the conduct of the affairs of the corporate credit union; or

(iii) Is required to cease and desist from or take any affirmative action described in Section 206 of the Act with respect to such corporate credit union.

(iv) *Exceptions.* The term *prohibited indemnification payment* does not include any reasonable payment by a corporate credit union that:

(A) Is used to purchase any commercial insurance policy or fidelity bond, provided that such insurance policy or bond must not be used to pay or reimburse an IAP for the cost of any judgment or civil money penalty assessed against such person in an administrative proceeding or civil action commenced by NCUA or the appropriate state supervisory authority (in the case of a state chartered corporate), but may pay any legal or professional expenses incurred in connection with

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such proceeding or action or the amount of any restitution to the corporate credit union or its liquidating agent; or

(B) Represents partial indemnification for legal or professional expenses specifically attributable to particular charges for which there has been a formal and final adjudication or finding in connection with a settlement that the IAP has not violated certain laws or regulations or has not engaged in certain unsafe or unsound practices or breaches of fiduciary duty, unless the administrative action or civil proceeding has resulted in a final prohibitive order against the IAP.

(10) *Troubled Condition* means that the corporate credit union:

(i) *Has been assigned:*

(A) A 4 or 5 Corporate Risk Information System (CRIS) rating by NCUA in either the Financial Risk or Risk Management composites, in the case of a federal corporate credit union, or

(B) An equivalent 4 or 5 CRIS rating in either the Financial Risk or Risk Management composites by the state supervisory authority (SSA) in the case of a federally insured, state-chartered corporate credit union in a state that has adopted the CRIS system, or an equivalent 4 or 5 CAMEL composite rating by the SSA in the case of a federally insured, state-chartered corporate credit union in a state that uses the CAMEL system, or

(C) A 4 or 5 CRIS rating in either the Financial Risk or Risk Management composites by NCUA based on core work papers received from the SSA in the case of a federally insured, state-chartered credit union in a state that does not use either the CRIS or CAMEL system. In this case, the SSA will be notified in writing by the Director of the Office of Corporate Credit Unions that the corporate credit union has been designated by NCUA as a troubled institution; or

(ii) Has been granted assistance as outlined under Sections 208 or 216 of the Federal Credit Union Act.

(b) *Golden parachute payments prohibited.* No corporate credit union will make or agree to make any golden parachute payment, except as otherwise provided in this section.

(c) *Prohibited indemnification payments.* No corporate credit union will make or agree to make any prohibited indemnification payment, except as provided in this section.

(d) *Permissible golden parachute payments.* (1) A corporate credit union may agree to make or may make a golden parachute payment if and to the extent that:

(i) Such an agreement is made in order to hire a person to become an IAP either at a time when the corporate credit union satisfies or in an effort to prevent it from imminently satisfying any of the criteria set forth in paragraph (a)(4)(ii) of this section, and the Board, consents in writing to the amount and terms of the golden parachute payment. Such consent by the Board must not improve the IAP's position in the event of the insolvency of the corporate credit union since such consent can neither bind a liquidating agent nor affect the provability of claims in liquidation. In the event that the institution is placed into conservatorship or liquidation, the conservator or the liquidating agent, as the case may be, will not be obligated to pay the promised golden parachute and the IAP will not be accorded preferential treatment on the basis of such prior approval; or

(ii) Such a payment is made pursuant to an agreement which provides for a reasonable severance payment, not to exceed twelve months salary, to an IAP in the event of a merger with another corporate credit union; provided, however, that a corporate credit union must obtain the consent of the Board, before making such a payment and this paragraph (d)(1)(iii) does not apply to any merger between corporates that results from an assisted transaction as described in Section 208 of the Act (12 U.S.C. 1788) or the corporate credit union being placed into conservatorship or liquidation; or

(iii) The Board, with the written concurrence of the appropriate state supervisory authority (in the case of a state-chartered corporate), determines that such a payment or agreement is permissible.

(2) A corporate credit union making a request pursuant to paragraphs (d)(1)(i)

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through (iii) of this section must demonstrate that it does not possess and is not aware of any information, evidence, documents or other materials which would indicate that there is a reasonable basis to believe, at the time such payment is proposed to be made, that:

(i) The IAP has committed any fraudulent act or omission, breach of trust or fiduciary duty, or insider abuse with regard to the corporate credit union that has had or is likely to have a material adverse effect on the corporate credit union;

(ii) The IAP is substantially responsible for the insolvency of, the appointment of a conservator or liquidating agent for, or the troubled condition, as defined by §701.14(b)(4), of the corporate credit union;

(iii) The IAP has materially violated any applicable federal or state banking law or regulation that has had or is likely to have a material effect on the corporate credit union; and

(iv) The IAP has violated or conspired to violate Section 215, 656, 657, 1005, 1006, 1007, 1014, 1032, or 1344 of Title 18 of the United States Code, or Section 1341 or 1343 of such title affecting a federally insured financial institution as defined in Title 18 of the United States Code.

(3) In making a determination under paragraphs (d)(1)(i) through (iii) of this section, the Board may consider:

(i) Whether, and to what degree, the IAP was in a position of managerial or fiduciary responsibility;

(ii) The length of time the IAP was affiliated with the corporate credit union, and the degree to which the proposed payment represents a reasonable payment for services rendered over the period of employment; and

(iii) Any other factors or circumstances which would indicate that the proposed payment would be contrary to the intent of Section 206(t) of the Act or this part.

(e) *Permissible indemnification payments.* (1) A corporate credit union may make or agree to make reasonable indemnification payments to an IAP with respect to an administrative proceeding or civil action initiated by NCUA or a state regulatory authority if:

(i) The corporate credit union's board of directors, in good faith, determines in writing after due investigation and consideration that the institution-affiliated party acted in good faith and in a manner he/she believed to be in the best interests of the membership;

(ii) The corporate credit union's board of directors, in good faith, determines in writing after due investigation and consideration that the payment of such expenses will not materially adversely affect the institution's or holding company's safety and soundness;

(iii) The indemnification payments do not constitute prohibited indemnification payments as that term is defined in §704.20(c); and

(iv) The IAP agrees in writing to reimburse the corporate credit union, to the extent not covered by payments from insurance or bonds purchased pursuant to §704.20(a)(9)(iv)(A), for that portion of the advanced indemnification payments which subsequently become prohibited indemnification payments, as defined in §704.20(a)(9).

(2) An IAP seeking indemnification payments must not participate in any way in the board's discussion and approval of such payments; provided, however, that such IAP may present his/her request to the board and respond to any inquiries from the board concerning his/her involvement in the circumstances giving rise to the administrative proceeding or civil action.

(3) In the event that a majority of the members of the board of directors are named as respondents in an administrative proceeding or civil action and request indemnification, the remaining members of the board may authorize independent legal counsel to review the indemnification request and provide the remaining members of the board with a written opinion of counsel as to whether the conditions delineated in paragraph (e)(1) of this section have been met. If independent legal counsel opines that said conditions have been met, the remaining members of the board of directors may rely on such opinion in authorizing the requested indemnification.

(4) In the event that all of the members of the board of directors are

named as respondents in an administrative proceeding or civil action and request indemnification, the board will authorize independent legal counsel to review the indemnification request and provide the board with a written opinion of counsel as to whether the conditions delineated in paragraph (e)(1) of this section have been met. If independent legal counsel opines that said conditions have been met, the board of directors may rely on such opinion in authorizing the requested indemnification.

(f) *Filing instructions.* Requests to make excess nondiscriminatory severance plan payments pursuant to §704.20(a)(4)(iv)(E) and golden parachute payments permitted by §704.20(d) must be submitted in writing to the Board. The request must be in letter form and must contain all relevant factual information as well as the reasons why such approval should be granted.

(g) *Applicability in the event of liquidation or conservatorship.* The provisions of this part, or any consent or approval granted under the provisions of this part by the Board, will not in any way bind any liquidating agent or conservator for a failed corporate credit union and will not in any way obligate the liquidating agent or conservator to pay any claim or obligation pursuant to any golden parachute, severance, indemnification or other agreement. Claims for employee welfare benefits or other benefits that are contingent, even if otherwise vested, when a liquidating agent or conservator is appointed for any corporate credit union, including any contingency for termination of employment, are not provable claims or actual, direct compensatory damage claims against such liquidating agent or conservator. Nothing in this part may be construed to permit the payment of salary or any liability or legal expense of any IAP contrary to 12 U.S.C. 1786(t)(3).

[75 FR 64845, Oct. 20, 2010]

EFFECTIVE DATE NOTE: At 75 FR 64845, Oct. 20, 2010, §704.20 was added, effective January 18, 2011.

APPENDIX A TO PART 704—MODEL FORMS

This appendix contains sample forms intended for use by corporate credit unions to aid in compliance with the membership capital account and paid-in capital disclosure requirements of §704.3.

Sample Form 1

Terms and Conditions of Membership Capital Account

(1) A membership capital account is not subject to share insurance coverage by the NCUSIF or other deposit insurer.

(2) A membership capital account is not releasable due solely to the merger, charter conversion or liquidation of the member credit union. In the event of a merger, the membership capital account transfers to the continuing credit union. In the event of a charter conversion, the membership capital account transfers to the new institution. In the event of liquidation, the membership capital account may be released to facilitate the payout of shares with the prior written approval of NCUA.

(3) A member credit union may withdraw membership capital with three years' notice.

(4) Membership capital cannot be used to pledge borrowings.

(5) Membership capital is available to cover losses that exceed retained earnings and paid-in capital.

(6) Where the corporate credit union is liquidated, membership capital accounts are payable only after satisfaction of all liabilities of the liquidation estate including uninsured obligations to shareholders and the NCUSIF.

(7) Where the corporate credit union is merged into another corporate credit union, the membership capital account will transfer to the continuing corporate credit union. The three-year notice period for withdrawal of the membership capital account will remain in effect.

(8) {If an adjusted balance account}: The membership capital balance will be adjusted (1 or 2) time(s) annually in relation to the member credit union's (assets or other measure) as of (date(s)). {If a term certificate}: The membership capital account is a term certificate that will mature on (date).

I have read the above terms and conditions and I understand them.

I further agree to maintain in the credit union's files the annual notice of terms and conditions of the membership capital account.

The notice form must be signed by either all of the directors of the member credit union or, if authorized by board resolution,