§ 701.34 Designation of low income status; Acceptance of secondary capital accounts by low-income designated credit unions.

(a) Designation of low-income status.

(1) Based on data obtained through examinations, NCUA will notify a federal credit union that it qualifies for designation as a low-income credit union if a majority of its membership qualifies as low-income members. A federal credit union that wishes to receive the designation will notify NCUA in writing within 30 days of receipt of NCUA's notification.

(2) Low-income members are those members whose family income is 80% or less than the median family income for the metropolitan area where they live or national metropolitan area, whichever is greater, or those members who earn 80% or less than the total median earnings for individuals for the metropolitan area where they live or national metropolitan area, whichever is greater. NCUA will use the statewide...
or national, non-metropolitan area median family income instead of the metropolitan area or national metropolitan area median family income for members living outside a metropolitan area. Member earnings will be estimated based on data reported by the U.S. Census Bureau for the geographic area where the member lives. The term “low-income members” also includes those members enrolled as students in a college, university, high school, or vocational school.

(3) Federal credit unions that do not receive notification that they qualify for a low-income credit union designation but believe they qualify may submit information to NCUA to demonstrate they qualify for a low-income credit union designation. For example, federal credit unions may provide actual member income from loan applications or surveys to demonstrate a majority of their membership is low-income members. Actual member income data must be compared to a like category of statistical data, for example, actual individual member income may only be compared to total median earnings for individuals for the metropolitan area where they live or national metropolitan area, whichever is greater. A Federal credit union may rely on a sample of membership income data drawn from loan files or a member survey provided the Federal credit union can demonstrate the sample is a statistically valid, random sample by submitting with its data a narrative describing its sampling technique and evidence supporting the validity of the analysis, including the actual data set used in the analysis. The random sample must be representative of the membership, must be sufficient in both number and scope on which to base conclusions, and must have a minimum confidence level of 95% and a confidence interval of 5%. A Federal credit union may appeal NCUA’s determination that the credit union no longer meets the criteria for a low-income designation to the Board within 60 days of the date of the notice from NCUA. An appeal must be submitted through NCUA.

(5) Any credit union with a low-income credit union designation on January 1, 2009 will have five years from that date to meet the criteria for low-income designation under paragraph (a)(1) of this section, unless NCUA determines a longer time is required to allow the low-income credit union to satisfy the terms of a secondary capital or nonmember deposit account agreement.

(6) Definitions. The following definitions apply to this section:

Median family income and total median earnings for individuals are income statistics reported by the U.S. Census Bureau. The applicable income data can be obtained via the American FactFinder on the Census Bureau’s webpage at http://factfinder.census.gov/home/saff/main.html?lang=en.

Metropolitan area means an area designated by the Office of Management and Budget pursuant to 31 U.S.C. 1104(d), 44 U.S.C. 2504(c), and Executive Order 10253, 16 FR 5605 (June 13, 1951) (as amended).

(b) Acceptance of secondary capital accounts by low-income designated credit unions. A federal credit union having a designation of low-income status pursuant to paragraph (a) of this section may accept secondary capital accounts
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from nonnatural person members and
nonnatural person nonmembers subject

to the following conditions:

(1) Secondary capital plan. Before ac-
ccepting secondary capital, a low-in-
come credit union ("LICU") shall
adopt, and forward to NCUA for ap-

proval, a written "Secondary Capital

Plan" that, at a minimum:

(i) States the maximum aggregate

amount of uninsured secondary capital
the LICU plans to accept;

(ii) Identifies the purpose for which

the aggregate secondary capital will be

used, and how it will be repaid;

(iii) Explains how the LICU will pro-
vide for liquidity to repay secondary
capital upon maturity of the accounts;

(iv) Demonstrates that the planned
uses of secondary capital conform to
the LICU's strategic plan, business
plan and budget; and

(v) Includes supporting pro forma fi-
nancial statements, including any off-
balance sheet items, covering a min-
imum of the next two years.

(2) Decision on plan. If a LICU is not

 notified within 45 days of receipt of a
Secondary Capital Plan that the plan
is approved or disapproved, the LICU
may proceed to accept secondary cap-
cital accounts pursuant to the plan.

(3) Nonshare account. The secondary

capital account must be established as
an uninsured secondary capital ac-
count or other form of non-share ac-
count.

(4) Minimum maturity. The maturity

of the secondary capital account must
be a minimum of five years.

(5) Uninsured account. The secondary
capital account will not be insured by
the National Credit Union Share Insur-
ance Fund or any governmental or pri-

vate entity.

(6) Subordination of claim. The sec-

ondary capital account investor's
claim against the LICU must be subor-
dinate to all other claims including
those of shareholders, creditors and the
National Credit Union Share Insurance
Fund.

(7) Availability to cover losses. Funds
deposited into a secondary capital ac-
count, including interest accrued and
paid into the secondary capital ac-
count, must be available to cover oper-
ating losses realized by the LICU that
exceed its net available reserves (exclu-
sive of secondary capital and allowance
accounts for loan and lease losses), and
to the extent funds are so used, the
LICU must not restore or replenish the
account under any circumstances. The
LICU may, in lieu of paying interest
into the secondary capital account, pay
accrued interest directly to the inves-
tor or into a separate account from
which the secondary capital investor
may make withdrawals. Losses must be
distributed pro-rata among all sec-
ondary capital accounts held by the
LICU at the time the losses are real-
ized. In instances where a LICU accept-
ed secondary capital from the United
States Government or any of its sub-
divisions under the Community Devel-
opment Capital Initiative of 2010 ("CDCI secondary capital") and matching
funds were required under the Ini-
tiative and are on deposit in the form
of secondary capital at the time a loss
is realized, a LICU must apply either of
the following pro-rata loss distribution
procedures to its secondary capital ac-
counts with respect to the loss:

(i) If not inconsistent with any agree-
ments governing other secondary cap-
ital on deposit at the time a loss is re-
alized, the CDCI secondary capital may
be excluded from the calculation of the
pro-rata loss distribution until all of
its matching secondary capital has
been depleted, thereby causing the
CDCI secondary capital to be held as
senior to all other secondary capital
until its matching secondary capital is
exhausted. The CDCI secondary capital
should be included in the calculation of
the pro-rata loss distribution and is
available to cover the loss only after
all of its matching secondary capital
has been depleted.

(ii) Regardless of any agreements ap-
licable to other secondary capital, the
CDCI secondary capital and its match-
ing secondary capital may be consid-
ered a single account for purposes of
determining a pro-rata share of the
loss and the amount determined as the
pro-rata share for the combined ac-
count must first be applied to the
matching secondary capital account,
thereby causing the CDCI secondary
capital to be held as senior to its
matching secondary capital. The CDCI
secondary capital is available to cover
the loss only after all of its matching secondary capital has been depleted.

(8) Security. The secondary capital account may not be pledged or provided by the account investor as security on a loan or other obligation with the LICU or any other party.

(9) Merger or dissolution. In the event of merger or other voluntary dissolution of the LICU, other than merger into another LICU, the secondary capital accounts will be closed and paid out to the account investor to the extent they are not needed to cover losses at the time of merger or dissolution.

(10) Contract agreement. A secondary capital account contract agreement must be executed by an authorized representative of the account investor and of the LICU reflecting the terms and conditions mandated by this section and any other terms and conditions not inconsistent with this section.

(11) Disclosure and acknowledgement. An authorized representative of the LICU and of the secondary capital account investor each must execute a “Disclosure and Acknowledgment” as set forth in the appendix to this section at the time of entering into the account agreement. The LICU must retain an original of the account agreement and the “Disclosure and Acknowledgment” for the term of the agreement, and a copy must be provided to the account investor.

(12) Prompt corrective action. As provided in §§702.204(b)(11), 702.304(b) and 702.305(b) of this chapter, the NCUA Board may prohibit a LICU classified “critically undercapitalized” or, if “new,” as “moderately capitalized”, “marginally capitalized”, “minimally capitalized” or “uncapitalized”, as the case may be, from paying principal, dividends or interest on its uninsured secondary capital accounts established after August 7, 2000, except that unpaid dividends or interest will continue to accrue under the terms of the account to the extent permitted by law.

(c) Accounting treatment; Recognition of net worth value of accounts—(1) Equity account. A LICU that issues secondary capital accounts pursuant to paragraph (b) of this section must record the funds on its balance sheet in an equity account entitled “uninsured secondary capital account.”

(2) Schedule for recognizing net worth value. The LICU’s reflection of the net worth value of the accounts in its financial statement may never exceed the full balance of the secondary capital on deposit after any early redemptions and losses. For accounts with remaining maturities of less than five years, the LICU must reflect the net worth value of the accounts in its financial statement in accordance with the lesser of:

(i) The remaining balance of the accounts after any redemptions and losses; or
(ii) The amounts calculated based on the following schedule:

<table>
<thead>
<tr>
<th>Remaining maturity</th>
<th>Net worth value of original balance (percent)</th>
</tr>
</thead>
<tbody>
<tr>
<td>Four to less than five years</td>
<td>80</td>
</tr>
<tr>
<td>Three to less than four years</td>
<td>60</td>
</tr>
<tr>
<td>Two to less than three years</td>
<td>40</td>
</tr>
<tr>
<td>One to less than two years</td>
<td>20</td>
</tr>
<tr>
<td>Less than one year</td>
<td>0</td>
</tr>
</tbody>
</table>

(3) Financial statement. The LICU must reflect the full amount of the secondary capital on deposit in a footnote to its financial statement.

(d) Redemption of secondary capital. With the written approval of NCUA, secondary capital that is not recognized as net worth under paragraph (c)(2) of this section (“discounted secondary capital” reclassified as subordinated debt) may be redeemed according to the remaining maturity schedule in paragraph (d)(3) of this section.

(1) Request to redeem secondary capital. A request for approval to redeem discounted secondary capital may be submitted in writing at any time, must specify the increment(s) to be redeemed and the schedule for redeeming all or any part of each eligible increment, and must demonstrate to the satisfaction of NCUA that:

(i) The LICU will have a post-redemption net worth classification of “adequately capitalized” under part 702 of this chapter;
(ii) The discounted secondary capital has been on deposit at least two years;
(iii) The discounted secondary capital will not be needed to cover losses prior to final maturity of the account.
(iv) The LICU’s books and records are current and reconciled;
(v) The proposed redemption will not jeopardize other current sources of funding, if any, to the LICU; and
(vi) The request to redeem is authorized by resolution of the LICU’s board of directors.

(2) Decision on request. A request to redeem discounted secondary capital may be granted in whole or in part. If a LICU is not notified within 45 days of receipt of a request for approval to redeem secondary capital that its request is either granted or denied, the LICU may proceed to redeem secondary capital accounts as proposed.

(3) Schedule for redeeming secondary capital.

<table>
<thead>
<tr>
<th>Remaining maturity</th>
<th>Redemption limit as percent of original balance</th>
</tr>
</thead>
<tbody>
<tr>
<td>Four to less than five years</td>
<td>20</td>
</tr>
<tr>
<td>Three to less than four years</td>
<td>40</td>
</tr>
<tr>
<td>Two to less than three years</td>
<td>60</td>
</tr>
<tr>
<td>One to less than two years</td>
<td>80</td>
</tr>
</tbody>
</table>

(4) Early redemption exception. Subject to the written approval of NCUA obtained pursuant to the requirements of paragraphs (d)(1) and (2) of this section, a LICU can redeem all or part of secondary capital accepted from the United States Government or any of its subdivisions at any time after the secondary capital has been on deposit for two years. If the secondary capital was accepted under conditions that required matching secondary capital from a source other than the Federal Government, the matching secondary capital may also be redeemed in the manner set forth in the preceding sentence. For purposes of obtaining NCUA’s approval, all secondary capital a LICU accepts from the United States Government or any of its subdivisions, as well as its matching secondary capital, if any, is eligible for early redemption regardless of whether any part of the secondary capital has been discounted pursuant to paragraph (c)(2) of this section.

APPENDIX TO § 701.34

A LICU that is authorized to accept uninsured secondary capital accounts and each investor in such an account shall execute and date the following “Disclosure and Acknowledgment” form, a signed original of which must be retained by the credit union:

**DISCLOSURE AND ACKNOWLEDGMENT**

[Name of CU] and [Name of investor] hereby acknowledge and agree that [Name of investor] has committed [amount of funds] to a secondary capital account with [name of credit union] under the following terms and conditions:

1. **Term.** The funds committed to the secondary capital account are committed for a period of ___ years.

2. **Redemption prior to maturity.** Subject to the conditions set forth in 12 CFR 701.34, the funds committed to the secondary capital account are redeemable prior to maturity only at the option of the LICU and only with the prior approval of NCUA.

3. **Uninsured, non-share account.** The secondary capital account is not a share account and the funds committed to the secondary capital account are not insured by the National Credit Union Share Insurance Fund or any other governmental or private entity.

4. **Prepayment risk.** Redemption of U.S.C. prior to the account’s original maturity date may expose the account investor to the risk of being unable to reinvest the repaid funds at the same rate of interest for the balance of the period remaining until the original maturity date. The investor acknowledges that it understands and assumes responsibility for prepayment risk associated with the [name of credit union]’s redemption of the investor’s U.S.C. account prior to the original maturity date.

5. **Availability to cover losses.** The funds committed to the secondary capital account and any interest paid into the account may be used by [name of credit union] to cover any and all operating losses that exceed the credit union’s net worth exclusive of allowance accounts for loan losses, and in the event the funds are so used, (name of credit union) will under no circumstances restore or replenish those funds to [name of institutional investor]. Dividends are not considered operating losses and are not eligible to be paid out of secondary capital.

6. **Accrued interest.** By initialing below, [name of credit union] and [name of institutional investor] agree that accrued interest will be:
   - Paid into and become part of the secondary capital account;
   - Paid directly to the investor;
   - Paid into a separate account from which the investor may make withdrawals; or
   - Any combination of the above provided the details are specified and agreed to in writing.

7. **Subordination of claims.** In the event of liquidation of [name of credit union], the funds committed to the secondary capital...
§ 701.35 Share, share draft, and share certificate accounts.

(a) Federal credit unions may offer share, share draft, and share certificate accounts in accordance with section 107(6) of the Act (12 U.S.C. 1757(6)) and the board of directors may declare dividends on such accounts as provided in section 117 of the Act (12 U.S.C. 1763).

(b) A Federal credit union shall accurately represent the terms and conditions of its share, share draft, and share certificate accounts in all advertising, disclosures, or agreements, whether written or oral.

(c) A Federal credit union may, consistent with this section, parts 707 and 740 of this subchapter, other federal law, and its contractual obligations, determine the types of fees or charges and other matters affecting the opening, maintaining and closing of a share, share draft or share certificate account. State laws regulating such activities are not applicable to federal credit unions.

(d) For purposes of this section, "state law" means the constitution, statutes, regulations, and judicial decisions of any state, the District of Columbia, the several territories and possessions of the United States, and the Commonwealth of Puerto Rico.

§ 701.36 FCU ownership of fixed assets.

(a) Investment in Fixed Assets. (1) No Federal credit union with $1,000,000 or more in assets may invest in any fixed assets if the investment would cause the aggregate of all such investments to exceed five percent of the credit union’s shares and retained earnings.

(2) The NCUA may waive the prohibition in paragraph (a)(1) of this section.

(i) A Federal credit union desiring a waiver must submit a written request to the NCUA regional office having jurisdiction over the geographical area in which the credit union’s main office is located. The request must describe in detail the contemplated investment and the need for the investment. The request must also indicate the approximate aggregate amount of fixed assets, as a percentage of shares and retained earnings, that the credit union would hold after the investment.

(ii) The regional director will inform the requesting credit union, in writing, of the date the request was received and of any additional documentation that the regional director might require in support of the waiver request.

(iii) The regional director will approve or disapprove the waiver request in writing within 45 days after receipt of the request and all necessary supporting documentation. If the regional director approves the waiver, the regional director will establish an alternative limit on aggregate investments in fixed assets, either as a dollar limit or as a percentage of the credit union’s shares and retained earnings. Unless otherwise specified by the regional director, the credit union may make future acquisition of fixed assets only if the aggregate all of such future investments in fixed assets does not exceed an additional one percent of the shares and retained earnings of the credit union.