

circumstances warrant, for example, to address changes in the credit union's operations; and

(5) Annual testing.

[72 FR 42274, Aug. 2, 2007, as amended at 77 FR 71085, Nov. 29, 2012]

## PART 750—GOLDEN PARACHUTE AND INDEMNIFICATION PAYMENTS

Sec.

750.0 Scope.

750.1 Definitions.

750.2 Golden parachute payments prohibited.

750.3 Prohibited indemnification payments.

750.4 Permissible golden parachute payments.

750.5 Permissible indemnification payments.

750.6 Filing instructions; appeal.

750.7 Applicability in the event of liquidation or conservatorship.

AUTHORITY: 12 U.S.C. 1786(t).

SOURCE: 76 FR 30517, May 26, 2011, unless otherwise noted.

### § 750.0 Scope.

(a) This part limits and prohibits, in certain circumstances, the ability of Federally insured credit unions, including Federally and state chartered natural person credit unions and Federally and state chartered corporate credit unions, to enter into contracts to pay and to make golden parachute and indemnification payments to institution-affiliated parties (IAPs).

(b) The limitations on golden parachute payments apply to troubled Federally insured credit unions that seek to enter into contracts to pay or to make golden parachute payments to their IAPs. A “golden parachute payment” is generally considered to be any payment to an IAP which is contingent on the termination of that person's employment and is received when the Federally insured credit union making the payment is troubled. The definition of golden parachute payment does not include payments pursuant to qualified retirement plans, non-qualified bona fide deferred compensation plans, nondiscriminatory severance pay plans, other types of common benefits plans, state statutes and death benefits. Certain limited exceptions to the golden parachute payment prohibition are provided for in cases involving

unassisted mergers and the hiring of new management to help improve a troubled Federally insured credit union's financial condition. A procedure is also set forth to permit a Federally insured credit union to request permission to make what would otherwise be a prohibited golden parachute payment.

(c) The limitations on indemnification payments apply to all Federally insured credit unions, including state chartered credit unions, regardless of their financial health. Generally, this part prohibits Federally insured credit unions from indemnifying an IAP for that portion of the costs sustained with regard to an administrative proceeding or civil action commenced by NCUA or a state regulatory authority that results in a final order or settlement pursuant to which the IAP is assessed a civil money penalty, removed from office, prohibited from participating in the affairs of a Federally insured credit union or required to cease and desist from an action or take an affirmative action described in section 206 of the Federal Credit Union Act, 12 U.S.C. 1786. There are exceptions to this general prohibition. First, a Federally insured credit union may purchase commercial insurance to cover these expenses, except judgments and penalties. Second, the credit union may advance legal and other professional expenses to an IAP directly (except for judgments and penalties) if its board of directors makes certain specific findings and the IAP provides a written affirmation and agrees in writing to reimburse the credit union if it is ultimately determined that the IAP violated a law or regulation or has engaged in certain unsafe or unsound practices or breaches of fiduciary duty. For Federal credit unions, fiduciary duty is defined in 701.4 of this chapter. State chartered credit unions should look to applicable state law.

### § 750.1 Definitions.

As used in this part:

(a) *Act* means the Federal Credit Union Act.

(b) *Benefit plan* means any employee benefit plan, contract, agreement or other arrangement subject to the requirements in § 701.19 of this chapter;

## National Credit Union Administration

## § 750.1

provided, however, that to the extent the plan exhibits characteristics of a deferred compensation plan or arrangement, or severance plan, it meets the criteria set forth in paragraph (c) or (i), respectively, of this section.

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

(1) An IAP voluntarily elects to defer all or a portion of the reasonable compensation, wages or fees paid for services rendered that otherwise would have been paid to the IAP at the time the services were rendered, including a plan providing for crediting a reasonable investment return on the elective deferrals, and the Federally insured credit union either:

(i) Recognizes compensation expense and accrues a liability for the benefit payments according to generally accepted accounting principles (GAAP); or

(ii) Segregates or otherwise sets aside assets in a trust that may only be used to pay plan and other benefits, except that the assets of the trust may be available to satisfy claims of the Federally insured credit union's creditors in the case of insolvency; or

(2) A Federally insured credit union establishes a nonqualified deferred compensation or supplemental retirement plan, other than an elective deferral plan described in paragraph (c)(1) of this section:

(i) 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 U.S.C. 415, 401(a)(17), 402(g)); or

(ii) 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 (e)(2)(v) of this section and permissible golden parachute payments described in § 750.4; and

(3) In the case of any nonqualified deferred compensation or supplemental retirement plans as described in para-

graphs (c)(1) and (2) of this section, the following requirements apply:

(i) The plan was in effect at least one year before any of the events described in paragraph (e)(1)(ii) of this section;

(ii) Any payment made pursuant to the plan is made in accordance with the terms of the plan as in effect no later than one year before any of the events described in paragraph (e)(1)(ii) of this section and in accordance with any amendments to the plan during that one year period that do not increase the benefits payable under the plan;

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

(iv) Benefits under the 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;

(v) Any payment made pursuant to the plan is not based on any discretionary acceleration of vesting or accrual of benefits that occurs at any time later than one year before any of the events described in paragraph (e)(1)(ii) of this section;

(vi) The Federally insured 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 that may only be used to pay plan benefits, except that the assets of the trust may be available to satisfy claims of the credit union's creditors in the case of insolvency; and

(vii) Payments pursuant to the plans must not exceed the accrued liability computed in accordance with GAAP.

(d) *Federally insured credit union* means a Federal credit union, state chartered credit union, or corporate credit union the member accounts of which are insured under the Act.

(e) *Golden parachute payment*.

(1) The term *golden parachute payment* means any payment or any agreement to make any payment in the nature of compensation by any Federally insured credit union for the benefit of any current or former IAP pursuant to an obligation of the credit union that:

§750.1

12 CFR Ch. VII (1-1-13 Edition)

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

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

(A) The insolvency of the Federally insured credit union that is making the payment; or

(B) The appointment of any conservator or liquidating agent for the Federally insured credit union; or

(C) A determination by NCUA or, in the case of a state chartered credit union, the appropriate state supervisory authority that the Federally insured credit union is in a troubled condition, as defined in §701.14(b)(3) and (4) of this chapter; or

(D) The Federally insured credit union has been assigned:

(1) In the case of a Federal credit union, 4 or 5 CAMEL composite rating by NCUA; or

(2) In the case of a Federally insured state chartered credit union, an equivalent 4 or 5 CAMEL composite rating by the state supervisor; or

(3) In the case of a Federally insured state chartered credit union in a state that does not use the CAMEL system, a 4 or 5 CAMEL composite rating by NCUA based on core workpapers received from the state supervisor; or

(4) In the case of a corporate credit union, the corporate credit union is undercapitalized as defined in §704.4, or has been assigned a 4 or 5 Corporate Risk Information System (CRIS) rating by NCUA in either the Financial Risk or Risk Management composites, or, in the case of a state chartered corporate credit union, assigned a rating equivalent to a 4 or 5 CRIS rating in either composite by the state supervisory authority (SSA) or by NCUA, based on core exam work papers received from the SSA (in states not using the CRIS or CAMEL rating systems); or

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

(iii) Is payable to an IAP whose employment by or affiliation with a Federally insured credit union is terminated at a time when the Federally insured credit union by which the IAP is

employed or with which the IAP is affiliated satisfies any of the conditions enumerated in paragraphs (e)(1)(ii) (A) through (E) of this section, or in contemplation of any of these conditions.

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

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

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

(v) Any payment made pursuant to a nondiscriminatory severance pay plan or arrangement that 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 payment that exceeds the base compensation paid to the employee during the twelve months, or a longer period or greater benefit as the NCUA will consent to, immediately preceding termination of employment, resignation or early retirement, and the severance pay plan or arrangement must not or cannot have been adopted or modified to increase the amount or scope of severance benefits at a time when the Federally insured credit union was in a condition specified in paragraph (e)(1)(ii) of this section or in contemplation of that condition without the prior written consent of NCUA; or

(vi) Any severance or similar payment required to be made pursuant to a state statute 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

## National Credit Union Administration

## § 750.1

(vii) Any other payment NCUA determines to be permissible in accordance with § 750.4.

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

(g) *Liability or legal expense* means:

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

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

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

(h) *NCUA* means the National Credit Union Administration.

(i) *Nondiscriminatory* means that the plan, contract or arrangement applies to all employees of a Federally insured 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, 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 33% of all employees.

(j) *Payment* means:

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

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

(3) The conferring of any benefit; or

(4) 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 the 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:

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

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

(k) *Prohibited indemnification payment.*

(1) *Prohibited indemnification payment* means any payment or any agreement or arrangement to make any payment by any Federally insured credit union for the benefit of any person who is or was an IAP of the Federally insured 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 NCUA or any appropriate state regulatory authority, in the case of a credit union or corporate credit union chartered by a state, 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 Federally insured credit union; or

(iii) Is required to cease and desist from an action or take any affirmative action described in section 206 of the Act (12 U.S.C.1786) with respect to the credit union.

(2) *Exceptions. Prohibited indemnification payment* does not include any reasonable payment that:

(i) Is used to purchase a commercial insurance policy or fidelity bond, provided that the 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 the IAP in an administrative proceeding or civil action commenced by NCUA or the appropriate state supervisory authority, in the case of a credit union or corporate credit union chartered by a state, but may pay any legal or professional expenses incurred in connection with a proceeding or action or the amount of any restitution, to the Federally insured credit union or its conservator or liquidating agent; or

(ii) Represents partial indemnification for legal or professional expenses specifically attributable to particular

## § 750.2

## 12 CFR Ch. VII (1–1–13 Edition)

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 prohibition order against the IAP.

(1) *Troubled condition* means any Federally insured credit union that meets the criteria as described in § 701.14(b)(3) and (4) of this chapter, or has been granted assistance described in sections 208 or 216 of the Act.

[76 FR 30517, May 26, 2011, as amended at 76 FR 36980, June 24, 2011]

### § 750.2 Golden parachute payments prohibited.

A Federally insured credit union must not make or agree to make any golden parachute payment, except as permitted by this part.

### § 750.3 Prohibited indemnification payments.

A Federally insured credit union must not make or agree to make any prohibited indemnification payment, except as permitted by this chapter.<sup>1</sup>

### § 750.4 Permissible golden parachute payments.

(a) A Federally insured credit union may agree to make or may make a golden parachute payment if:

(1) NCUA, with written concurrence of the appropriate state supervisory authority in the case of a state chartered credit union or corporate credit union, determines the payment or agreement is permissible; or

(2) An agreement is made in order to hire a person to become an IAP at a time when the Federally insured credit union satisfies or in an effort to prevent it from imminently satisfying any of the criteria in § 750.1(e)(1)(ii), and NCUA, with written concurrence of the appropriate state supervisory authority in the case of a state chartered credit union or corporate credit union, consents in writing to the amount and

terms of the golden parachute payment. NCUA's consent will not improve the IAP's position in the event of the insolvency of the credit union since NCUA's consent cannot bind a liquidating agent or affect the provability of claims in liquidation. In the event the credit union is placed into conservatorship or liquidation, the conservator or the liquidating agent will not be obligated to pay the promised golden parachute and the IAP will not be accorded preferential treatment on the basis of any prior approval; or

(3) A payment is made pursuant to an agreement that provides for a reasonable severance payment, not to exceed twelve months' salary, to an IAP in the event of a merger of the Federally insured credit union; provided, however, that a Federally insured credit union must obtain the consent of NCUA before making a payment and this paragraph (a)(3) does not apply to any merger of a Federally insured credit union resulting from an assisted transaction described in section 208 of the Act, 12 U.S.C. 1788, or the Federally insured credit union being placed into conservatorship or liquidation; and

(4) A Federally insured credit union or IAP making a request pursuant to paragraphs (a)(1) through (3) of this section must demonstrate it does not possess and is not aware of any information, evidence, documents or other materials indicating there is a reasonable basis to believe, at the time the 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 Federally insured credit union that has had or is likely to have a material adverse effect on the Federally insured credit union;

(ii) The IAP is substantially responsible for the insolvency of, the appointment of a conservator liquidating agent for, or the troubled condition, as defined by § 750.1(1), of the Federally insured credit union;

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

(iv) The IAP has violated or conspired to violate sections 215, 656, 657,

<sup>1</sup>The provisions in this part 750 control to the extent of any inconsistency with § 701.33 of this chapter.