PROBABLE ASSET/SHARE RATIO—MERGING CREDIT UNION

	Book Value	Market Value
ADDITIONS:		
Cash.		
Loans.		
Investments.		
Fixed Assets.		
Other Assets.		
Total (A).		
DEDUCTIONS:		
Notes Payable.		
Accounts Payable.		
Other Recorded Liabilities.		
Contingent and/or Unrecorded Liabilities.		
Subsidiary Ledger Differences (Losses) Other Losses.		
Total (B).		
Net Value of Assets (A − B).		
Total Shares.		
Probable Asset/Share Ratio		

(i) *Certification of no non-disclosed merger-related financial arrangements.* The merger package required by §708b.104 must include the following certification.

CERTIFICATION OF NO NON-DISCLOSED MERGER-RELATED FINANCIAL ARRANGEMENTS

We, the undersigned officials of [name of merging credit union] and [name of continuing credit union], certify to the National Credit Union Administration (NCUA) as follows:

1. The information provided to the NCUA in the merger application, and the proposed disclosure to the members of [name of merging credit union] includes a complete, true and accurate statement about all merger-related financial arrangements, if any, provided to covered persons, as those terms are defined in Part 708b of the NCUA's regulations.

2. We understand that we have an affirmative duty to revise our merger application and the notice to the members of [name of merging credit union] if merger-related financial arrangements are added or increased after our application is submitted.

This certification signed [month and day], 20___.

[name of continuing credit union]

Board Presiding Officer

CEO

[name of merging credit union]

Board Presiding Officer

CEO

[83 FR 30311, June 28, 2018]

PART 709—INVOLUNTARY LIQUIDATION OF FEDERAL CREDIT UNIONS AND ADJUDICATION OF CREDITOR CLAIMS INVOLVING FEDERALLY INSURED CREDIT UNIONS IN LIQUIDATION

Sec.

AUTHORITY: 12 U.S.C. 1757, 1766, 1767, 1786(h), 1786(t), and 1787(b)(4), 1788, 1789, 1789a.

SOURCE: 56 FR 56925, Nov. 7, 1991, unless otherwise noted.

§ 709.0 Scope.

The rules and procedures in this part apply to charter revocations of federal credit unions under 12 U.S.C. 1787(a)(1)(A), (B), the involuntary liquidation and adjudication of creditor claims in all cases involving federally-insured credit unions, the treatment by the Board as conservator or liquidating agent of financial assets transferred in connection with a securitization or participation or of public funds held by a federally-insured credit union, and the allowance of prepayment fees to Federal Home Loan Banks under specified conditions. Remaining sections of this part are applicable to all federally insured credit unions. This part does not apply to share insurance claims arising out of the liquidation of a federally insured credit union. Insurance claims are decided pursuant to part 745 of this chapter.

[56 FR 56925, Nov. 7, 1991, as amended at 65 FR 55442, Sept. 14, 2000; 66 FR 11230, Feb. 23, 2001; 66 FR 40575, Aug. 3, 2001]

§ 709.1 Definitions.

For the purposes of this part, the following definitions apply:

(a) *General Counsel* means the General Counsel of the National Credit Union Administration or any attorney assigned to the General Counsel's staff.

(b) *Liquidating Agent* means the NCUA Board or person(s) appointed by it with delegated authority to carry out the liquidation of the credit union.

(c) *Insolvent* means insolvent as that term is defined in §700.2 of this chapter.

(d) *Claim* means a creditor's claim against the credit union in liquidation. This term does not include insurance claims arising out of the liquidation of a federally insured credit union. Insurance claims are decided pursuant to part 745 of this chapter.

(e) *Shareholder* means members, nonmembers, accountholders or any other party or entity that is the owner of a share, share certificate or share draft account or the equivalent of such accounts under state law.

[56 FR 56925, Nov. 7, 1991, as amended at 69 FR 27828, May 17, 2004; 78 FR 32545, May 31, 2013]

§ 709.2 NCUA Board as liquidating agent.

(a) The Board, as liquidating agent, by operation of law and without any conveyance or other instrument, act or deed, shall succeed to all the rights, titles, powers, and privileges of the credit union, and of its shareholders, officers, and directors, with respect to the credit union and its assets, and such shareholders, officers, or directors, shall not thereafter have or exercise any such rights, powers, or privileges or act in connection with any assets or property of any nature of the credit union.

(b) The Board, as liquidating agent, shall take possession of and title to books, records, and assets of every description of such credit union to which such credit union has rights of possession and title to all offices and other facilities of such credit union.

§ 709.3 Challenge to revocation of charter and involuntary liquidation.

If a Federal credit union is determined to be insolvent and placed into liquidation pursuant to 12 U.S.C. 1787, the Federal credit union may, not later than 10 days after the date on which the Board closes the credit union for liquidation, apply to the United States District Court for the Judicial district in which the principal office of the credit union is located or the United States District Court for the District of Columbia for an order requiring the Board to show cause why it should not be prohibited from continuing such liquidation. Notwithstanding other provisions of this part, the board of directors of the credit union may meet following the placing of the institution into liquidation for the sole purpose of considering and authorizing the filing of this action in the name of the credit union. No such action in the name of the credit union may be instituted without the authorization of the board of directors of the institution pursuant to a valid board of directors resolution.

No credit union funds shall be available to pay expenses incurred in bringing a legal action to challenge the Board's liquidation action.

§ 709.4 Powers and duties of liquidating agent.

(a) *Inventory of assets.* As soon as practicable after taking possession, the liquidating agent shall inventory the assets of such credit union as of the date of taking possession, showing the value as carried on the books of the credit union, and the security therefore, if any, a brief description of the assets and any security, and a record of the credit union's creditor and accounts liabilities.

(b) *Notice to creditors.* The liquidating agent shall promptly publish a notice to the credit union's creditors to present their claims, together with proof, to the liquidating agent by a date specified in the notice. This date shall be not less than 90 days after the publication of the notice. The liquidating agent shall republish such notice approximately one and two months, respectively, after the initial publication. At the time of initial publication, the liquidating agent shall mail a notice similar to the published notice to any creditor shown on the credit union's books at the last address appearing therein. If the liquidating agent discovers the name of a creditor whose name does not appear on the credit union's books, a notice similar to the published notice shall be mailed to such creditor within 30 days after the discovery of the name and address.

(c) *General.* The liquidating agent shall collect all obligations and money due such credit union and may, to the extent consistent with its appointment, do all things desirable or expedient in its discretion to wind up the affairs of the credit union including, but not limited to, the following:

(1) Exercise all rights and powers of the credit union including, but not limited to, any rights and powers under any mortgage, deed of trust, chose in action, option, collateral note, contract, judgment or decree, or instrument of any nature;

(2) Institute, prosecute, maintain, defend, intervene, and otherwise participate in any and all actions, suits, or other legal proceedings by and against the liquidating agent or the credit union or in which the liquidating agent, the credit union, or its creditors or shareholders, or any of them, shall have an interest, and in every way to represent the credit union, its shareholders and creditors, subject to the direction of General Counsel;

(3) Employ on a salary or fee basis such persons as in the judgment of the liquidating agent are necessary or desirable to carry out its responsibilities and functions, including, but not limited to, appraisers and Certified Public Accountants, and pay the costs out of the assets of the liquidated credit union;

(4) Employ or retain any attorney or attorneys designated by, or acceptable to, the General Counsel in connection with litigation or for legal advice and assistance, for the liquidation generally or in particular instances, and pay compensation and retainers of such attorney or attorneys, together with all expenses, including, but not limited to, the costs and expenses of any litigation, as approved by the General Counsel, out of the assets of the liquidated credit union;

(5) Execute, acknowledge, and deliver any and all deeds, contracts, leases, assignments, bills of sale, releases, extensions, satisfactions, and other instruments necessary or proper for any purposes, including, but not limited to, the effectuation, termination, or transfer of real, personal or mixed property, or that shall be necessary or proper to liquidate the credit union, and any deed or other instrument executed pursuant to the authority hereby given shall be as valid and effective for all purposes as if the same had been executed as the act and deed of the credit union;

(6) With concurrence of General Counsel, disaffirm or repudiate any contract or lease to which the credit union is a party, the performance of which the liquidating agent, in his sole discretion, determines to be burdensome, and which disaffirmance or repudiation in the liquidating agent's sole discretion will promote the orderly administration of the credit union's affairs;

(7) Deposit, withdraw, or transfer funds, and otherwise exercise complete control over all investment or depository accounts maintained by or for the credit union at financial dispository or similar institutions;

(8) Do such things, and have such rights, powers, privileges, immunities, and duties, whether or not otherwise granted in this part 709, as shall be authorized, directed, conferred, or imposed from time to time by the Board, or as shall be conferred by the Federal Credit Union Act;

(9) Exercise such other authority as is conferred by the Federal Credit Union Act; and

(10) Where acting as liquidating agent for a state-chartered federally insured credit union, exercise all the rights, powers, and privileges granted by state law to such a liquidating agent.

(d) *Expenditure of funds of the liquidation.* The liquidating agent shall have power to:

(1) Pay all costs and expenses of the liquidation as determined by the liquidating agent;

(2) Pay off and discharge taxes and liens;

(3) Pay out and expend such sums as are deemed necessary or advisable for or in connection with the preservation, maintenance, conservation, protection, remodeling, repair, rehabilitation, or improvement of any asset or property of any nature of the credit union or the liquidating agent;

(4) Pay off and discharge any assessments, liens, claims, or charges of any kind against any asset or property of any nature on which the credit union or the liquidating agent has a lien by way of mortgage, deed of trust, pledge, or otherwise, or in which the credit union or liquidating agent has any interest;

(5) Settle, compromise, or obtain the release of, for cash or other consideration, claims and demands against the credit union or the liquidating agent; and

(6) Indemnify its employees and agents from the assets of the credit union against liabilities incurred in the good faith performance of their duties.

(e) *Assets, claims, and contracts.* The liquidating agent shall have power to:

(1) Sell for cash or on terms, exchange, assign, or otherwise dispose of, in whole or in part, any or all of the assets and property of the credit union, real, personal and mixed, tangible and intangible, of any nature, including any mortgage, deed of trust, chose in action, bond, note, contract, judgment, or decree, share or certificate of share of stock or debt, owing to the credit union or the liquidating agent; and

(2) Surrender, abandon, and release any chose in action, or other assets or property of any nature, whether the subject of pending litigation or not, and settle, compromise, modify, or release, for cash or other consideration, claims and demands in favor of the credit union or the liquidating agent.

[56 FR 56925, Nov. 7, 1991, as amended at 75 FR 34621, June 18, 2010]

§ 709.5 Payout priorities in involuntary liquidation.

(a) Claimants whose claims are secured shall receive their security. To the extent their respective claims exceed the value of the security for those claims, as determined to the satisfaction of the liquidating agent, they shall each have an unsecured claim against the credit union having priority as provided in paragraph (b) of this section.

(b) Unsecured claims against the liquidation estate that are proved to the satisfaction of the liquidating agent shall have priority in the following order:

(1) Administrative costs and expenses of liquidation;

(2) Claims for wages and salaries, including vacation, severance, and sick leave pay; *provided, however,* that, in accordance with § 750.7 of this chapter, no claim for vacation, severance, or sick leave pay is provable unless entitlement to the benefit is provided for in the credit union employee handbook or other written credit union record, is calculable in accordance with an objective formula, and is available to all employees who meet applicable eligibility requirements, such as minimum length of service, or if such payment is required by applicable state or local law;

(3) Taxes legally due and owing to the United States or any state or subdivision thereof;

(4) Debts due and owing the United States, including the National Credit Union Administration;

(5) General creditors, and secured creditors (to the extent that their respective claims exceed the value of the security for those claims);

(6) Shareholders to the extent of their respective uninsured shares and the National Credit Union Share Insurance Fund to the extent of its payment of share insurance;

(7) in a case involving liquidation of a corporate credit union, holders of then-outstanding membership capital accounts and nonperpetual capital accounts or instruments to the extent not depleted in a calendar year prior to the date of liquidation and also subject to the capital priority option described in appendix A of part 704 of this chapter;

(8) In a case involving liquidation of a low-income designated credit union, any outstanding secondary capital accounts issued pursuant to the authority of § 701.34 or § 741.204(c) of this chapter; and

(9) in a case involving liquidation of a corporate credit union, holders of then-outstanding paid in capital or perpetual contributed capital instruments to the extent not depleted in a calendar year prior to the date of liquidation and also subject to the capital priority option described in appendix A of part 704 of this chapter;

(c) Priorities are to be based on the circumstances that exist on the date of liquidation.

(d) If the repudiation or disaffirmance of any contract or lease gives rise to a claim for damages, such claim shall be considered a general creditor claim under paragraph (b)(5) of this section and not a cost or expense of liquidation under paragraph (b)(1) of this section.

(e) All unsecured claims of any category or class or priority described in paragraphs (b)(1) through (b)(7) of this section shall be paid in full, or provisions made for such payment, before any claims of lesser priority are paid. If there are insufficient funds to pay all claims of a category or class, payment shall be made pro rata. Notwithstanding anything to the contrary herein, the liquidating agent may, at any time, and from time to time, prior to the payment in full of all claims of a category or class with higher priority, make such distributions to claimants in priority categories described in paragraphs (b)(1), (b)(2), (b)(3), (b)(4), and (b)(5) of this section as the liquidating agent believes are reasonably necessary to conduct the liquidation, provided that the liquidating agent determines that adequate funds exist or will be recovered during the liquidation to pay in full all claims of any higher priority. If a surplus remains after making distribution in full on all allowed claims described in paragraphs (b)(1) through (b)(9) of this section, such surplus shall be distributed pro rata to the credit union's shareholders.

[56 FR 56825, Nov. 7, 1991, as amended at 61 FR 3791, Feb. 2, 1996; 62 FR 12949, Mar. 19, 1997; 64 FR 57365, Oct. 25, 1999; 75 FR 64859, Oct. 20, 2010; 83 FR 24652, May 30, 2018]

§ 709.6 Initial determination of creditor claims by the liquidating agent.

(a)(1) Any party wishing to submit a claim against the liquidated credit union must submit a written proof of claim in accordance with the requirements set forth in the notice to creditors. A failure to submit a written claim within the time provided in the notice to creditors shall be deemed a waiver of said claim and claimant shall have no further rights or remedies with respect to such claim.

(2) Notwithstanding paragraph (a)(1) of this section, the liquidating agent may, at his discretion, consider an untimely claim provide the following two criteria are present:

(i) The claimant did not receive notice of the appointment of the liquidating agent in time to file a claim before the date provided for in the notice; and

(ii) The claim is filed in time to permit payment of the claim.

(b) The liquidating agent may require submission of supplemental evidence by the claimant and by interested parties in the event of a dispute concerning a claim against any asset of

the liquidated credit union. In requiring the submission of supplemental evidence, the liquidating agent may set such limitations of time, scope, and size as the liquidating agent deems reasonable in the circumstances, and may refuse to include in the record submissions or portions of submissions not in compliance with such limitations or requirements. The liquidating agent shall compile such written record of a claim or dispute as, in its discretion, is deemed sufficient to provide a reasonable basis for allowing or disallowing a claim or resolving a dispute. This written record shall be considered the administrative record.

(c) The liquidating agent shall determine whether to allow or disallow a claim and shall notify the claimant within 180 days from the date a claim against a credit union is filed pursuant to paragraph (a)(1) of the section. This 180-day period may be extended by written agreement between the claimant and the liquidating agent. Failure by the liquidating agent to determine a claim and notify the claimant within the 180-day period or, if the period is extended, within the extended period, shall be deemed a denial of the claim.

(d) If a claim or any portion thereof is disallowed, the notice to the claimant shall contain a statement of the reasons for the disallowance and an explanation of appeal rights pursuant to §709.7 of this part.

(e) Notice of any determination with respect to a claim shall be sufficient if mailed to the most recent address of the claimant which appears:

(1) On the credit union's books;

(2) In the claim filed by the claimant; or

(3) In the documents submitted in the proof of claim.

(f) In the event the liquidating agent disallows all or part of a claim, the liquidating agent shall file with the Board, or its designated agent, a report of its determination. This report shall become part of the record and shall include the notice to the claimant and findings on all issues raised and decided by the liquidating agent.

§709.7 Procedures for agency review or judicial determination of claims.

(a) *General.* A claimant may either request agency review of an initial determination of the liquidating agent to disallow a claim or seek a de novo judicial determination of claims. In order to receive agency review of an initial determination, a claimant must request an administrative appeal before the NCUA Board. In order to seek a judicial determination, a claimant must file suit (or continue an action commenced before the appointment of the liquidating agent) in the district or territorial court of the United States for the district within which the credit union's principal place of business is located or the United States District Court for the District of Columbia.

(b) *Procedures for agency review.* A claimant requesting an administrative appeal may request a hearing on the record conducted pursuant to the procedures set forth in subpart A of part 747 of this chapter. The determination of whether to agree to a request for a hearing on the record shall rest solely with the NCUA Board, which shall notify the claimant of its decision in writing. Alternatively, a claimant may request an appeal before the NCUA Board pursuant to the procedures set forth in subpart B to part 746 of this chapter.

(c) *Deadline to request agency review or file suit.* A claimant must request agency review of an initial determination or file suit (or continue an action commenced before the appointment of the liquidating agent) within 60 days from the mailing of the initial determination or the expiration of the time period for the liquidating agent to determine claims under §709.6(c), whichever is earlier. A request for a hearing on the record will suspend the 60-day period for filing a lawsuit (or continuing an action commenced before the appointment of the liquidating agent) from the date of the claimant's request to the date of the NCUA Board's decision regarding that request. If a claimant fails to either request a hearing on the record or an appeal to the Board or file suit (or continue an action commenced before the appointment of the liquidating agent) within the 60-day period, any disallowance of claims shall

be final and the claimant shall have no further rights or remedies with respect to such claims.

(d) *Reconsideration.* Prior to requesting agency review or filing or continuing a lawsuit, a claimant may request reconsideration of the initial determination of the liquidating agent in accordance with the procedures set forth in subpart B to part 746 of this chapter. The deadline to request agency review or file suit (or continue an action commenced before the appointment of the liquidating agent) in paragraph (c) of this section will be suspended from the date of the claimant's request to the date of the liquidating agent's decision regarding that request.

[82 FR 50294, Oct. 30, 2017]

§ 709.8 Expedited determination of creditor claims.

(a) *General.* The provisions of this section establish procedures under which claimants may request expedited relief in lieu of the procedures set forth in § 709.6 of this part. A claimant shall be entitled to expedited determination of a claim only upon a showing that there exists a legally valid and enforceable or perfected security interest in assets of the liquidated credit union and that irreparable injury will occur if the routine claims procedure is followed.

(b) *Filing of request for expedited relief.* All requests for expedited relief must be filed within 30 days from the date of mailing, by the liquidating agent, of the notice to the creditor concerned. The request shall be deemed to be filed when received by the Secretary of the Board, National Credit Union Administration, 1775 Duke Street, Alexandria, VA 22314–3428. A copy of the request must be simultaneously served upon the liquidating agent for the credit union concerned. There shall be no right of personal appearance before the Board in connection with any claim submitted under this paragraph.

(c) *Content of request for expedited relief.* Any Request for Expedited Relief must contain the following:

(1) A clear and concise statement of the facts and issues on which the request is based;

(2) A clear and concise statement describing the nature of any security interests in any assets of the credit union;

(3) A clear and concise statement of the probable, imminent and irreparable harm likely to occur if expedited relief is not granted;

(4) An assessment of the likelihood of success on the merits of the underlying claim, including statutory citations and relevant documentation supporting the merits of the claim;

(5) Any other relevant documentation that supports the request;

(6) Citations to applicable statutes, regulations, or other legal authority; and

(7) A signed statement certifying that a copy of the request has been mailed or hand delivered to the liquidating agent on or before the day that the request was filed with the Board.

(d) *Burden of proof.* The burden of proving entitlement to expedited relief rests at all times with the requester.

(e) *Additional information.* The Board may order the filing of additional information and or documentation in order to make its determination. Such filing shall be on a date certain, and failure to provide the additional documentation or information may constitute the sole grounds for denial of the request.

(f) *Decision.* Before the end of the 90-day period beginning on the date a request filed, the Board shall render its decision and provide it to the requester. The Board will determine whether to grant expedited review and allow or disallow the claim or whether such claim should be resolved pursuant to the claims process described in § 709.6 of this part.

(1) *Expedited review denied.* A decision by the Board that expedited review is not appropriate shall be final and the claim shall be decided pursuant to the claims adjudication process set forth in § 709.6 of this part.

(2) *Expedited review granted.* If expedited review is granted, the Board shall decide the claim. If the claim is disallowed, in whole or part, the decision shall contain a statement of each reason for the disallowance and the procedure for obtaining judicial review.

(g) *Period for filing or renewing suit.* Any claimant who files a request for expedited relief shall be permitted to file a suit, or to continue a suit filed before the appointment of the liquidating agent, seeking a determination of the claimant's rights with respect to its security interest after the earlier of:

(1) The end of the 90-day period beginning on the date of the filing of a request for expedited relief; or

(2) The date the Board denies all or part of the claim.

(h) *Statute of limitations.* If an action described in paragraph (g) of this section is not filed, or the motion to renew a previously filed suit is not made, before the end of the 30-day period beginning on the date on which such action or motion may be filed in accordance with paragraph (g) of this section, the claim shall be deemed to be disallowed as of the end of such period (other than any portion of such claim that was allowed by the Board). Such disallowance shall be final and the claimant shall have no further rights or remedies with respect to such claim.

[56 FR 56925, Nov. 7, 1991, as amended at 59 FR 36041, July 15, 1994; 75 FR 34621, June 18, 2010. Redesignated at 82 FR 50294, Oct. 30, 2017]

§ 709.9 Treatment of financial assets transferred in connection with a securitization or participation.

(a) *Definitions.*

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.

Investor means a person or entity that owns an obligation issued by an issuing 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.

Monetary default means a default in the payment of principal or interest when due following the expiration of any cure period.

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.

Participation means the transfer or assignment of an undivided interest in all or part of a financial asset, that has all of the characteristics of a ''participating interest,'' from a seller, known as the ''lead,'' to a buyer, known as the ''participant,'' without recourse to the lead, pursuant to an agreement between the lead and the participant. ''Without recourse'' means that the participation is not subject to any agreement that requires the lead to repurchase the participant's interest or to otherwise compensate the participant upon the borrower's default on the underlying obligation.

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.

Servicer means any entity responsible for the management or collection of some or all of the financial assets on behalf of the issuing entity or making allocations or distributions to holders of the obligations, including reporting on the overall cash flow and credit characteristics of the financial assets supporting the securitization to enable the issuing entity to make payments to investors on the obligations. The term ''servicer'' does not include a trustee for the issuing entity or the holders of obligations that makes allocations or distributions to holders of the obligations if the trustee receives such allocations or distributions from a servicer and the trustee does not otherwise perform the functions of a servicer.

Specified GSE means each of the following:

(1) The Federal National Mortgage Association and any affiliate thereof;

(2) Federal Home Loan Mortgage Corporation and any affiliate thereof;

(3) The Government National Mortgage Association; and

(4) Any Federal or State sponsored mortgage finance agency.

Sponsor means a person or entity that organizes and initiates a securitization 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:

(1) The conveyance of a financial asset or financial assets to an issuing entity; or

(2) The creation of a security interest in such asset or assets for the benefit of the issuing entity.

(b) *Coverage.* This section applies to securitizations that meet the following criteria:

(1) *Capital structure and financial assets.* The documents creating the securitization must define the payment structure and capital structure of the transaction.

(i) *Requirements applicable to all securitizations.* (A) The securitization may not consist of re-securitizations of obligations or collateralized debt obligations unless the documents creating the securitization require that disclosures required in paragraph (b)(2) of this section are made available to investors for the underlying assets supporting the securitization at initiation and while obligations are outstanding; and

(B) The documents creating the securitization must require that payment of principal and interest on the securitization obligation will be primarily based on the performance of financial assets that are transferred to the issuing entity and, except for interest rate or currency mismatches between the financial assets and the obligations, will not be contingent on market or credit events that are independent of such financial assets. The securitization may not be an unfunded securitization or a synthetic transaction.

(ii) *Requirements applicable only to securitizations in which the financial assets include any residential mortgage loans.* (A) The capital structure of the securitization must be limited to no more than six credit tranches and cannot include ''sub-tranches,'' grantor trusts or other structures. Notwithstanding the foregoing, the most senior credit tranche may include time-based sequential pay or planned amortization and companion sub-tranches; and

(B) The credit quality of the obligations cannot be enhanced at the issuing entity or pool level through external credit support or guarantees. However, the credit quality of the obligations may be enhanced by credit support or guarantees provided by Specified GSEs and the temporary payment of principal and/or interest may be supported by liquidity facilities, including facilities designed to permit the temporary payment of interest following appointment of the NCUA Board as conservator or liquidating agent. Individual financial assets transferred into a securitization may be guaranteed, insured, or otherwise benefit from credit support at the loan level through mortgage and similar insurance or guarantees, including by private companies, agencies or other governmental entities, or government-sponsored enterprises, and/or through co-signers or other guarantees.

(2) *Disclosures.* The documents must require that the sponsor, issuing entity, and/or servicer, as appropriate, will make available to investors, information describing the financial assets, obligations, capital structure, compensation of relevant parties, and relevant historical performance data set forth in this paragraph (b)(2).

(i) *Requirements applicable to all securitizations.* (A) The documents must require that, on or prior to issuance of obligations and at the time of delivery of any periodic distribution report and, in any event, at least once per calendar quarter, while obligations are outstanding, information about the obligations and the securitized financial assets will be disclosed to all potential investors at the financial asset or pool level and security level, as appropriate for the financial assets, to enable evaluation and analysis of the credit risk and performance of the obligations and financial assets. The documents must require that such information and its disclosure, at a minimum, complies with the requirements of Securities and Exchange Commission Regulation AB, or any successor disclosure requirements for public issuances, even if the obligations are issued in a private placement or are not otherwise required to be registered. Information that is unknown or not available to the sponsor or the issuer after reasonable investigation may be omitted if the issuer includes a statement in the offering documents disclosing that the specific information is otherwise unavailable.

(B) The documents must require that, on or prior to issuance of obligations, the structure of the securitization and the credit and payment performance of the obligations will be disclosed, including the capital or tranche structure, the priority of payments, and specific subordination features; representations and warranties made with respect to the financial assets, the remedies for, and the time permitted for cure of any breach of representations and warranties, including the repurchase of financial assets, if applicable; liquidity facilities and any credit enhancements permitted by this rule, any waterfall triggers, or priority of payment reversal features; and policies governing delinquencies, servicer advances, loss mitigation, and write-offs of financial assets.

(C) The documents must require that while obligations are outstanding, the issuing entity will provide to investors information with respect to the credit performance of the obligations and the financial assets, including periodic and cumulative financial asset performance data, delinquency and modification data for the financial assets, substitutions and removal of financial assets, servicer advances, as well as losses that were allocated to such tranche and remaining balance of financial assets supporting such tranche, if applicable, and the percentage of each tranche in relation to the securitization as a whole.

(D) In connection with the issuance of obligations, the documents must disclose the nature and amount of compensation paid to the originator, sponsor, rating agency or third-party advisor, any mortgage or other broker, and the servicer(s), and the extent to which any risk of loss on the underlying assets is retained by any of them for such securitization be disclosed. The securitization documents must require the issuer to provide to investors while obligations are outstanding any changes to such information and the amount and nature of payments of any deferred compensation or similar arrangements to any of the parties.

(ii) *Requirements applicable only to securitizations in which the financial assets include any residential mortgage loans.* (A) Prior to issuance of obligations, sponsors must disclose loan level information about the financial assets including, but not limited to, loan type, loan structure (for example, fixed or adjustable, resets, interest rate caps, balloon payments, etc.), maturity, interest rate and/or Annual Percentage Rate, and location of the property.

(B) Prior to issuance of obligations, sponsors must affirm compliance in all material respects with applicable statutory and regulatory standards for the underwriting and origination of residential mortgage loans. Sponsors must

disclose a third-party due diligence report on compliance with such standards and the representations and warranties made with respect to the financial assets.

(C) The documents must require that prior to issuance of obligations and while obligations are outstanding, servicers will disclose any ownership interest by the servicer or an affiliate of the servicer in other whole loans secured by the same real property that secures a loan included in the financial asset pool. The ownership of an obligation, as defined in this regulation, does not constitute an ownership interest requiring disclosure.

(3) *Documentation and recordkeeping.* The documents creating the securitization must specify the respective contractual rights and responsibilities of all parties and include the requirements described in paragraph (b)(3) of this section and use as appropriate any available standardized documentation for each different asset class.

(i) *Requirements applicable to all securitizations.* The documents must define the contractual rights and responsibilities of the parties, including but not limited to representations and warranties and ongoing disclosure requirements, and any measures to avoid conflicts of interest; and provide authority for the parties, including but not limited to the originator, sponsor, servicer, and investors, to fulfill their respective duties and exercise their rights under the contracts and clearly distinguish between any multiple roles performed by any party.

(ii) *Requirements applicable only to securitizations in which the financial assets include any residential mortgage loans.* (A) Servicing and other agreements must provide servicers with authority, subject to contractual oversight by any master servicer or oversight advisor, if any, to mitigate losses on financial assets consistent with maximizing the net present value of the financial asset. Servicers shall have the authority to modify assets to address reasonably foreseeable default, and to take other action to maximize the value and minimize losses on the securitized financial assets. The documents shall require that the servicers apply industry best practices for asset management and servicing. The documents shall require the servicer to act for the benefit of all investors, and not for the benefit of any particular class of investors, that the servicer maintain records of its actions to permit full review by the trustee or other representative of the investors and that the servicer must commence action to mitigate losses no later than ninety (90) days after an asset first becomes delinquent unless all delinquencies have been cured, *provided* that this requirement will not be deemed to require that the documents include any provision concerning loss mitigation that requires any action that may conflict with the requirements of Regulation X (12 CFR part 1024), as Regulation X may be amended or modified from time to time.

(B) The servicing agreement may not require a primary servicer to advance delinquent payments of principal and interest for more than three payment periods, unless financing or reimbursement facilities are available, which may include, but are not limited to, the obligations of the master servicer or issuing entity to fund or reimburse the primary servicer, or alternative reimbursement facilities. Such ''financing or reimbursement facilities'' under this paragraph may not be dependent for repayment on foreclosure proceeds.

(4) *Compensation.* The following requirements apply only to securitizations in which the financial assets include any residential mortgage loans. Compensation to parties involved in the securitization of such financial assets must be structured to provide incentives for sustainable credit and the long-term performance of the financial assets and securitization as follows:

(i) The documents must require that any fees or other compensation for services payable to credit rating agencies or similar third-party evaluation companies are payable, in part, over the five-year period after the first issuance of the obligations based on the performance of surveillance services and the performance of the financial assets, with no more than sixty percent of the total estimated compensation due at closing; and

(ii) The documents must provide that compensation to servicers will include incentives for servicing, including payment for loan restructuring or other loss mitigation activities, which maximizes the net present value of the financial assets. Such incentives may include payments for specific services, and actual expenses, to maximize the net present value or a structure of incentive fees to maximize the net present value, or any combination of the foregoing that provides such incentives.

(5) *Origination and retention requirements*—(i) *Requirements applicable to all securitizations.* For any securitization, the documents creating the securitization shall require retention of an economic interest in the credit risk of the financial assets in accordance with the regulations required under Section 15G of the Securities Exchange Act, 15 U.S.C. 78a *et seq.*, added by Section 941(b) of the Dodd-Frank Wall Street Reform and Consumer Protection Act, including restrictions on sale, pledging and hedging set forth therein.

(ii) *Requirements applicable only to securitizations in which the financial assets include any residential mortgage loans.* (A) The documents must require the establishment of a reserve fund equal to at least five (5) percent of the cash proceeds of the securitization payable to the sponsor to cover the repurchase of any financial assets required for breach of representations and warranties. The balance of such fund, if any, must be released to the sponsor one year after the date of issuance.

(B) The documents must include a representation that the assets were originated in all material respects in compliance with statutory, regulatory, and originator underwriting standards in effect at the time of origination. The documents must include a representation that the mortgages included in the securitization were underwritten at the fully indexed rate, based upon the borrowers' ability to repay the mortgage according to its terms, and rely on documented income and comply with all existing all laws, rules, regulations, and guidance governing the underwriting of residential mortgages by federally insured credit unions.

(c) *Other requirements.* (1) The transaction should be an arms-length, bona fide securitization transaction. The documents must require that the obligations issued in a securitization shall not be predominantly sold to a credit union service organization in which the sponsor credit union has an interest (other than a wholly-owned credit union service organization consolidated for accounting and capital purposes with the credit union) or insider of the sponsor;

(2) The securitization agreements are in writing, approved by the board of directors of the credit union or its loan committee (as reflected in the minutes of a meeting of the board of directors or committee), and have been, continuously, from the time of execution in the official record of the credit union;

(3) The securitization was entered into in the ordinary course of business, not in contemplation of insolvency and with no intent to hinder, delay, or defraud the credit union or its creditors;

(4) The transfer was made for adequate consideration;

(5) The transfer and/or security interest was properly perfected under the UCC or applicable state law;

(6) The transfer and duties of the sponsor as transferor must be evidenced in a separate agreement from its duties, if any, as servicer, custodian, paying agent, credit support provider, or in any capacity other than the transferor; and

(7) The documents must require that the sponsor separately identify in its financial asset data bases the financial assets transferred into any securitization and maintain (i) an electronic or paper copy of the closing documents for each securitization in a readily accessible form, (ii) a current list of all of its outstanding securitizations and the respective issuing entities, and (iii) the most recent Securities and Exchange Commission Form 10-K, if applicable, or other periodic financial report for each securitization and issuing entity. The documents must provide that to the extent serving as servicer, custodian, or paying agent for the securitization, the sponsor may not comingle amounts received with respect to the financial assets with its own assets except for the

time, not to exceed two business days, necessary to clear any payments received. The documents must require that the sponsor will make these records readily available for review by NCUA promptly upon written request.

(d) *Safe harbor*—(1) *Participations.* With respect to transfers of financial assets made in connection with participations, the NCUA Board as conservator or liquidating agent will not, in the exercise of its statutory authority to disaffirm or repudiate contracts, reclaim, recover, or recharacterize as property of the credit union or the liquidation estate any such transferred financial assets, provided that such transfer satisfies the conditions for sale accounting treatment under generally accepted accounting principles, except for the ''legal isolation'' condition that is addressed by this section. The foregoing sentence applies to a last-in, first-out participation, provided that the transfer of a portion of the financial asset satisfies the conditions for sale accounting treatment under generally accepted accounting principles that would have applied to such portion if it had met the definition of a ''participating interest,'' except for the ''legal isolation'' condition that is addressed by this section.

(2) *For securitizations meeting sale accounting requirements.* With respect to any securitization for which transfers of financial assets were made after adoption of this rule, or from a master trust or revolving trust established after adoption of this rule, and which complies with the requirements applicable to that securitization as set forth in paragraphs (b) and (c) of this section, the NCUA Board as conservator or liquidating agent will not, in the exercise of its statutory authority to disaffirm or repudiate contracts, reclaim, recover, or recharacterize as property of the credit union or the liquidation estate such transferred financial assets, provided that such transfer satisfies the conditions for sale accounting treatment under generally accepted accounting principles in effect for reporting periods after November 15, 2009, except for the ''legal isolation'' condition that is addressed by this paragraph (d)(2).

(3) *For securitizations not meeting sale accounting requirements.* With respect to any securitization for which transfers of financial assets were made after adoption of this rule, or from a master trust or revolving trust established after adoption of this rule, and which complies with the requirements applicable to that securitization as set forth in paragraphs (b) and (c) of this section, but where the transfer does not satisfy the conditions for sale accounting treatment set forth by generally accepted accounting principles in effect for reporting periods after November 15, 2009, the following conditions apply:

(i) *Monetary default.* If, at any time after appointment, the NCUA Board as conservator or liquidating agent is in a monetary default under a securitization due to its failure to pay or apply collections from the financial assets received by it in accordance with the securitization documents, whether as servicer or otherwise, and remains in monetary default for ten business days after actual delivery of a written notice to the NCUA Board as conservator or liquidating agent pursuant to paragraph (f) of this section requesting the exercise of contractual rights because of such monetary default, the NCUA Board as conservator or liquidating agent hereby consents pursuant to 12 U.S.C. 1787(c)(13)(C) to the exercise of any contractual rights in accordance with the documents governing such securitization, including but not limited to taking possession of the financial assets and exercising self-help remedies as a secured creditor under the transfer agreements, provided no involvement of the conservator or liquidating agent is required other than such consents, waivers, or execution of transfer documents as may be reasonably requested in the ordinary course of business in order to facilitate the exercise of such contractual rights. Such consent does not waive or otherwise deprive the NCUA Board as conservator or liquidating agent or its assignees of any seller's interest or other obligation or interest issued by the issuing entity and held by the conservator or liquidating agent or its assignees, but shall serve as full satisfaction of the obligations of the

insured credit union in conservatorship or liquidation and the NCUA Board as conservator or liquidating agent for all amounts due.

(ii) *Repudiation.* If the NCUA Board as conservator or liquidating agent provides a written notice of repudiation of the securitization agreement pursuant to which the financial assets were transferred, and does not pay damages, defined in this paragraph, within ten business days following the effective date of the notice, the NCUA Board as conservator or liquidating agent hereby consents pursuant to 12 U.S.C. 1787(c)(13)(C) to the exercise of any contractual rights in accordance with the documents governing such securitization, including but not limited to taking possession of the financial assets and exercising self-help remedies as a secured creditor under the transfer agreements, provided no involvement of the conservator or liquidating agent is required other than such consents, waivers, or execution of transfer documents as may be reasonably requested in the ordinary course of business in order to facilitate the exercise of such contractual rights. For purposes of this paragraph, the damages due will be in an amount equal to the par value of the obligations outstanding on the date of appointment of the conservator or liquidating agent, less any payments of principal received by the investors through the date of repudiation, plus unpaid, accrued interest through the date of repudiation in accordance with the contract documents to the extent actually received through payments on the financial assets received through the date of repudiation. Upon payment of such repudiation damages, all liens or claims on the financial assets created pursuant to the securitization documents shall be released. Such consent does not waive or otherwise deprive the NCUA Board as conservator or liquidating agent or its assignees of any seller's interest or other obligation or interest issued by the issuing entity and held by the conservator or liquidating agent or its assignees, but serves as full satisfaction of the obligations of the insured credit union in conservatorship or liquidation and the NCUA Board as conservator or liquidating agent for all amounts due.

(iii) *Effect of repudiation.* If the NCUA Board as conservator or liquidating agent repudiates or disaffirms a securitization agreement, it will not assert that any interest payments made to investors in accordance with the securitization documents before any such repudiation or disaffirmance remain the property of the conservatorship or liquidation.

(e) *Consent to certain actions.* Prior to repudiation or, in the case of a monetary default referred to in paragraph (d)(3)(i) of this section, prior to the effectiveness of the consent referred to therein, the NCUA Board as conservator or liquidating agent consents pursuant to 12 U.S.C. 1787(c)(13)(C) to the making of, or if serving as servicer, does make, the payments to the investors to the extent actually received through payments on the financial assets (but in the case of repudiation, only to the extent supported by payments on the financial assets received through the date of the giving of notice of repudiation) in accordance with the securitization documents, and, subject to the conservator's or liquidating agent's rights to repudiate such agreements, consents to any servicing activity required in furtherance of the securitization or, if acting as servicer, the conservator or liquidating agent performs such servicing activities in accordance with the terms of the applicable servicing agreements, with respect to the financial assets included in securitizations that meet the requirements applicable to that securitization as set forth in paragraphs (b) and (c) of this section.

(f) *Notice for consent.* Any party requesting the NCUA Board's consent as conservator or liquidating agent under 12 U.S.C. 1787(c)(13)(C) pursuant to paragraph (d)(3)(i) of this section must provide notice to the President, NCUA Asset Management & Assistance Center, 4807 Spicewood Springs Road, Suite 5100, Austin TX 78759–8490, and a statement of the basis upon which such request is made, and copies of all documentation supporting such request, including without limitation a copy of the applicable agreements and of any applicable notices under the contract.

(g) *Contemporaneous requirement.* The NCUA Board as conservator or liquidating agent will not seek to avoid an otherwise legally enforceable agreement that is executed by an insured credit union in connection with a securitization or in the form of a participation solely because the agreement does not meet the ''contemporaneous'' requirement of 12 U.S.C. 1787(b)(9) and 1788(a)(3).

(h) *Limitations.* The consents set forth in this section do not act to waive or relinquish any rights granted to NCUA in any capacity, including the NCUA Board as conservator or liquidating agent, pursuant to any other applicable law or any agreement or contract except as specifically set forth herein. Nothing contained in this section alters the claims priority of the securitized obligations.

(i) *No waiver.* This section does not authorize the attachment of any involuntary lien upon the property of the NCUA Board as conservator or liquidating agent. Nor does this section waive, limit, or otherwise affect the rights or powers of NCUA in any capacity, including the NCUA Board as conservator or liquidating agent, to take any action or to exercise any power not specifically mentioned, including but not limited to any rights, powers or remedies of the NCUA Board as conservator or liquidating agent regarding transfers or other conveyances taken in contemplation of the credit union's insolvency or with the intent to hinder, delay or defraud the credit union or the creditors of such credit union, or that is a fraudulent transfer under applicable law.

(j) *No assignment.* The right to consent under 12 U.S.C. 1787(c)(13)(C) may not be assigned or transferred to any purchaser of property from the NCUA Board as conservator or liquidating agent, other than to a conservator or bridge credit union.

(k) *Repeal.* This section may be repealed by NCUA upon 30 days' notice provided in the FEDERAL REGISTER, but any repeal does not apply to any issuance made in accordance with this section before such repeal.

[82 FR 29706, June 30, 2017. Redesignated at 82 FR 50294, Oct. 30, 2017]

§ 709.10 Treatment by conservator or liquidating agent of collateralized public funds.

An agreement to provide for the lawful collateralization of funds of a federal, state, or local governmental entity or of any depositor or member referred to in section 207(k)(2)(A) of the Act will not be deemed to be invalid under sections 207(b)(9) and 208(a)(3) of the Act solely because such agreement was not executed contemporaneously with the acquisition of collateral or with any changes, increases, or substitutions in the collateral made in accordance with such agreement, provided the following conditions are met:

(a) The agreement was undertaken in the ordinary course of business, not in contemplation of insolvency, and with no intent to hinder, delay or defraud the credit union or its creditors;

(b) The secured obligation represents a bona fide and arm's length transaction;

(c) The secured party or parties are not insiders or affiliates of the credit union;

(d) The grant or creation of the security interest was for adequate consideration; and,

(e) The security agreement evidencing the security interest is in writing, was approved by the credit union's board of directors, and has been continuously an official record of the credit union from the time of its execution.

[65 FR 55443, Sept. 14, 2000. Redesignated at 82 FR 50294, Oct. 30, 2017]

§ 709.11 Prepayment fees to Federal Home Loan Bank.

The Board as conservator or liquidating agent of a federally-insured credit union in receipt of any extension of credit from a Federal Home Loan Bank will allow a claim for a prepayment fee by the Bank if:

(a) The claim is made pursuant to a written contract that provides for a prepayment fee but the prepayment fee allowed by the Board will not exceed the present value of the loss attributable to the difference between the contract rate of the secured borrowing and the reinvestment rate then available to the Bank; and

(b) The indebtedness owed to the Bank is secured by sufficient collateral

in which a perfected security interest in favor of the Bank exists or as to which the Bank's security interest is entitled to priority under section 306(d) of the Competitive Equality Banking Act of 1987, 12 U.S.C. 1430(e), or otherwise so that the aggregate of the outstanding principal on the advances secured by the collateral, the accrued but unpaid interest on the outstanding principal and the prepayment fee applicable to the advances can be paid in full from the amounts realized from the collateral. For purposes of this paragraph, the adequacy of the collateral will be determined as of the date the prepayment fees are due and payable under the terms of the written contract.

[66 FR 40575, Aug. 3, 2001. Redesignated at 82 FR 50294, Oct. 30, 2017]

§ 709.12 Treatment of swap agreements in liquidation or conservatorship.

The Board has determined that a swap agreement, as defined in the Federal Deposit Insurance Act at 12 U.S.C. 1821(e)(8)(D)(vi), is a qualified financial contract for purposes of the special treatment for qualified financial contracts provided in 12 U.S.C. 1787(c). Any master agreement for any swap agreement, together with all supplements to such master agreement, will be treated as one swap agreement.

[68 FR 32356, May 30, 2003. Redesignated at 82 FR 50294, Oct. 30, 2017]

PART 710—VOLUNTARY LIQUIDATION

Sec.

AUTHORITY: 12 U.S.C. 1766(a), 1786, and 1787.

SOURCE: 58 FR 35365, July 1, 1993, unless otherwise noted.

§ 710.0 Scope.

This part describes the requirements that must be followed to accomplish the voluntary liquidation of a Federal credit union. Federally insured state credit unions are only subject to the notification requirement provided in §710.9; voluntary liquidation is to be accomplished in accordance with state law or procedures established by the state regulatory authority.

§ 710.1 Definitions.

For the purpose of this part, the following definitions apply:

(a) *Voluntary liquidation* means the dissolution of a solvent Federal credit union with the assets being sold or collected, liabilities paid, and shares distributed under the direction of the board of directors or its duly appointed liquidating agent.

(b) *Liquidation date* means the date the members vote to approve liquidation.

(c) *Liquidating agent* means the person or persons, including any legally recognized entity, appointed by the board of directors to liquidate the Federal credit union.

§ 710.2 Responsibility for conducting voluntary liquidation.

(a) The board of directors shall be responsible for conserving the assets, for expediting the liquidation, and for equitable distribution of the assets to the members.

(b) After voting to present the question of liquidation to the members, the board of directors may appoint a liquidating agent and delegate all or part of the board's responsibility to such agent and authorize reasonable compensation for the services provided.

(c) The board of directors shall determine that the liquidating agent and all persons who handle or have access to funds of the Federal credit union are adequately covered by surety bond and that either such coverage remains in effect, or the discovery period is extended, for at least four months after final distribution of assets.

(d) Within three days after the decision of the board of directors to submit