

# Proposed Rules

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This section of the FEDERAL REGISTER contains notices to the public of the proposed issuance of rules and regulations. The purpose of these notices is to give interested persons an opportunity to participate in the rule making prior to the adoption of the final rules.

## NATIONAL CREDIT UNION ADMINISTRATION

### 12 CFR Parts 741 and 750

RIN 3133-AD73

### Golden Parachute and Indemnification Payments

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

**ACTION:** Proposed rule.

**SUMMARY:** NCUA proposes to adopt a rule to prohibit, with some exceptions, a federally insured credit union (FICU) from making golden parachute and indemnification payments to an institution-affiliated party (IAP). The proposed rule is intended to help safeguard the National Credit Union Share Insurance Fund (NCUSIF) by preventing the wrongful or improper disposition of FICU assets and to inhibit unwarranted rewards to IAPs who may have contributed to an FICU's troubled condition. The proposed rule would also provide FICUs with greater clarity on the distinction between legitimate employee severance payments and improper golden parachute payments.

**DATES:** Comments must be received on or before September 7, 2010.

**ADDRESSES:** You may submit comments by any of the following methods (Please send comments by one method only):

- *Federal eRulemaking Portal:* <http://www.regulations.gov>. Follow the instructions for submitting comments.
- *NCUA Web site:* [http://www.ncua.gov/RegulationsOpinionsLaws/proposed\\_regs/proposed\\_regs.html](http://www.ncua.gov/RegulationsOpinionsLaws/proposed_regs/proposed_regs.html). Follow the instructions for submitting comments.

- *E-mail:* Address to [regcomments@ncua.gov](mailto:regcomments@ncua.gov). Include “[Your name] Comments on ‘Golden Parachute and Indemnification Payments’” in the e-mail subject line.

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

- *Mail:* Address to Mary Rupp, Secretary of the Board, National Credit

Union Administration, 1775 Duke Street, Alexandria, Virginia 22314-3428.

- *Hand Delivery/Courier:* Same as mail address.

*Public Inspection:* All public comments are available on the agency's Web site at <http://www.ncua.gov/RegulationsOpinionsLaws/comments> as submitted, except as may not be possible for technical reasons. Public comments will not be edited to remove any identifying or contact information. Paper copies of comments may be inspected in NCUA's law library at 1775 Duke Street, Alexandria, Virginia 22314, by appointment weekdays between 9 a.m. and 3 p.m. To make an appointment, call (703) 518-6546 or send an e-mail to [OGCMail@ncua.gov](mailto:OGCMail@ncua.gov).

**FOR FURTHER INFORMATION CONTACT:** Pamela Yu, Staff Attorney, at the above address, or telephone: (703) 518-6540.

#### SUPPLEMENTARY INFORMATION:

#### I. Background

Section 2523 of the Comprehensive Thrift and Bank Fraud Prosecution and Taxpayer Recovery Act of 1990 (Fraud Act)<sup>1</sup> amended the Federal Credit Union Act (FCU Act) by adding section 206(t). Public Law No. 101-647, 2523 (1990). Section 206(t) states that “[t]he Board may prohibit or limit, by regulation or order, any golden parachute payment or indemnification payment.” 12 U.S.C. 1786(t)(1).

This proposal implements section 206(t) by adding a new part 750 to NCUA's regulations. Although the Fraud Act authorized the Board to prescribe rules in this area, the Board did not promulgate rules to implement section 206(t) initially because of a government-wide moratorium on rulemaking. Regarding the golden parachute and indemnification provisions in the proposed corporate rule, the Board noted its concern with “recent problems exposed by the corporate financial crisis, including corporate governance problems” but stated it did not intend to apply the requirements of the proposed corporate rule to natural person credit unions. 74 FR 65210, 65255 (Dec. 9, 2009). Given the current economic climate and

<sup>1</sup> The Comprehensive Thrift and Bank Fraud Prosecution and Taxpayer Recovery Act of 1990 is title XXV of the Crime Control Act of 1990, S. 3266, which Congress passed on October 27, 1990 and the President signed into law on November 29, 1990.

continuing financial problems facing many natural person credit unions, the Board now believes it should implement the golden parachute and indemnification provisions of the anti-fraud legislation for all FICUs. Furthermore, because the Board wishes to implement this regulation without delay, the comment period will be 30 days, as required under the Administrative Procedure Act, 5 U.S.C. 553(d), rather than a 60-day comment period NCUA generally provides under IRPS 87-2, *Developing and Reviewing Government Regulations*, 52 FR 35231 (Sept. 18, 1987), as amended by IRPS 03-2, 68 FR 31949 (May 29, 2003). The provisions of this proposed rule, substantively identical to the provisions in the proposed corporate rule, will prevent the improper disposition of FICU assets and inhibit unwarranted rewards that can contribute to an FICU's troubled condition.

#### II. Summary of the Proposed Rule

NCUA proposes to adopt a rule to prohibit, with certain exceptions, an FICU from making golden parachute and indemnification payments to an IAP. The purpose of the proposed rule is to safeguard the NCUSIF by preventing the wrongful or improper disposition of FICU assets and to inhibit rewards to IAPs who may have contributed to an FICU's troubled condition. It is also intended to provide FICUs with greater clarity on the distinction between legitimate employee severance payments and improper golden parachute payments. The proposed rule tracks closely to existing regulations applying to banks.<sup>2</sup>

This proposal is drafted so as to apply to all FICUs, including natural person and corporate credit unions. NCUA previously issued a proposal to implement section 206(t) for corporate credit unions on November 19, 2009, as part of a comprehensive proposal to amend part 704, NCUA's rule governing corporate credit unions. 74 FR 6520 (Dec. 9, 2009) (to be codified at 12 CFR 704.20).<sup>3</sup> This proposed rule, with only minor differences, for example, in grammar or simpler word choice, is substantively the same as the proposed corporate provisions. A final corporate rule may be adopted before this

<sup>2</sup> See 12 CFR part 359.

<sup>3</sup> The comment period for the corporate proposal ended March 9, 2010.

proposal is finalized and, if so, the Board may then consider consolidating the corporate rule's golden parachute provisions into a final rule for this proposal to avoid duplicative sections on the same subject.

Once finalized, the new part 750 will apply to all new employment contracts entered into on or after that date, as well as to existing contracts that are renewed or modified in any way after the final rule's effective date.

#### *A. Prohibited Golden Parachute Payments*

Proposed part 750 prohibits, with some exceptions, FICUs that are insolvent, in conservatorship, rated CAMEL 4 or 5, or in an otherwise troubled condition from making golden parachute payments. Golden parachutes are payments made to an IAP that are contingent on the termination of that person's employment and received when the credit union making the payment is troubled, undercapitalized, or insolvent. 12 U.S.C. 1786(t)(4).

Recognizing, however, that certain post-employment payments have reasonable business purposes, the proposal includes several "exceptions" to the general prohibition against golden parachutes to allow FICUs to offer, consistent with normal business practice, "bona fide" deferred compensation plans and legitimate "nondiscriminatory" severance pay plans. The proposal also includes an exception to permit a troubled FICU to hire and agree to pay a golden parachute to competent management to assist in bringing a troubled credit union back to financial health. The proposal would also permit limited golden parachute payments, with prior NCUA approval, in circumstances involving the merger of a troubled FICU.

#### *B. Prohibited Indemnification Payments*

The proposal also prohibits FICUs, regardless of their financial condition, from paying or reimbursing an IAP's legal or other professional expenses incurred in administrative or civil proceedings instituted by NCUA or the appropriate state regulatory authority where the IAP is assessed a civil money penalty, removed from office or made subject to a cease and desist order.<sup>4</sup> FICUs, however, may purchase

<sup>4</sup> Federal credit unions may provide for indemnification of officers and directors as set forth at 12 CFR 701.33(c). While proposed § 750.5 is intended to apply to all FICUS, it does not grant or enhance any authority state chartered credit unions may have under state law to provide indemnification. To the extent this proposed part 750 is perceived to conflict with § 701.33 or any state law or regulation for state-chartered credit unions, a FICU must comply with part 750.

reasonable commercial insurance policies or fidelity bonds. The proposal also allows for partial indemnification in circumstances where there is a formal and final adjudication or finding 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. In these instances, indemnification would be permitted for only that portion of the legal or professional expenses attributable to the charges for which there has been a finding in favor of the IAP.

### **III. Description of Key Provisions**

A detailed description of the proposal rule's key provisions follows.

#### *Section 750.1 Definitions*

Proposed § 750.1 contains definitions applicable to this part. The key definitions are discussed in detail below.

#### **Bona Fide Deferred Compensation Plan or Arrangement**

This definition, which appears as proposed § 750.1(d), is intended to permit FICUs to offer reasonable deferred compensation plans that are typical in executive compensation packages for credit union executives. Since credit unions, as tax-exempt organizations, are not able to offer equity-based incentive compensation, deferred compensation plans are an important tool for credit unions to attract executive talent in a competitive market. The proposed definition would permit FICUs to continue to provide legitimate deferred compensation plans, including supplemental retirement benefits and nonqualified deferred compensation plans, consistent with normal business practices.

#### **Golden Parachute Payment**

The proposed rule generally prohibits a FICU from making or agreeing to make any golden parachute payment. Proposed § 750.1(f) defines a "golden parachute payment" as any payment (or agreement to make any payment) to an IAP that is contingent on the termination of that party's employment and received when the FICU making the payment is insolvent, undercapitalized, in conservatorship, rated CAMEL 4 or 5, subject to a proceeding to terminate or suspend its share insurance, or in an otherwise troubled condition, as defined in § 701.14(b)(3) and (4).<sup>5</sup>

The proposed golden parachute definition would provide exceptions for

<sup>5</sup> Corporate credit unions that have been granted assistance as described in sections 208 or 216 of the FCU Act would also be considered to be in a "troubled condition" under the proposal.

certain qualified pension or retirement plans under section 401 of the Internal Revenue Code (IRC); employee benefit plans that are permissible under § 701.19; bona fide deferred compensation plans; certain death and disability payments; certain "nondiscriminatory" severance plans; payments required by state law; and payments that the Board has determined permissible under § 750.4. These types of payments would not be considered golden parachute payments for purposes of this rule.

#### **Nondiscriminatory**

Section 750.1(i) of the proposal defines "nondiscriminatory" as it relates to severance pay plans or arrangements, stating only "nondiscriminatory" severance pay plans or arrangements qualify as an exception to the prohibition on golden parachute payments. To meet the proposed definition of nondiscriminatory, a severance pay plan must apply to all employees of an FICU who meet reasonable and customary eligibility requirements applicable to all employees. NCUA recognizes that severance plans providing somewhat more generous benefits to higher ranking IAPs are typical in the industry. Thus, the proposed definition permits severance plans with a modest variance in benefits based on objective criteria. Disparities in benefits are only acceptable if based on objective criteria like salary, total compensation, length of service, job grade or classification. Additionally, the proposed definition requires any group of employees that is designated for a different level of benefits based on objective criteria must consist of not less than 33% of all employees.

#### **Prohibited Indemnification Payment**

Under proposed § 750.1(k), a "prohibited indemnification payment" is any payment or agreement to make any payment by an FICU to an IAP 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 by NCUA or the appropriate state regulatory authority and the IAP is assessed a civil money penalty, removed from office or made subject to a cease and desist order. The proposed definition would not include any reasonable payment to purchase commercial insurance policies or fidelity bonds. The policy or bond cannot pay for any penalty or judgment against an IAP; however, the policy or bond may cover the potential future cost of defending an administrative

proceeding or civil action or pay restitution to the FICU or its liquidating agent.

The proposed definition would also provide an exception for payments representing a partial indemnification for legal or professional expenses specifically attributable to charges for which there has been a formal and final adjudication or finding 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.

#### *Section 750.4 Permissible Golden Parachute Payments*

In certain, limited circumstances, NCUA believes payments that otherwise satisfy the definition of golden parachute payments should be permitted. Accordingly, the proposal includes three major exceptions to the general prohibition on golden parachute payments.

First, the proposal includes an exception to allow an FICU in a troubled condition to agree to pay a golden parachute payment in order to hire new management to help bring a troubled FICU back to sound financial health. This exception is intended to ensure an FICU can attract qualified senior management with appropriate expertise to help improve a troubled FICU's financial condition. An FICU must notify and obtain the written permission of the Board before employing this exception to make a golden parachute payment.

Second, the proposed rule includes an exception to allow FICUs to offer reasonable severance plan payments in the context of a merger involving a troubled credit union.

The merger must be unassisted, that is, without assistance from, and at no cost to, NCUA. Reasonable severance arrangements related to an unassisted merger must not exceed twelve months' salary. Additionally, an FICU must obtain the written consent of the Board before making the severance payment.

Third, the proposal includes a general exception to permit golden parachute payments where the Board determines such a payment is permissible.

In applying to NCUA for any of the three exceptions above, the FICU must demonstrate that the IAP does not bear any responsibility for the troubled condition of the FICU. Specifically, an FICU must demonstrate that it does not possess, and is not aware of, any information providing a reasonable basis to believe that: the IAP has committed any fraudulent act or omission, breach of trust or fiduciary duty, or insider abuse; the IAP is

substantially responsible for the insolvency of, the appointment of a conservator or liquidating agent for, or the troubled condition of the FICU; or the IAP has violated or conspired to violate any applicable federal or state law or regulation or certain specified criminal provisions of the United States Code.

Under the proposal, the Board may consider the following factors in determining whether to permit a golden parachute payment:

- Whether, and to what degree, the IAP was in a position of managerial or fiduciary responsibility;
- The length of time the IAP was affiliated with the FICU, and the degree to which the proposed payment represents a reasonable payment for services rendered over the period of employment; and
- Any other factors or circumstances which would indicate that the proposed payment would be contrary to the intent of section 206(t) of the FCU Act.

#### *Section 750.5 Permissible Indemnification Payments*

The proposed rule generally prohibits indemnification payments for the benefit of an IAP for any liability or legal expense in connection with an administrative or civil enforcement action 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 conduct of the affairs of an insured credit union, or required to cease and desist from or take any affirmative action described in section 206 of the FCU Act. Recognizing, however, that there are circumstances where indemnification would be appropriate, § 750.5 of the proposal allows for reasonable indemnification payments to an IAP under certain conditions. Specifically, an FICU may make or agree to make an indemnification payment to an IAP for reasonable legal or other professional expenses incurred in defending an administrative or civil action brought by NCUA or the appropriate state regulator where the FICU's board of directors makes a good faith determination, after due investigation, that:

- The IAP acted in good faith and in a manner he or she believed to be in the best interests of the FICU;
- The payment will not materially adversely affect the FICU's safety and soundness;
- The payments do not ultimately become prohibited indemnification payments as defined in § 750.1(k), that is, the administrative action does not result in a civil money penalty, removal

order, or cease and desist order against the IAP; and

- The IAP agrees in writing to reimburse the FICU, to the extent not covered by payments from insurance, for that portion of the advanced indemnification payments, if any, which subsequently becomes a prohibited indemnification payment.

#### *Section 750.7 Applicability in the Event of Liquidation or Conservatorship*

This section clarifies how the prohibitions and limitations in this part would apply in the event of a liquidation or conservatorship. Under the proposal, the Board's consent or approval of a golden parachute payment under this part will not in any way bind or obligate any liquidating agent or conservator for a failed FICU to pay any claim or obligation under any golden parachute, severance, indemnification or other agreement.

## **IV. Regulatory Procedures**

### *Regulatory Flexibility Act*

The Regulatory Flexibility Act requires NCUA to prepare an analysis to describe any significant economic impact a rule may have on a substantial number of small entities (primarily those under ten million dollars in assets). This proposed rule does not impose any regulatory burden but prohibits improper golden parachute and indemnification payments to IAPs by FICUs in certain circumstances. Accordingly, it will not have a significant economic impact on a substantial number of small credit unions, and therefore, no regulatory flexibility analysis is required.

### *Paperwork Reduction Act*

The Paperwork Reduction Act of 1995 (PRA) applies to rulemakings in which an agency by rule creates a new paperwork burden on regulated entities or modifies an existing burden. 44 U.S.C. 3507(d). For purposes of the PRA, a paperwork burden may take the form of a either a reporting or a recordkeeping requirement, both referred to as information collections. Proposed part 750 would impose new information collection requirements. Proposed § 750.6 would require requests for an FICU to make nondiscriminatory severance plan payments under § 750.1(f)(2)(v) and golden parachute payments permitted by § 750.4 to be submitted in writing to NCUA.

In FY 2009, there were 351 problem FICUs with CAMEL 4 or 5 ratings. Of those, 156 FICUs had less than \$10 million in total assets and 117 FICUs had less than \$100 million in total

assets. These smaller FICUs are unlikely to seek NCUA approval to make golden parachute payments because these payments are more typically seen in the executive compensation of larger, more complex FICUs. Of the remaining 78 larger problem FICUs, NCUA anticipates no more than 20 percent would seek NCUA approval to make a golden parachute payment. Accordingly, NCUA estimates that 15 FICUs will need to solicit NCUA approval in advance of making a severance or golden parachute payment within the scope of the proposed rule and that preparing the request for approval may take four hours: 15 FICUs × 4 hours = 60 hours.

As required by the PRA, NCUA is submitting a copy of this proposed regulation to the Office of Management and Budget (OMB) for its review and approval. Persons interested in submitting comments with respect to the information collection aspect of the proposed rule should submit them to the OMB at the following address: Office of Information and Regulatory Affairs, OMB, New Executive Office Building, Washington, DC 20503; Attention: NCUA Desk Officer, with a copy to Mary Rupp, Secretary of the Board, National Credit Union Administration, 1775 Duke Street, Alexandria, Virginia 22314-3428.

*The Treasury and General Government Appropriations Act, 1999—Assessment of Federal Regulations and Policies on Families*

NCUA has determined that this rule will not affect family well-being within the meaning of section 654 of the Treasury and General Government Appropriations Act, 1999, Public Law 105-277, 112 Stat. 2681 (1998).

*Small Business Regulatory Enforcement Fairness Act*

The Small Business Regulatory Enforcement Fairness Act of 1996 (Pub. L. 104-121) (SBREFA) provides generally for congressional review of agency rules. A reporting requirement is triggered in instances where NCUA issues a final rule as defined by Section 551 of the APA. 5 U.S.C. 551. NCUA does not believe this proposed rule is a “major rule” within the meaning of the relevant sections of SBREFA. NCUA has submitted the rule to the Office of Management and Budget for its determination in that regard.

**List of Subjects**

*12 CFR Part 741*

Bank deposit insurance, Credit unions, Reporting and recordkeeping requirements.

*12 CFR Part 750*

Credit Unions, Golden parachute payments, Indemnity payments.

By the National Credit Union Administration Board, this 29th day of July, 2010.

**Mary F. Rupp,**

*Secretary of the Board.*

For the reasons discussed above, NCUA proposes to amend 12 CFR chapter VII as follows:

**PART 741—REQUIREMENTS FOR INSURANCE**

1. The authority citation for part 741 continues to read as follows:

**Authority:** 12 U.S.C. 1757, 1766(a), 1781-1790, and 1790d; 31 U.S.C. 3717.

2. Add § 741.223 to read as follows:

**§ 741.223 Golden parachute and indemnification payments.**

Any credit union insured pursuant to Title II of the Act must adhere to the requirements stated in part 750 of this chapter.

3. New part 750 is added to read as follows:

**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.

750.7 Applicability in the event of liquidation or conservatorship.

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

**§ 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, nonqualified 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 or civil enforcement action commenced by NCUA 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 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 agrees in writing to reimburse the credit union if it is ultimately determined that the IAP violated a law, regulation or other fiduciary duty.

**§ 750.1 Definitions.**

(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, but the term does not include a plan within the exceptions described in paragraphs (f)(2) (iii) and (v) of this section.

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

(d) *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 (f)(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 (f)(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 paragraphs (d)(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 (f)(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 (f)(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 (f)(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.

(e) *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.

(f) *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:

(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 the Board 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.

(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 (f)(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 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 (d) 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 Board 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 (f)(1)(ii) of this section or in contemplation of that condition without the prior written consent of the Board; 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

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

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

(h) *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.

(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; and

(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 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 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.

(l) *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.

#### **§ 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 part.

#### **§ 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) The Board, 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(f)(1)(ii), and the Board, 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. The Board's consent will not improve the IAP's position in the event of the insolvency of the credit union since the Board'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 the Board 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(l), 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; and

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

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

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

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

(3) Any other factors or circumstances indicating the proposed payment would be contrary to the intent of section 206(t) of the Act or this part.

#### **§ 750.5 Permissible indemnification payments.**

(a) A federally insured credit union may make or agree to make reasonable indemnification payments to an IAP with respect to an administrative proceeding or civil action initiated by NCUA or a state regulatory authority if:

(1) The federally insured credit union's board of directors, in good faith, determines in writing after due investigation and consideration that the institution-affiliated party acted in good faith and in a manner he or she believed

to be in the best interests of the institution;

(2) The federally insured credit union's board of directors, in good faith, determines in writing after due investigation and consideration that the payment of the expenses will not materially adversely affect the credit union's safety and soundness;

(3) The indemnification payments do not constitute prohibited indemnification payments as defined in § 750.1(k); and

(4) The IAP agrees in writing to reimburse the federally insured credit union, to the extent not covered by payments from insurance or bonds purchased pursuant to § 750.1(k)(2)(i), for that portion of the advanced indemnification payments which subsequently become prohibited indemnification payments, as defined in § 750.1(k).

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

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

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

#### **§ 750.6 Filing instructions.**

Requests to make excess nondiscriminatory severance plan payments pursuant to § 750.1(f)(2)(v) and golden parachute payments permitted by § 750.4 must be submitted in writing to the Board. The request must be in letter form and must contain all relevant factual information as well as the reasons why such approval should be granted.

#### **§ 750.7 Applicability in the event of liquidation or conservatorship.**

The provisions of this part, or any consent or approval granted under the provisions of this part by the Board, will not in any way bind any liquidating agent or conservator for a failed federally insured credit union and will not in any way obligate the liquidating agent or conservator to pay any claim or obligation pursuant to any golden parachute, severance, indemnification or other agreement. Claims for employee welfare benefits or other benefits that are contingent, even if otherwise vested, when a liquidating agent or conservator is appointed for any federally insured credit union, including any contingency for termination of employment, are not provable claims or actual, direct compensatory damage claims against such liquidating agent or conservator.

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## **DEPARTMENT OF TRANSPORTATION**

### **Federal Aviation Administration**

#### **14 CFR Part 39**

[Docket No. FAA-2010-0705; Directorate Identifier 2009-NM-206-AD]

RIN 2120-AA64

#### **Airworthiness Directives; McDonnell Douglas Corporation Model DC-9-14, DC-9-15, and DC-9-15F Airplanes; and Model DC-9-20, DC-9-30, DC-9-40, and DC-9-50 Series Airplanes**

**AGENCY:** Federal Aviation Administration (FAA), Department of Transportation (DOT).

**ACTION:** Notice of proposed rulemaking (NPRM).

**SUMMARY:** The FAA proposes to supersede an existing airworthiness directive (AD) that applies to certain Model DC-9-14 and DC-9-15 airplanes; and Model DC-9-20, DC-9-30, DC-9-40, and DC-9-50 series airplanes. The existing AD currently requires repetitive high frequency eddy current inspections to detect cracking in the vertical radius