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## NATIONAL CREDIT UNION ADMINISTRATION

### 12 CFR Part 701

RIN 3133-AD75

#### The Low-Income Definition

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

**ACTION:** Interim final rule and request for comments.

**SUMMARY:** NCUA is amending the definition of “low-income members” to clarify that, in determining if a credit union qualifies for a low-income designation, the comparison of credit union data, whether individual or family income data, must be with statistical data for the same category. The amendment will clarify the intention of the original regulatory text so it is consistent with the geo-coding software the agency uses to make the low-income credit union (LICU) designation.

**DATES:** The rule is effective August 5, 2010. Comments must be received by October 4, 2010.

**FOR FURTHER INFORMATION CONTACT:** Sheila Albin, Staff Attorney, Office of General Counsel, National Credit Union Administration, 1775 Duke Street, Alexandria, Virginia 22314-3428, or telephone: (703) 518-6540.

#### SUPPLEMENTARY INFORMATION:

##### Background

The Federal Credit Union Act (Act) authorizes the NCUA Board (Board) to define “low-income members” so that credit unions with a membership consisting of predominantly low-income members can benefit from certain statutory relief and receive assistance from the Community Development Revolving Loan Fund. 12 U.S.C. 1752(5), 1757a(b)(2)(A), 1757a(c)(2)(B), 1772c-1. This authority has been

implemented in § 701.34 of NCUA regulations, known as the low-income rule. 12 CFR 701.34. In April 2008, the Board proposed substantial changes to the rule, which had previously been based on measuring median household income, with geographic differentials for certain areas with higher costs of living. 73 FR 22836 (April 28, 2008). In brief, the Board proposed to, and as adopted in the final rule, did replace median household income with median family income or median earnings for individuals as better measures, more flexible, and in line with standards used by other federal agencies. 73 FR 71909 (Nov. 26, 2008).

As discussed in the preamble to the final rule, NCUA also undertook as part of the regulatory changes to facilitate the low-income designation process by eliminating the requirement for credit unions to apply for the designation. NCUA is in the process of implementing geo-coding software to make the calculation automatically for credit unions during the examination process.

NCUA will make the determination of whether a majority of an FCU’s members are low-income based on data it obtains during the examination process. This will involve linking member address information to publicly available information from the U.S. Census Bureau to estimate member earnings. Using automated, geo-coding software, NCUA will use member street addresses collected during FCU examinations to determine the geographic area and metropolitan area for each member account. NCUA will then use income information for the geographic area from the Census Bureau and assign estimated earnings to each member.

73 FR 71910-11. NCUA’s software ensures that the same categories of data available for member income at a particular credit union are compared with like categories of statistical data on income from the Census Bureau. In particular, individual member earnings information is compared to median individual earnings data, family income information is compared to median family income data, and so forth.<sup>1</sup>

<sup>1</sup> NCUA’s geo-coding software, known within the agency as the “Low-Income Designation Assessment Tool,” is currently a stand-alone software program developed by NCUA’s Office of the Chief Information Officer with guidance from regional staff experienced in low-income designation. Regional staff as well as Economic Development Specialists currently use the tool as needed based on requests from credit unions. Eventually, the same software rules will be embedded into the

The final rule in November 2008 also provided credit unions, as an alternative to relying on NCUA’s geo-coding software, the option of providing actual income information about their members as a basis for qualifying as a LICU. Confusion has arisen regarding the appropriate comparison of actual member information and statistical data from the Census Bureau, prompting the need for this clarifying amendment. The confusion arises from a discussion in the preamble to the final rule, where the Board stated:

The rule also provides an alternative basis for an FCU to qualify for a LICU designation. An FCU may be able to demonstrate the actual income of its members based on data it has, for example, from loan applications or surveys of its members. An FCU may qualify as a LICU if it can establish a majority of its members meet the low-income formula. For example, an FCU with 1,000 members may be able to show the actual income of 501 or more of its members is equal to or less than 80% of the MFI for the metropolitan area(s) where they live. As a practical matter, the Board thinks few FCUs will need this option because NCUA’s approach of matching member residential information with Census Bureau income information will provide an estimate very close to members’ actual income.

73 FR 71911. The rule provides median family income or median individual earnings as alternatives and, as noted above, NCUA’s geo-coding software compares like categories of data. Unfortunately, the above-quoted statement in the preamble indicates that, as an alternative to relying on the NCUA’s geo-coding, a credit union could apply for a low-income designation relying on a comparison of actual income data for individual members to statistical data on median family income as the basis for the designation. This would not be a valid or meaningful comparison. The Board believes that, as a matter of logic and

NCUA AIREX examination software. The current version performs 30 different ratio calculations for each member based on a variety of factors and data to determine whether the member meets the low-income definition. The variety of ratios is expansive in order to provide all of the possible options for members to meet the definition. Factors recognize the following: (1) Data sources include both decennial income data as well as American Community Survey income data; (2) different data is incorporated for metro vs. non-metro geographic areas; and (3) ratio options include comparisons of census tract and block group income data, to zip code, county, MSA, state, and national data, plus comparisons of county income data to CBSA, state, and national income data.

statistical reasoning, only like categories of data may be compared in making the determination that a credit union's membership meets the low-income definition. Actual individual member income information should not be measured against median family income, but rather, against individual median earnings.

### Changes to the Low-Income Rule

This interim final rule amends § 701.34(a)(1) by clarifying that median family income and median earnings for individuals are alternative bases on which credit union members may qualify as low income. In addition, the subsection of the rule where the option for credit unions to submit their own information for purposes of qualifying for the designation is amended to clarify that actual member data must be compared with a like category of statistical data. For example, if a credit union provides individual income information for members, the median earnings for individuals must be used to determine if the members are low-income.

### Interim Final Rule and Immediate Effective Date

NCUA is issuing this rulemaking as an interim final rule effective on publication. The Administrative Procedure Act (APA), 5 U.S.C. 553, generally requires that before a rulemaking can be finalized it must first be published as a notice of proposed rulemaking with the opportunity for public comment, unless the agency for good cause finds that notice and public comment are impracticable, unnecessary, or contrary to the public interest. Additionally, the APA requires that, once finalized, a rulemaking generally must have a delayed effective date of 30 days from the date of publication, except for good cause. In this regard, NCUA believes good cause exists for issuing these clarifying amendments as an interim final rule, effective immediately, in order to eliminate as soon as possible any confusion resulting from the preamble language that was inconsistent with or makes ambiguous the regulatory text for the definition of low-income members. To that extent, NCUA believes issuing this rulemaking as an interim final rule, effective on publication, is also in the public interest. Finally, credit unions should take notice that, upon the Board's adoption of this interim final rule, NCUA will not consider requests from credit unions under § 701.34(a)(3) for a low-income designation based on a comparison of actual individual

member income data to median family income data.

Although issuing these changes an interim final rule, effective immediately, NCUA would like the benefit of public comment before adopting the changes in a final rule and invites interested parties to submit comments during a 60-day comment period. In adopting a final regulation, NCUA may revise the interim rule in light of the comments received if appropriate.

### Regulatory Procedures

#### *Regulatory Flexibility Act*

The Regulatory Flexibility Act requires NCUA to prepare an analysis to describe any significant economic impact any regulation may have on a substantial number of small entities. 5 U.S.C. 603(a). For purposes of this analysis, NCUA considers credit unions having under \$10 million in assets small entities. Interpretive Ruling and Policy Statement 03-2, 68 FR 31949 (May 29, 2003). As of December 31, 2007, out of approximately 8,410 federally insured credit unions, 3,599 had less than \$10 million in assets. This interim final rule merely clarifies the existing low-income rule and, therefore, an analysis is not required. NCUA, however, provided an analysis when it issued the final rule in November 2008, concluding that the economic impact on entities affected by the rule would not be significant. 73 FR 71911-12.

#### *Small Business Regulatory Enforcement Fairness Act*

The Small Business Regulatory Enforcement Fairness Act (SBREFA) of 1996, Public Law 104-121, 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 Administrative Procedures Act. 5 U.S.C. 551. While NCUA views this clarifying amendment as minor, the formal determination by the Office of Information and Regulatory Affairs is pending.

#### *Paperwork Reduction Act*

This clarifying amendment does not change the collection requirements under the Paperwork Reduction Act of 1995 (PRA), 44 U.S.C. 3501 *et seq.*

#### *Executive Order 13132*

Executive Order 13132 encourages independent regulatory agencies to consider the impact of their actions on state and local interests. In adherence to fundamental federalism principles, NCUA, an independent regulatory agency as defined in 44 U.S.C. 3502(5), voluntarily complies with the executive

order. The final rule will not have substantial direct effect on the states, on the connection between the national government and the states, or on the distribution of power and responsibilities among the various levels of government. NCUA has determined this final rule does not constitute a policy that has federalism implications for purposes of the executive order.

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

NCUA has determined that this final 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).

### List of Subjects in 12 CFR Part 701

Credit unions, Federal credit unions, Low income, Nonmember deposits, Secondary capital, Shares.

By the National Credit Union Administration Board, on July 29, 2010.

**Mary F. Rupp,**

*Secretary of the Board.*

■ For the reasons stated above, NCUA amends 12 CFR part 701 as follows:

### **PART 701—ORGANIZATION AND OPERATIONS OF FEDERAL CREDIT UNIONS**

■ 1. The authority for part 701 continues to read as follows:

**Authority:** 12 U.S.C. 1752(5), 1757, 1765, 1766, 1781, 1782, 1787, 1789; Title V, Pub. L. 109-351, 120 Stat. 1966.

■ 2. In § 701.34, amend paragraph (a) by:

■ a. Removing the first two sentences in paragraph (a)(2) and adding a new first sentence; and

■ b. Adding a new sentence to the end of paragraph (a)(3).

The additions read as follows:

#### **§ 701.34 [Amended]**

(a) \* \* \*

(2) Low-income members are those members whose family income is 80% or less than the median family income for the metropolitan area where they live or national metropolitan area, whichever is greater, or those members who earn 80% or less than the total median earnings for individuals for the metropolitan area where they live or national metropolitan area, whichever is greater. \* \* \*

(3) \* \* \* Actual member income data must be compared to a like category of statistical data, for example, actual

individual member income may only be compared to total median earnings for individuals for the metropolitan area where they live or national metropolitan area, whichever is greater.

\* \* \* \* \*

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## NATIONAL CREDIT UNION ADMINISTRATION

### 12 CFR Part 707

RIN 3133-AD72

#### Truth in Savings

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

**ACTION:** Interim final rule with request for comments.

**SUMMARY:** On July 22, 2009, NCUA published a final rule amending part 707, which implements the Truth in Savings Act, and the official staff interpretations to the regulation. The final rule addressed credit unions' disclosure practices related to overdraft services, including balances disclosed to members through automated systems. This interim final rule amends part 707 and official staff interpretations to address the application of the July 2009 final rule to retail sweep programs and the terminology for overdraft fee disclosures and to make amendments that conform to the Federal Reserve Board's (Federal Reserve) final Regulation E amendments addressing overdraft services, adopted in November 2009. This rule also includes a minor technical correction to sample form B-12 for formatting purposes.

**DATES:** This rule is effective September 7, 2010, except for the amendment to § 707.11(a)(1)(i), which is effective October 1, 2010. Comments must be received by October 4, 2010.

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

- *NCUA Web Site:* [http://www.ncua.gov/news/proposed\\_regs/proposed\\_regs.html](http://www.ncua.gov/news/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 Interim Final Rule (Truth in Savings)" 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 website 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:

Justin M. Anderson, Staff Attorney, Office of General Counsel, National Credit Union Administration, 1775 Duke Street, Alexandria, Virginia 22314-3428, or telephone: (703) 518-6540.

#### SUPPLEMENTARY INFORMATION:

##### I. Background

The Truth in Savings Act (TISA) requires NCUA to promulgate regulations substantially similar to those promulgated by the Federal Reserve within 90 days of the effective date of the Federal Reserve's rules. 12 U.S.C. 4311(b). In doing so, NCUA is to take into account the unique nature of credit unions and the limitations under which they pay dividends on member accounts. *Id.* In compliance with TISA, NCUA is issuing this interim final rule with request for comment that is substantially similar to the Federal Reserve's June 2010 final rule. NCUA is also making technical corrections to the aggregate overdraft and returned item fees sample form for formatting purposes.

On January 29, 2009, the Federal Reserve published a final rule amending Regulation DD, its TISA rule, and the official staff commentary to address depository institutions' disclosure practices related to overdraft services, including balances disclosed to consumers through automated systems. 74 FR 5584 (January 29, 2009). NCUA issued a similar final rule on July 22, 2009. 74 FR 36102 (July 22, 2009). Both rules had an effective date of January 1, 2010.

In November 2009, the Federal Reserve adopted a final rule amending Regulation E, which implements the Electronic Fund Transfer Act. This final rule limits a financial institution's ability to assess fees for paying ATM and one-time debit card transactions pursuant to the institution's discretionary overdraft service without

the consumer's affirmative consent to such payment.

Since publication of the Federal Reserve's January 2009 final rule, institutions and others have requested clarification of particular aspects of the rule and further guidance regarding compliance with the rule. In addition, the Federal Reserve believed conforming amendments to Regulation DD were necessary in light of certain provisions subsequently adopted in the Regulation E final rule. Accordingly, in March 2010, the Federal Reserve proposed to amend Regulation DD and the official staff commentary. 75 FR 9126 (March 1, 2010). Based on comments it received, the Federal Reserve issued a final rule on June 4, 2010. 75 FR 31673 (June 4, 2010).

##### II. Interim Final Rule

The NCUA Board (the Board) is adopting interim final revisions to part 707 and the accompanying official staff interpretations that are substantively identical to the Federal Reserve's June 2010 final rule. Like the Federal Reserve's approach, the effective date of this rule will be 30 days from the date of publication in the **Federal Register**, but compliance with the changes to § 707.11(a)(1)(i) will not be mandatory until October 1, 2010. This will give credit unions sufficient time to implement the necessary system changes to comply with this rule.

The Board is issuing this rule as an interim final rule because there is a strong public interest in having consumer-oriented rules in places that are consistent with those recently promulgated by the Federal Reserve. Additionally, as discussed above, NCUA is statutorily required to issue rules substantially similar to those of the Federal Reserve within 90 days of the effective date of the Federal Reserve's rules.

##### III. Section-by-Section Analysis

###### A. Section 707.6(b)—Periodic Statement Disclosures; Statement Disclosures

Section 707.6(b) describes disclosures regarding certain charges or fees required when a credit union provides a periodic statement to its members. The Board is making an amendment to § 707.6(b) and the related official staff interpretation. First, the Board is adding new § 707.6(b)(5) to state explicitly that the aggregate fee disclosures required by § 707.11(a)(1), discussed below, are among the disclosures required to be provided on periodic statements for purposes of § 707.6(b). Second, the Board is revising comment 6(b)(3)-2 to eliminate the reference to the promotion