NATIONAL CREDIT UNION ADMINISTRATION

12 CFR Parts 702 and 741

RIN 3133–AE98

Subordinated Debt

AGENCY: National Credit Union Administration (NCUA).

ACTION: Final rule.

SUMMARY: The NCUA Board (Board) is amending the Subordinated Debt rule, which the Board finalized in December 2020 with an effective date of January 1, 2022. This final rule amends the definition of ''Grandfathered Secondary Capital'' to include any secondary capital issued to the United States Government or one of its subdivisions (U.S. Government), under a secondary capital application approved before January 1, 2022, irrespective of the date of issuance. This amendment will benefit eligible low-income credit unions (LICUs) that are either participating in the U.S. Department of the Treasury's (Treasury) Emergency Capital Investment Program (ECIP) or other programs administered by the U.S. Government that can be used to fund secondary capital, if they do not receive the funds for such programs by December 31, 2021. The Board is also amending the Subordinated Debt rule by extending the expiration of regulatory capital treatment for the aforementioned secondary capital issuances to the later of 20 years from the date of issuance or January 1, 2042.

DATES: The final rule is effective January 1, 2022.

FOR FURTHER INFORMATION CONTACT: Justin Anderson, Senior Staff Attorney, (703) 518–6556, Office of General Counsel, National Credit Union Administration, 1775 Duke Street, Alexandria, VA 22314.

SUPPLEMENTARY INFORMATION:

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I. Background

A. Subordinated Debt Rule

At its December 2020 meeting, the Board issued a final Subordinated Debt rule permitting LICUs, Complex Credit Unions, and New Credit Unions to issue Subordinated Debt for purposes of Regulatory Capital treatment.[1] Relevant to this final rule, the Subordinated Debt rule grandfathered secondary capital issued before January 1, 2022, and allowed such secondary capital to receive regulatory capital treatment until January 1, 2042 (20 years from the effective date of the Subordinated Debt rule).[2] The grandfathering provision of the Subordinated Debt rule allows LICUs with grandfathered secondary capital to continue to be subject to the requirements of 12 CFR 701.34(b), (c), and (d) (recodified in the December 2020 final Subordinated Debt rule as 12 CFR 702.414), rather than the requirements of the Subordinated Debt rule.[3]

The Subordinated Debt rule also includes a provision stating that any issuances of secondary capital not completed by January 1, 2022, are, as of January 1, 2022, subject to the requirements applicable to Subordinated Debt in the Subordinated Debt rule.[4] This provision would nullify any approved secondary capital application if the associated issuance is not completed before January 1, 2022. Any LICU in this situation would be required to reapply under the Subordinated Debt rule if such LICU sought to proceed with its planned secondary capital issuance.

B. Emergency Capital Investment Program

Subsequent to the issuance of the Subordinated Debt rule, Congress passed the Consolidated Appropriations Act, 2021 (CAA).[5] The CAA, among other things, created the ECIP. Under the ECIP, Congress appropriated funds and directed Treasury to make investments in ''eligible institutions'' to support their efforts to ''provide loans, grants, and forbearance for small businesses, minority-owned businesses, and consumers, especially in low-income and underserved communities.''[6] The definition of ''eligible institutions'' includes federally insured credit unions that are minority depository institutions or community development financial institutions, provided such credit unions are not in troubled condition or subject to any formal enforcement actions related to unsafe or unsound lending practices.[7]

Under the terms developed by Treasury, investments in eligible credit unions will be in the form of subordinated debt. Treasury also aligned its investments in LICUs with the Federal Credit Union Act and the NCUA's regulations to allow eligible LICUs to apply to the NCUA for secondary capital treatment for these investments.

Treasury opened the ECIP application process on March 4, 2021, with an application deadline of May 7, 2021. Treasury subsequently extended this deadline multiple times, with the most recent deadline being September 1, 2021.

C. Summary of the Proposed Rule

At its September 2021 meeting, the Board issued a notice of proposed rulemaking to amend the Subordinated Debt rule to address a specific situation with funding of approved secondary capital applications.[8]

As discussed in subsection A of this section, if the ECIP investments, or investments from any other programs administered by the U.S. Government that can fund secondary capital, are not funded by the end of 2021, those approved LICUs would be required to reapply under the Subordinated Debt rule to complete an issuance. As this scenario would impose an unnecessary burden on these LICUs, the Board proposed to amend the Subordinated Debt rule to permit funding of secondary capital approved under the current secondary capital rule, beyond 2021, without the need to reapply under the Subordinated Debt rule. Regardless of the issuance date of the secondary capital, such secondary capital would, for the purposes of the Subordinated Debt rule, be considered Grandfathered Secondary Capital, and remain subject to 12 CFR 701.34(b), (c) and (d) of the NCUA's regulations (recodified in the December 2020 final Subordinated Debt rule as 12 CFR 702.414). The Board notes that the proposed changes were narrowly tailored to provide an exception to the issuance cutoff date, if the secondary capital issuance is:

1. To the U.S. Government; and

2. Being conducted under a secondary capital application that was approved before January 1, 2022, under either § 701.34 of the NCUA's regulations, for federal credit unions, or § 741.203 of the NCUA's regulations, for federally insured, state-chartered credit unions.

[1] 86 FR 11060 (Feb. 23, 2021). Capitalized terms in this preamble are defined in the December 2020 Subordinated Debt final rule.

[2] *Id.* at 11074.

[3] *Id.*

[4] *Id.* at 11083.

[5] Consolidated Appropriations Act, 2021, Public Law 116–260 (H.R. 133), Dec. 27, 2020.

[6] *Id.* codified at 12 U.S.C. 4703a *et seq.*

[7] 12 U.S.C. 4703a(a)(2).

[8] 86 FR 53567 (Sept. 28, 2021).

Consistent with the final Subordinated Debt rule, any LICU not meeting the above criteria will remain subject to the requirement to complete any issuance by the end of 2021 or such issuance will be subject to the requirements of the final Subordinated Debt rule.

The Board also proposed to amend the starting point for Grandfathered Secondary Capital to retain its status as Regulatory Capital. Currently, the Subordinated Debt rule states that all Grandfathered Secondary Capital will be treated as regulatory capital until January 1, 2042 (20 years from the effective date of the final Subordinated Debt rule). As the proposed rule would allow limited issuances of Grandfathered Secondary Capital beyond January 1, 2022, the Board proposed to allow such secondary capital to count as regulatory capital for up to 20 years from the date of issuance. The Board noted that this proposed amendment would provide equitable treatment for all issuances of Grandfathered Secondary Capital.

II. Summary of Comments

A. The Public Comments, Generally

The NCUA received 15 comments following publication of the proposed rule. All of the commenters that addressed the proposed rule were in support of the proposed amendments. There were no commenters that opposed the proposed amendments.

B. Comments Outside the Scope of the Proposed Rule

All of the commenters recommended additional changes to the Subordinated Debt rule. In the proposed rule, however, the Board stated the proposed changes contained therein were narrowly tailored to address a specific situation with funding of approved secondary capital applications.[9] Therefore, the Board noted it was not considering any other changes to the final Subordinated Debt rule at that time and comments outside the scope of the proposed rule would be treated as such for the purpose of any final rule the Board may issue.[10]

While the comments recommending changes to the Subordinated Debt rule are outside the scope of this rulemaking, the Board will retain these comments for use in any future proposals to amend the Subordinated Debt rule.

III. Final Rule

As no commenters opposed the proposed rule, the Board is finalizing the proposed amendments without change.

V. Administrative Law Matters

A. Administrative Procedure Act

The Administrative Procedure Act (APA) generally requires that a final rule be published in the **Federal Register** no less than 30 days before its effective date except for (1) substantive rules which grant or recognize an exemption or relieve a restriction; (2) interpretative rules and statements of policy; or (3) as otherwise provided by the agency for good cause.[11] Because the final rule relieves a restriction, the final rule is exempt from the APA's delayed effective date requirement.[12] Therefore, this final rule will become effective on January 1, 2022.

B. Small Business Regulatory Enforcement Fairness Act

The Small Business Regulatory Enforcement Fairness Act of 1996 (Pub. L. 104–121) (SBREFA) generally provides for congressional review of agency rules.[13] A reporting requirement is triggered in instances where the NCUA issues a final rule as defined by Section 551 of the APA.[14] The NCUA does not believe this rule is a ''major rule'' within the meaning of the relevant sections of SBREFA. As required by SBREFA, the NCUA will submit this final rule to the Office of Management and Budget for it to determine if the final rule is a ''major rule'' for purposes of SBREFA. The NCUA also will file all appropriate Congressional reports.

C. Paperwork Reduction Act

The Paperwork Reduction Act of 1995 (44 U.S.C. 3501 *et seq.*) requires that the Office of Management and Budget approve all collections of information by a Federal agency from the public before they can be implemented. Respondents are not required to respond to any collection of information unless it displays a valid Office of Management and Budget control number. This final rule extends the time for certain issuances of secondary capital and the corresponding Regulatory Capital treatment of such issuances. As such, this rule does not require any information collection as defined by the Paperwork Reduction Act of 1995.

D. Regulatory Flexibility Act

The Regulatory Flexibility Act (RFA) [15] generally requires an agency to consider whether the rule it proposes will have a significant economic impact on a substantial number of small entities. For purposes of the RFA, the Board considers credit unions with assets less than $100 million to be small entities.[16]

The Board determined that the proposed rule would affect a small number of LICUs with approved secondary capital applications for issuances to the U.S. Government or its subdivisions. The rule is focused on relieving administrative application requirements that would otherwise apply. As such, the Board found that an RFA analysis was not required for the proposed rule. Accordingly, the Board certifies that the final rule does not have a significant economic impact on a substantial number of small credit unions.

E. Executive Order 13132

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

The rule relieves administrative application requirements that would otherwise apply and does not alter substantive requirements that apply to state-chartered credit unions generally. The Board has therefore determined that this rule does not constitute a policy that has federalism implications for purposes of the executive order.

F. Assessment of Federal Regulations and Policies on Families

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

List of Subjects

12 CFR Part 702

Credit unions, Reporting and recordkeeping requirements.

12 CFR Part 741

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

[9] *Id.* at 53568.

[10] *Id.*

[11] 5 U.S.C. 553(d).

[12] *Id.* 553(d)(1).

[13] *Id.* 801–804.

[14] *Id.* 551.

[15] *Id.* 601 *et seq.*

[16] NCUA Interpretive Ruling and Policy Statement 15–1. 80 FR 57512 (Sept. 24, 2015).

By the NCUA Board on December 16, 2021.

Melane Conyers-Ausbrooks,

Secretary of the Board.

For the reasons discussed in the preamble, the NCUA is amending 12 CFR parts 702 and 741, as amended by 86 FR 11060 (Feb. 23, 2021) and effective on January 1, 2022, as follows:

PART 702—CAPITAL ADEQUACY

■ 1. The authority citation for part 702 continues to read as follows:

Authority: 12 U.S.C. 1766(a), 1790d.

■ 2. In § 702.2 revise the definitions of ''Grandfathered Secondary Capital'' and ''Regulatory Capital'' to read as follows:

§ 702.2 Definitions.

* * * * *

Grandfathered Secondary Capital means any secondary capital issued under § 701.34 of this chapter, before January 1, 2022 or, in the case of a federally insured, state-chartered credit union, with § 741.204(c) of this chapter, before January 1, 2022. (12 CFR 701.34 was recodified as § 702.414 as of January 1, 2022). This term also includes issuances of secondary capital to the U.S. Government or any of its subdivisions, under applications approved before January 1, 2022, pursuant to § 701.34 or § 741.204(c) of this chapter, irrespective of the date of issuance.

* * * * *

Regulatory Capital means:

(1) With respect to an Issuing Credit Union that is a LICU and not a complex credit union, the aggregate outstanding principal amount of Subordinated Debt and, until the later of 20 years from the date of issuance or January 1, 2042, Grandfathered Secondary Capital that is included in the credit union's net worth ratio;

(2) With respect to an Issuing Credit Union that is a complex credit union and not a LICU, the aggregate outstanding principal amount of Subordinated Debt that is included in the credit union's RBC Ratio;

(3) With respect to an Issuing Credit Union that is both a LICU and a Complex Credit Union, the aggregate outstanding principal amount of Subordinated Debt and, until the later of 20 years from the date of issuance or January June 1, 2042, Grandfathered Secondary Capital that is included in its net worth ratio and in its RBC Ratio; and

(4) With respect to a new credit union, the aggregate outstanding principal amount of Subordinated Debt and, until the later of 20 years from the date of issuance or January 1, 2042, Grandfathered Secondary Capital that is considered pursuant to § 702.207.

* * * * *

■ 3. Revise § 702.401 to read as follows:

§ 702.401 Purpose and scope.

(a) *Subordinated Debt.* This subpart sets forth the requirements applicable to all Subordinated Debt issued by a federally insured, natural person credit union, including the NCUA's review and approval of that credit union's application to issue or prepay Subordinated Debt. This subpart shall apply to a federally insured, state-chartered credit union only to the extent that such federally insured, state-chartered credit union is permitted by applicable state law to issue debt instruments of the type described in this subpart. To the extent that such state law is more restrictive than this subpart with respect to the issuance of such debt instruments, that state law shall apply. Except as provided in the next sentence, any secondary capital, as that term is used in the Federal Credit Union Act, issued after January 1, 2022, is Subordinated Debt and subject to the requirements of this subpart. Issuances of secondary capital, as that term is used in the Federal Credit Union Act, to the U.S. Government or any of its subdivisions, under applications approved before January 1, 2022, pursuant to § 701.34 or § 741.204(c) of this chapter, are not subject to the requirements applicable to Subordinated Debt, discussed elsewhere in this subpart, irrespective of the date of issuance.

(b) *Grandfathered Secondary Capital.* Any secondary capital defined as ''Grandfathered Secondary Capital,'' under § 702.402, is governed by § 702.414. Grandfathered Secondary Capital will no longer be treated as Regulatory Capital as of the later of 20 years from the date of issuance or January 1, 2042.

■ 4. In § 702.402 revise the definition for ''Grandfathered Secondary Capital'' to read as follows:

§ 702.402 Definitions.

* * * * *

Grandfathered Secondary Capital means any secondary capital issued under § 701.34 of this chapter before January 1, 2022, or, in the case of a federally insured, state-chartered credit union, with § 741.204(c) of this chapter, before January 1, 2022. (12 CFR 701.34 was recodified as § 702.414 as of January 1, 2022). This term also includes issuances of secondary capital to the U.S. Government or any of its subdivisions, under applications approved before January 1, 2022, pursuant to § 701.34 or § 741.204(c) of this chapter, irrespective of the date of issuance.

* * * * *

■ 5. In § 702.414 revise the introductory paragraph and paragraph (a)(2) to read as follows:

§ 702.414 Regulations governing Grandfathered Secondary Capital.

This section recodifies the requirements from 12 CFR 701.34(b), (c), and (d) that were in effect as of December 31, 2021, with minor modifications. The terminology used in this section is specific to this section. Except as provided in the next sentence, all secondary capital issued under § 701.34 of this chapter before January 1, 2022, or, in the case of a federally insured, state-chartered credit union, § 741.204(c) of this chapter, that is referred to elsewhere in this subpart as ''Grandfathered Secondary Capital,'' is subject to the requirements set forth in this section. Issuances of secondary capital to the U.S. Government or any of its subdivisions, under applications approved before January 1, 2022, pursuant to § 701.34 or § 741.204(c) of this chapter, are also considered ''Grandfathered Secondary Capital'' irrespective of the date of issuance.

* * * * *

(a) * * *

(1) * * *

(2) *Issuances not completed before January 1, 2022.* Except as provided in the next sentence, any issuances of secondary capital not completed by January 1, 2022, are, as of January 1, 2022, subject to the requirements applicable to Subordinated Debt discussed elsewhere in this subpart. Issuances of secondary capital to the U.S. Government or any of its subdivisions, under applications approved before January 1, 2022, pursuant to §§ 701.34 or 741.204(c) of this chapter, are not subject to the requirements applicable to Subordinated Debt, discussed elsewhere in this subpart, irrespective of the date of issuance.

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PART 741—REQUIREMENTS FOR INSURANCE

■ 6. 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.

■ 7. Amend § 741.204 by revising paragraph (c) to read as follows:

§ 741.204 Maximum public unit and nonmember accounts, and low-income designation.

* * * * *

(c) Follow the requirements of § 702.414 of this chapter for any Grandfathered Secondary Capital (as defined in part 702 of this chapter).

[FR Doc. 2021–27643 Filed 12–22–21; 8:45 am]

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NATIONAL CREDIT UNION ADMINISTRATION

12 CFR Parts 703 and 721

RIN 3133–AF26

Mortgage Servicing Assets

AGENCY: National Credit Union Administration (NCUA).

ACTION: Final rule.

SUMMARY: The NCUA Board (Board) is issuing a final rule to permit federal credit unions (FCUs) to purchase mortgage servicing assets (MSAs), referred to as mortgage servicing rights in the proposed rule, from other federally insured credit unions subject to certain requirements. Under the final rule, FCUs with a CAMEL or CAMELS composite rating of 1 or 2 and a CAMEL or CAMELS Management component rating of 1 or 2, may purchase the mortgage servicing rights of loans that the FCU is otherwise empowered to grant, provided these purchases are made in accordance with the FCU's policies and procedures that address the risk of these investments and servicing practices. The Federal Credit Union Act (the Act) permits FCUs to purchase mortgage servicing assets under their express authority to purchase assets from other credit unions.

DATES: The final rule is effective April 1, 2022.

FOR FURTHER INFORMATION CONTACT: Thomas Fay, Director, Capital Markets; John G. Nilles, Senior Capital Markets Specialist, Office of Examination & Insurance, or Ian Marenna, Associate General Counsel; Chrisanthy Loizos, Senior Trial Attorney, Office of General Counsel, or Ernestine Ward, Consumer Compliance Policy and Outreach Program Officer, Office of Consumer Financial Protection, at 1775 Duke Street, Alexandria, VA 22314 or telephone: (703) 518–6300, (703) 518–6540, or (703) 518–6524.

SUPPLEMENTARY INFORMATION:

I. Introduction

A. Background

While the Act provides specific, statutory investment powers for FCUs,[1] the Board has adopted regulatory prohibitions against certain investments and investment activities on the basis of safety and soundness concerns, including the purchase of mortgage servicing rights (MSRs) as an investment.[2] In December 2020, by a vote of 2–1, the Board approved a notice of proposed rulemaking (NPR) [3] to amend the agency's Investment and Deposit Activities Rule (Investment Rule), 12 CFR part 703, to explicitly permit FCUs to purchase MSRs from other federally insured credit unions (FICUs) based on express statutory authority that permits an FCU ''to sell all or a part of its assets to another credit union [and] to purchase all or part of the assets of another credit union. . .subject to regulations of the Board.'' [4] The proposed regulatory text provided the following requirements for this investment authority:

(1) The underlying mortgage loans of the MSRs are loans the FCU is empowered to grant; [5]

(2) The FCU purchases the MSRs within the limitations of the FCU's board of directors' written purchase policies; and

(3) The FCU's board of directors or investment committee approves the purchase in advance.

The NPR also included several questions as to whether the rule should place additional conditions on the authority, such as capital requirements, concentration limits, or other measures to address consumer financial protection, compliance risk and liquidity risk.

Generally, when a lender originates a mortgage loan, the lender may retain the loan and the servicing function for the loan in its portfolio, sell the loan along with the MSRs to another party, or separate the MSRs from its mortgage loan and transfer either the loan or the MSRs to another party. The NPR focused on the purchase of MSRs as assets that are distinct from their underlying mortgage loans. The Board proposed to permit FCUs to purchase MSRs by removing MSRs from the list of prohibited investments [6] in the Investment Rule and adding the purchase of MSRs from other FICUs to the rule's list of permissible investments for FCUs.[7]

Under the current Investment Rule, MSRs are defined as ''a contractual obligation to perform mortgage servicing and the right to receive compensation for performing those services. Servicing is the administration of a mortgage loan, including collecting monthly payments and fees, providing recordkeeping and escrow functions, and, if necessary, curing defaults and foreclosing.'' [8] Mortgage loan servicers, therefore, are intermediaries between borrowers and owners of the mortgage loans; their servicing functions are subject to a servicing agreement and consumer protection laws, as applicable.[9] MSRs, or mortgage servicing assets, a term used interchangeably with MSRs, are recorded in accordance with Generally Accepted Accounting Principles (GAAP).[10]

Mortgage servicing can carry various risks. Servicers are exposed to liquidity risk if servicing agreements require the servicer to remit mortgage loan payments to the investors of sold loans even when borrowers fail to make their monthly payments. There are also operational risks related to mortgage servicing due to a myriad of statutes and regulations that protect consumers, which can expose FCUs to reputational, legal, and compliance risk. The compliance and reputation risk of a mortgage servicer can be considerable due to the high touch nature of interactions with consumers and the attendant legal requirements imposed on mortgage servicers. For example, depending on the particular servicer and its activities, servicers must comply with a variety of requirements, including the Real Estate Settlement Procedures Act (RESPA) and its implementing regulation, Regulation X; the Truth in Lending Act (TILA) and its implementing regulation, Regulation Z; as well as amendments to Regulations X and Z under the Mortgage Servicing Rules promulgated by the Consumer Financial Protection Bureau, which implement provisions of the Dodd-Frank Wall Street Reform and Consumer

[1] 12 U.S.C. 1757(7), (8), (14), (15).

[2] 62 FR 32989 (June 18, 1997); 66 FR 54168, 54169 (Oct. 26, 2001); 67 FR 78996, 78997 (Dec. 27, 2002); 12 CFR 703.16(a).

[3] 85 FR 86867 (Dec. 31, 2020).

[4] 12 U.S.C. 1757(14).

[5] The phrase ''empowered to grant'' refers to an FCU's authority to make the type of loans permitted by the Act, NCUA regulations, FCU Bylaws, and an FCU's own internal policies. *See* NCUA OGC Op. 04–0713 (Oct. 25, 2004) available at *https://www.ncua.gov/files/legal-opinions/OL2004-0713.pdf,* 76 FR 81421, 81425 (December 28, 2011).

[6] 12 CFR 703.16.

[7] 12 CFR 703.14.

[8] 12 CFR 703.2.

[9] For example, *see* 12 CFR 1024.17; 12 CFR part 1024, subpart C; 12 CFR 1026.20, .36, .40–.41.

[10] *See* Financial Accounting Standards Board (FASB) Accounting Standards Codification (ASC) 860—Transfer and Servicing of Financial Assets.