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## Title 12

### § 701.34 Designation of low income status; Acceptance of secondary capital accounts by low-income designated credit unions.

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#### CROSS REFERENCE

Link to an amendment published at 80 FR 66706, Oct. 29, 2015.

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#### CROSS REFERENCE

This amendment was delayed until Jan. 1, 2020, at 83 FR 55467, Nov. 6, 2018.

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#### CROSS REFERENCE

This amendment was further delayed until Jan. 1, 2022, at 84 FR 68781, Dec. 17, 2019.

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#### CROSS REFERENCE

Link to an amendment published at 86 FR 11072, Feb. 23, 2021.

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(a) *Designation of low-income status.*

- (1) Based on data obtained through examinations, NCUA will notify a federal credit union that it qualifies for designation as a low-income credit union if a majority of its membership qualifies as low-income members. A federal credit union that wishes to receive the designation must notify NCUA in writing within 90 days of receipt of any NCUA notifications.
- (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. NCUA will use the statewide or national, non-metropolitan area median family income instead of the metropolitan area or national metropolitan area median family

income for members living outside a metropolitan area. Member earnings will be estimated based on data reported by the U.S. Census Bureau for the geographic area where the member lives. The term "low-income members" also includes those members enrolled as students in a college, university, high school, or vocational school.

- (3) Federal credit unions that do not receive notification that they qualify for a low-income credit union designation but believe they qualify may submit information to NCUA to demonstrate they qualify for a low-income credit union designation. For example, federal credit unions may provide actual member income from loan applications or surveys to demonstrate a majority of their membership is low-income members. 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. A Federal credit union may rely on a sample of membership income data drawn from loan files or a member survey provided the Federal credit union can demonstrate the sample is a statistically valid, random sample by submitting with its data a narrative describing its sampling technique and evidence supporting the validity of the analysis, including the actual data set used in the analysis. The random sample must be representative of the membership, must be sufficient in both number and scope on which to base conclusions, and must have a minimum confidence level of 95% and a confidence interval of 5%. A Federal credit union must draw the sample either entirely from loan files or entirely from the survey, and must not combine a loan file review with a survey. NCUA will provide a response to the Federal credit union within 60 days of its submission.
- (4) If NCUA determines a low-income designated Federal credit union no longer meets the criteria for the designation, NCUA will notify the Federal credit union in writing, and the Federal credit union must, within five years, meet the criteria for the designation or come into compliance with the regulatory requirements applicable to Federal credit unions that do not have a low-income designation. The designation will remain in effect during the five-year period. If a Federal credit union does not requalify and has secondary capital or nonmember deposit accounts with a maturity beyond the five-year period, NCUA may extend the time for a Federal credit union to come into compliance with regulatory requirements to allow the Federal credit union to satisfy the terms of any account agreements. A Federal credit union may request NCUA to reconsider a determination that it no longer meets the criteria for the designation and/or file an appeal with the NCUA Board in accordance with the procedures set forth in subpart B to part 746 of this chapter.
- (5) Any credit union with a low-income credit union designation on January 1, 2009 will have five years from that date to meet the criteria for low-income designation under paragraph (a)(1) of this section, unless NCUA determines a longer time is required to allow the low-income credit union to satisfy the terms of a secondary capital or nonmember deposit account agreement.

- (6) *Definitions.* The following definitions apply to this section:

*Median family income* and *total median earnings for individuals* are income statistics reported by the U.S. Census Bureau. The applicable income data can be obtained via the American Community Survey on the Census Bureau's web page at <http://www.census.gov>.

*Metropolitan area* means an area designated by the Office of Management and Budget pursuant to 31 U.S.C. 1104(d), 44 U.S.C. 3504(c), and Executive Order 10253 (June 13, 1951) (as amended).

- (b) *Acceptance of secondary capital accounts by low-income designated credit unions.* A federal credit union having a designation of low-income status pursuant to paragraph (a) of this section may accept secondary capital accounts from nonnatural person members and nonnatural person nonmembers subject to the following conditions:

- (1) *Secondary capital plan.* Before accepting secondary capital, a low-income credit union (“LICU”) shall adopt, and forward to NCUA for approval, a written “Secondary Capital Plan” that, at a minimum:
  - (i) States the maximum aggregate amount of uninsured secondary capital the LICU plans to accept;
  - (ii) Identifies the purpose for which the aggregate secondary capital will be used, and how it will be repaid;
  - (iii) Explains how the LICU will provide for liquidity to repay secondary capital upon maturity of the accounts;
  - (iv) Demonstrates that the planned uses of secondary capital conform to the LICU’s strategic plan, business plan and budget; and
  - (v) Includes supporting pro forma financial statements, including any off-balance sheet items, covering a minimum of the next two years.
- (2) *Decision on plan.* If a LICU is not notified within 45 days of receipt of a Secondary Capital Plan that the plan is approved or disapproved, the LICU may proceed to accept secondary capital accounts pursuant to the plan.
- (3) *Nonshare account.* The secondary capital account must be established as an uninsured secondary capital account or other form of non-share account.
- (4) *Minimum maturity.* The maturity of the secondary capital account must be a minimum of five years.
- (5) *Uninsured account.* The secondary capital account will not be insured by the National Credit Union Share Insurance Fund or any governmental or private entity.
- (6) *Subordination of claim.* The secondary capital account investor’s claim against the LICU must be subordinate to all other claims including those of shareholders, creditors and the National Credit Union Share Insurance Fund.
- (7) *Availability to cover losses.* Funds deposited into a secondary capital account, including interest accrued and paid into the secondary capital account, must be available to cover operating losses realized by the LICU that exceed its net available reserves (exclusive of secondary capital and allowance accounts for loan and lease losses), and to the extent funds are so used, the LICU must not restore or replenish the account under any circumstances. The LICU may, in lieu of paying interest into the secondary capital account, pay accrued interest directly to the investor or into a separate account from which the secondary capital investor may make withdrawals. Losses must be distributed pro-rata among all secondary capital accounts held by the LICU at the time the losses are realized. In instances where a LICU accepted secondary capital from the United States Government or any of its subdivisions under the Community Development Capital Initiative of 2010 (“CDCI secondary capital”) and matching funds were required under the Initiative and are on deposit in the form of secondary capital at the time a loss is realized, a LICU must apply either of the following pro-rata loss distribution procedures to its secondary capital accounts with respect to the loss:
  - (i) If not inconsistent with any agreements governing other secondary capital on deposit at the time a loss is realized, the CDCI secondary capital may be excluded from the calculation of the pro-rata loss distribution until all of its matching secondary capital has been depleted, thereby causing the CDCI secondary capital to be held as senior to all other secondary capital until its matching secondary capital is exhausted. The CDCI

secondary capital should be included in the calculation of the pro-rata loss distribution and is available to cover the loss only after all of its matching secondary capital has been depleted.

- (ii) Regardless of any agreements applicable to other secondary capital, the CDCI secondary capital and its matching secondary capital may be considered a single account for purposes of determining a pro-rata share of the loss and the amount determined as the pro-rata share for the combined account must first be applied to the matching secondary capital account, thereby causing the CDCI secondary capital to be held as senior to its matching secondary capital. The CDCI secondary capital is available to cover the loss only after all of its matching secondary capital has been depleted.
- (8) *Security.* The secondary capital account may not be pledged or provided by the account investor as security on a loan or other obligation with the LICU or any other party.
  - (9) *Merger or dissolution.* In the event of merger or other voluntary dissolution of the LICU, other than merger into another LICU, the secondary capital accounts will be closed and paid out to the account investor to the extent they are not needed to cover losses at the time of merger or dissolution.
  - (10) *Contract agreement.* A secondary capital account contract agreement must be executed by an authorized representative of the account investor and of the LICU reflecting the terms and conditions mandated by this section and any other terms and conditions not inconsistent with this section.
  - (11) *Disclosure and acknowledgement.* An authorized representative of the LICU and of the secondary capital account investor each must execute a “Disclosure and Acknowledgment” as set forth in the appendix to this section at the time of entering into the account agreement. The LICU must retain an original of the account agreement and the “Disclosure and Acknowledgment” for the term of the agreement, and a copy must be provided to the account investor.
  - (12) *Prompt corrective action.* As provided in §§ 702.204(b)(11), 702.304(b) and 702.305(b) of this chapter, the NCUA Board may prohibit a LICU classified “critically undercapitalized” or, if “new,” as “moderately capitalized”, “marginally capitalized”, “minimally capitalized” or “uncapitalized”, as the case may be, from paying principal, dividends or interest on its uninsured secondary capital accounts established after August 7, 2000, except that unpaid dividends or interest will continue to accrue under the terms of the account to the extent permitted by law.
- (c) *Accounting treatment; Recognition of net worth value of accounts -*
- (1) *Equity account.* A LICU that issues secondary capital accounts pursuant to paragraph (b) of this section must record the funds on its balance sheet in an equity account entitled “uninsured secondary capital account.”
  - (2) Schedule for recognizing net worth value. The LICU's reflection of the net worth value of the accounts in its financial statement may never exceed the full balance of the secondary capital on deposit after any early redemptions and losses. For accounts with remaining maturities of less than five years, the LICU must reflect the net worth value of the accounts in its financial statement in accordance with the lesser of:
    - (i) The remaining balance of the accounts after any redemptions and losses; or
    - (ii) The amounts calculated based on the following schedule:

Remaining maturity	Net worth value of original balance (percent)
Four to less than five years	80
Three to less than four years	60
Two to less than three years	40
One to less than two years	20
Less than one year	0

- (3) *Financial statement.* The LICU must reflect the full amount of the secondary capital on deposit in a footnote to its financial statement.
- (d) *Redemption of secondary capital.* With the written approval of NCUA, secondary capital that is not recognized as net worth under paragraph (c)(2) of this section (“discounted secondary capital” reclassified as subordinated debt) may be redeemed according to the remaining maturity schedule in paragraph (d)(3) of this section.
- (1) *Request to redeem secondary capital.* A request for approval to redeem discounted secondary capital may be submitted in writing at any time, must specify the increment(s) to be redeemed and the schedule for redeeming all any part of each eligible increment, and must demonstrate to the satisfaction of NCUA that:
- (i) The LICU will have a post-redemption net worth classification of “adequately capitalized” under part 702 of this chapter;
  - (ii) The discounted secondary capital has been on deposit at least two years;
  - (iii) The discounted secondary capital will not be needed to cover losses prior to final maturity of the account;
  - (iv) The LICU's books and records are current and reconciled;
  - (v) The proposed redemption will not jeopardize other current sources of funding, if any, to the LICU; and
  - (vi) The request to redeem is authorized by resolution of the LICU's board of directors.
- (2) *Decision on request.* A request to redeem discounted secondary capital may be granted in whole or in part. If a LICU is not notified within 45 days of receipt of a request for approval to redeem secondary capital that its request is either granted or denied, the LICU may proceed to redeem secondary capital accounts as proposed.
- (3) *Schedule for redeeming secondary capital.*

Remaining maturity	Redemption limit as percent of original balance
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Remaining maturity	Redemption limit as percent of original balance
Four to less than five years	20
Three to less than four years	40
Two to less than three years	60
One to less than two years	80

- (4) *Early redemption exception.* Subject to the written approval of NCUA obtained pursuant to the requirements of paragraphs (d)(1) and (2) of this section, a LICU can redeem all or part of secondary capital accepted from the United States Government or any of its subdivisions at any time after the secondary capital has been on deposit for two years. If the secondary capital was accepted under conditions that required matching secondary capital from a source other than the Federal Government, the matching secondary capital may also be redeemed in the manner set forth in the preceding sentence. For purposes of obtaining NCUA's approval, all secondary capital a LICU accepts from the United States Government or any of its subdivisions, as well as its matching secondary capital, if any, is eligible for early redemption regardless of whether any part of the secondary capital has been discounted pursuant to paragraph (c)(2) of this section.

## Appendix to § 701.34

A LICU that is authorized to accept uninsured secondary capital accounts and each investor in such an account shall execute and date the following "Disclosure and Acknowledgment" form, a signed original of which must be retained by the credit union:

### Disclosure and Acknowledgment

[Name of CU] and [Name of investor] hereby acknowledge and agree that [Name of investor] has committed [amount of funds] to a secondary capital account with [name of credit union] under the following terms and conditions:

1. *Term.* The funds committed to the secondary capital account are committed for a period of \_\_ years.
2. *Redemption prior to maturity.* Subject to the conditions set forth in 12 CFR 701.34, the funds committed to the secondary capital account are redeemable prior to maturity only at the option of the LICU and only with the prior approval of NCUA.
3. *Uninsured, non-share account.* The secondary capital account is not a share account and the funds committed to the secondary capital account are not insured by the National Credit Union Share Insurance Fund or any other governmental or private entity.
4. *Prepayment risk.* Redemption of U.S.C. prior to the account's original maturity date may expose the account investor to the risk of being unable to reinvest the repaid funds at the same rate of interest for the balance of the period remaining until the original maturity date.

The investor acknowledges that it understands and assumes responsibility for prepayment risk associated with the [name of credit union]'s redemption of the investor's U.S.C. account prior to the original maturity date.

5. *Availability to cover losses.* The funds committed to the secondary capital account and any interest paid into the account may be used by [name of credit union] to cover any and all operating losses that exceed the credit union's net worth exclusive of allowance accounts for loan losses, and in the event the funds are so used, (name of credit union) will under no circumstances restore or replenish those funds to [name of institutional investor]. Dividends are not considered operating losses and are not eligible to be paid out of secondary capital.

6. *Accrued interest.* By initialing below, [name of credit union] and [name of institutional investor] agree that accrued interest will be:

Paid into and become part of the secondary capital account;

Paid directly to the investor;

Paid into a separate account from which the investor may make withdrawals; or

Any combination of the above provided the details are specified and agreed to in writing.

7. *Subordination of claims.* In the event of liquidation of [name of credit union], the funds committed to the secondary capital account will be subordinate to all other claims on the assets of the credit union, including claims of member shareholders, creditors and the National Credit Union Share Insurance Fund.

8. *Prompt Corrective Action.* Under certain net worth classifications (see 12 CFR 702.204(b)(11), 702.304(b) and 702.305(b), as the case may be), the NCUA Board may prohibit [name of credit union] from paying principal, dividends or interest on its uninsured secondary capital accounts established after August 7, 2000, except that unpaid dividends or interest will continue to accrue under the terms of the account to the extent permitted by law.

ACKNOWLEDGED AND AGREED TO this \_\_\_ day of [month and year] by:

\_\_\_\_\_

[name of investor's official]

[title of official]

[name of investor]

[address and phone number of investor]

[investor's tax identification number]

\_\_\_\_\_

[name of credit union official]

[title of official]

*[61 FR 3790, Feb. 2, 1996, as amended at 61 FR 50695, 50697, Sept. 27, 1996; 64 FR 72270, Dec. 27, 1999; 65 FR 21131, Apr. 20, 2000; 71 FR 4238, Jan. 26, 2006; 73 FR 71912, Nov. 26, 2008; 75 FR 7342, Feb. 19, 2010; 75 FR 47172, Aug. 5, 2010; 75 FR 57843, Sept. 23, 2010; 76 FR 36979, June 24, 2011; 76 FR 80227, Dec. 23, 2011; 78 FR 4032, Jan. 18, 2013; 82 FR 50291, Oct. 30, 2017; 85 FR 62210, Oct. 2, 2020]*