

# Proposed Rules

Federal Register

Vol. 83, No. 21

Wednesday, January 31, 2018

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 Part 709

RIN 3133-AE82

### Involuntary Liquidation of Federal Credit Unions and Claims Procedures

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

**ACTION:** Proposed rule.

**SUMMARY:** The NCUA Board (Board) proposes to amend part 709 of its rules to update and clarify the procedures that apply to claims administration for federally insured credit unions that enter involuntary liquidation. Specifically, the proposal would amend the current rule's payout priority provision by specifying the conditions that claims in the nature of severance must meet to be allowed as provable claims.

**DATES:** Comments must be received on or before April 2, 2018.

**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 website:* <http://www.ncua.gov/regulation-supervision/Pages/rules/proposed.aspx>. Follow the instructions for submitting comments.

- *Email:* Address to [regcomments@ncua.gov](mailto:regcomments@ncua.gov). Include "[Your name] Comments on 'Involuntary Liquidation of Federal Credit Unions and Claims Procedures'" in the email subject line.

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

- *Mail:* Address to Gerard Poliquin, 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/>

*Regulations/Opinions/Laws/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 9:00 a.m. and 3:00 p.m. To make an appointment, call (703) 518-6546 or send an email to [OGCMail@ncua.gov](mailto:OGCMail@ncua.gov).

**FOR FURTHER INFORMATION CONTACT:** Ian Marenga, Senior Trial Attorney, at 1775 Duke Street, Alexandria, Virginia 22314, or telephone: (703) 518-6540.

#### SUPPLEMENTARY INFORMATION:

#### I. Background

Section 1217 of the Financial Institutions Reform, Recovery and Enforcement Act of 1989 (FIRREA)<sup>1</sup> amended the Federal Credit Union Act (FCU Act) by adding Section 207(b), thereby creating a comprehensive statutory framework for the liquidation of federally insured credit unions.<sup>2</sup> Section 207(b)(4) authorizes the Board to "prescribe regulations regarding the allowance or disallowance of claims by the liquidating agent and providing for administrative determination of claims and review of such determination."<sup>3</sup> In accordance with this authority, the Board adopted part 709 in 1991.<sup>4</sup>

The Board is proposing changes to part 709 to clarify how severance claims will be treated in involuntary liquidations. Specifically, the proposed rule would create an exception to the generally applicable limitation on provability for severance claims as set out in the Board's regulation governing golden parachute payments.<sup>5</sup>

#### II. Summary of Proposed Changes

*Priority accorded wages, including vacation pay, sick leave, and severance.* Section 709.5 sets forth the priorities by which claims will be paid from the liquidation estate. Currently, § 709.5(b)(2) accords second priority to claims for wages, including vacation pay, sick leave, and severance, subordinate among unsecured claims only to administrative costs and

expenses of liquidation. This section operates to protect those employees whose employment is terminated as a result of the appointment of the liquidating agent, but who may have worked some or all of the pay period immediately preceding the date of liquidation for which they had not been paid. The regulation contemplates that such an employee's final paycheck may include compensation for hours worked as well as accrued but unpaid sick leave and vacation time, as well as any severance to which he or she is entitled.

This provision may be in tension with NCUA's separate regulatory authority to control the types and amounts of payments that may be made by federally insured credit unions to institution affiliated parties upon termination of their employment. Under the FCU Act, the Board is authorized to prohibit or limit "golden parachute payments," defined to include payments that are contingent on the termination of the party's employment at the credit union and that are made when the credit union is in troubled financial condition.<sup>6</sup> In addition, part 750 of NCUA's regulations contains explicit limitations on the ability of an institution affiliated party to pursue a severance claim with the liquidating agent after a credit union has become insolvent and is placed in conservatorship or liquidation.<sup>7</sup>

Thus, part 750 expressly provides that any claim for "employee welfare benefits" or other benefits that are contingent at the time of liquidation are not provable claims against the liquidating agent or payable as damages if the conservator or liquidating agent repudiates the relevant contract under 12 U.S.C. 1787(c). This bar covers claims for severance or other employee welfare benefits that are contingent at the time of liquidation, even if otherwise vested, including any contingency for termination of employment.<sup>8</sup> This language is broad enough to extend to virtually any claim to benefits or entitlements (other than earned but unpaid wages) that remains unpaid as of the date of liquidation.

Given the breadth of the language in § 750.7, the Board believes clarification concerning the interplay with part 709 is necessary and appropriate. Claims for

<sup>1</sup> Sec. 1217(a)(3), (4), Public Law 101-73. Sec. 1217(a)(3), (4).

<sup>2</sup> 12 U.S.C. 1787(b).

<sup>3</sup> 12 U.S.C. 1787(b)(4).

<sup>4</sup> 56 FR 56925 (Nov. 7, 1991).

<sup>5</sup> 12 CFR part 750.

<sup>6</sup> 12 U.S.C. 1786(t)(4); 12 CFR 750.1(d).

<sup>7</sup> 12 CFR 750.7.

<sup>8</sup> Id.

unpaid wages or salary earned during the pay period immediately prior to the appointment of the conservator or liquidating agent will be allowed and accorded the second priority level under § 709.5(b). Employees are also allowed to claim earned but unused paid time off as of the liquidation date, provided that the credit union had a written policy, as reflected in the employee handbook or other similar credit union record, permitting departing employees to receive payment for earned but unused paid time off with their last paycheck. Employees may also claim severance pay, provided that the amount of entitlement is determined under an objective formula made available to all employees and is specified in a written policy, as reflected in the employee handbook or other similar credit union record.

The documentary evidence requirement reflects the standard for agreement-based claims against the liquidation estate and is intended to provide the liquidating agent an appropriate basis to determine that the credit union agreed to provide the benefits.<sup>9</sup> Because not every credit union may have an employee handbook, the proposed rule would allow for other credit union records that evidence entitlement to the benefits.

The Board intends for the provisions in part 750 restricting the provability of certain severance claims to be applicable in cases that involve executive level employees with separately negotiated employment contracts or similar benefit plans that are not generally available to all employees on a non-discriminatory basis. In such cases, the Board anticipates that the liquidating agent will exercise its power of repudiation<sup>10</sup> concerning the employment contract and/or benefit plan, with the result being that neither the severance claim itself nor any claim for damages arising from the repudiation will be allowed as provable in the liquidation, pursuant to part 750. It should be noted that these limitations on provability are applicable whether or not the arrangement in question would be considered a prohibited golden parachute under part 750 for an open credit union.

Accordingly, the Board proposes to amend § 709.5(b)(2) to provide that

claims seeking employee benefits other than earned but undisbursed salary or wages, including earned but unused paid time off and severance pay, will be allowed to the extent that the credit union has adopted a written policy, as reflected in the employee handbook or other similar record, that establishes a right to such payments and that the amount of such payment is determined in accordance with an objective, non-discriminatory formula made available to all employees. The proposed rule also recognizes that state law may require such payments and accommodates this possibility.

### III. 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 \$100 million in assets). The severance provision imposes no new requirements on credit unions. Instead, it would provide a limited exception to an existing regulation that applies to liquidated credit unions. Accordingly, the proposed rule 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. Part 709 only concerns credit unions that have failed and imposes no information collection requirements on existing credit unions. Accordingly, there are no PRA implications.

#### *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. This proposed rule would clarify certain procedures for NCUA's administration of liquidated federally insured credit unions. This proposed rule will not have a 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. The Board has determined that this proposed 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 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 709

Credit unions, Involuntary liquidation.

By the National Credit Union Administration Board, this 25th day of January, 2018.

**Gerard Poliquin,**

*Secretary of the Board.*

For the reasons discussed in the preamble, NCUA proposes to amend 12 CFR part 709 as follows:

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

■ 1. The authority citation for part 709 is revised to read as follows:

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

■ 2. Revise paragraph (b)(2) of § 709.5 to read as follows:

#### **§ 709.5 Payout priorities in involuntary liquidation.**

\* \* \* \* \*

(b) \* \* \*

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

<sup>9</sup> See 12 U.S.C. 1787(b)(9); *D'Oench, Duhme & Co. v. Federal Deposit Ins. Corp.*, 315 U.S. 447 (1942). Under the FCU Act and relevant case law, a claimant may not sustain a claim against the liquidating agent based on an agreement unless the agreement was in writing, was executed by the credit union and the claimant, was approved by the credit union's board, and has continuously been an official credit union record.

<sup>10</sup> 12 U.S.C. 1787(c).

payment is required by applicable state or local law.

\* \* \* \* \*

[FR Doc. 2018-01884 Filed 1-30-18; 8:45 am]

BILLING CODE 7535-01-P

## DEPARTMENT OF VETERANS AFFAIRS

### 38 CFR Part 17

RIN 2900-AP55

#### Medical Care in Foreign Countries and Filing for Reimbursement for Community Care Not Previously Authorized by VA

**AGENCY:** Department of Veterans Affairs.

**ACTION:** Proposed rule.

**SUMMARY:** The Department of Veterans Affairs (VA) proposes to amend its medical regulations related to hospital care and medical services in foreign countries. We would amend the regulations to simplify and clarify the scope of these rules. We would address medical services provided to eligible veterans in the Republic of the Philippines, and remove regulations related to grants to the Republic of the Philippines that are no longer supported by statutory authority. VA also proposes to amend its medical regulations related to filing claims for reimbursement of medical expenses incurred for VA care not previously authorized.

**DATES:** Written comments must be received on or before April 2, 2018.

**ADDRESSES:** Written comments may be submitted through [www.Regulations.gov](http://www.Regulations.gov); by mail or hand-delivery to the Director, Regulations Management (00REG), Department of Veterans Affairs, 810 Vermont Ave NW, Room 1063B, Washington, DC 20420; or by fax to (202) 273-9026. Comments should indicate that they are submitted in response to “RIN 2900-AP55—Medical care in foreign countries and filing for reimbursement for community care not previously authorized by VA.” Copies of comments received will be available for public inspection in the Office of Regulation Policy and Management, Room 1063B, between the hours of 8 a.m. and 4:30 p.m. Monday through Friday (except holidays). Please call (202) 461-4902 for an appointment (this is not a toll-free number). In addition, during the comment period, comments may be viewed online through the Federal Docket Management System (FDMS) at [www.Regulations.gov](http://www.Regulations.gov).

**FOR FURTHER INFORMATION CONTACT:**

Joseph Duran, Director, Policy and Planning, Office of Community Care

(10D1A1), Veterans Health Administration, Department of Veterans Affairs, 810 Vermont Avenue NW, Washington, DC 20420, (303) 372-4629. (This is not a toll-free number) or [Joseph.Duran2@va.gov](mailto:Joseph.Duran2@va.gov).

**SUPPLEMENTARY INFORMATION:** Section 1724 of title 38 United States Code (U.S.C.) prohibits VA from furnishing hospital care or medical services outside any State except under specific circumstances. VA is authorized under 38 U.S.C. 1724(b)(1) to furnish care and services to an eligible veteran outside any State if VA “determines that such care and services are needed for the treatment of a service-connected disability of the veteran or as part of a rehabilitation program under chapter 31 of this title.” VA furnishes health care to eligible veterans in the Republic of the Philippines under this authority. In addition, 38 U.S.C. 1724(c) provides that “within the limits” of the Veterans Memorial Medical Center at Manila, Republic of the Philippines, VA may enter into contracts to furnish necessary hospital care to a veteran for any non-service-connected disability if such veteran is unable to defray the expenses of necessary hospital care. VA may also operate an outpatient clinic in the Republic of the Philippines to furnish necessary medical services to a veteran who has a service-connected disability. 38 U.S.C. 1724(e).

Several sections of title 38 Code of Federal Regulations (CFR) part 17 address VA’s authority to provide for hospital care and medical services for eligible veterans outside the United States, as well as submission of claims for reimbursement for services obtained from community care providers outside the United States. VA proposes to revise or amend these regulations to consolidate similar content, clarify provisions, and ensure that these regulations reflect current VA practice and statutory authority.

#### § 17.35 Hospital Care and Outpatient Services in Foreign Countries

Current § 17.35 states that the Secretary may furnish hospital care and medical services to any veteran sojourning or residing outside the United States, without regard to the veteran’s citizenship if necessary for treatment of a service-connected disability, or any disability associated with and held to be aggravating a service-connected disability; or, if the care is furnished to a veteran participating in a rehabilitation program under 38 U.S.C. chapter 31 who requires care for the reasons enumerated in 38 CFR 17.47(i)(2).

We would revise § 17.35 by simplifying the rule and adding a paragraph to address medical services provided to eligible veterans in the Republic of the Philippines. VA proposes to remove the phrase “sojourning or residing” as it creates an unnecessary distinction. VA may furnish medical care and services to any veteran outside the United States, regardless of whether the veteran is sojourning (temporarily staying), has established residence outside of the United States, or in some other status that does not fit the broad definitions of either “sojourning or residing.” In addition, the term “sojourning” is antiquated. While it remains a defined term in many dictionaries it is not commonly used by the public. We would also amend the introductory sentence to refer to VA rather than the Secretary of VA which is how VA is referred to in recently published rulemakings. We would designate the introductory sentence in this section as paragraph (a), and current paragraphs (a) and (b) as paragraphs (a)(1) and (2) respectively. Finally, we would change the references to “medical services” in the current regulation to “outpatient services.” The term “outpatient services” is similarly used in § 17.38 and other VA regulations instead of “medical services,” and we believe it is more understandable to the reader.

We would add a new paragraph (b) to address hospital care and outpatient services provided to eligible veterans in the Republic of the Philippines as authorized in 38 U.S.C. 1724. Paragraph (b) would state that under the VA Foreign Medical Program VA may furnish hospital care and outpatient services in the Republic of the Philippines to a veteran who meets the requirements of § 17.35(a). VA may also provide outpatient services to a veteran in the VA outpatient clinic in Manila for the treatment of such veteran’s service-connected conditions within the limits of the clinic. A veteran’s non-service connected conditions may also be treated within the limits of the VA outpatient clinic in Manila, if the veteran has a service-connected disability.

Paragraph (c) would provide guidance on which sections of part 17 apply to claims for payment or reimbursement of services not previously authorized by the Foreign Medical Program. We would state that such claims are governed by §§ 17.123–17.127 and 17.129–17.132. This is consistent with the requirements for claims for payment or reimbursement for medical services not previously authorized by VA provided within the United States.