

**7535-01-U**

**NATIONAL CREDIT UNION ADMINISTRATION**

**12 CFR Part 750**

**RIN 3133-AD73**

**Golden Parachute and Indemnification Payments – Technical Correction**

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

**ACTION:** Final rule.

**SUMMARY:** NCUA is finalizing an interim rule to make a technical correction to its rule restricting a federally insured credit union (FICU) from making golden parachute and indemnification payments to an institution-affiliated party (IAP). The amendment corrects an exception to the definition of golden parachute payment pertaining to plans offered under §457 of the Internal Revenue Code. The interim final rule became effective on June 27, 2011. This rulemaking finalizes the interim rule without change.

**DATES:** This rule was effective June 27, 2011.

**FOR FURTHER INFORMATION CONTACT:** Pamela Yu, Staff Attorney, Office of General Counsel, at 1775 Duke Street, Alexandria, Virginia 22314-3428, or telephone: (703) 518-6540.

## **SUPPLEMENTARY INFORMATION**

- I. Background**
- II. Summary of Public Comments**
- III. Final Rule**
- IV. Regulatory Procedures**

### **I. Background<sup>1</sup>**

#### **A. Why is NCUA Adopting This Rule?**

On June 24, 2011, NCUA published an interim final rule to correct new part 750, which restricts a FICU from making certain golden parachute and indemnification payments to an IAP. 76 FR 36979. The interim rule became effective June 27, 2011 to correspond with the effective date of the new part 750. Public comments were accepted, however, until July 24, 2011. NCUA is issuing this rulemaking to finalize the interim rule without change.

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<sup>1</sup> President Obama signed the Plain Writing Act of 2010 (Public Law 111-274) into law on October 13, 2010 “to improve the effectiveness and accountability of federal agencies to the public by promoting clear Government communication that the public can understand and use.” This preamble is written to meet plain writing objectives.

## **B. What Changes Did the Interim Final Rule Make?**

The interim final rule corrected an exception to the definition of golden parachute payment in §750.1(e)(2) pertaining to plans offered under §457 of the Internal Revenue Code of 1986, as amended (IRC). The technical amendment was necessary to conform the regulatory text with the rule's intent, as described in the preamble to the final rule. 76 FR 30510 (May 26, 2011).

## **II. Summary of Public Comments**

NCUA received two comments on the interim final rule: one from a trade organization and one from a state credit union league. One comment was supportive of the interim final rule, noting that the correction is consistent with the intent of the rule to permit post-employment payments that have reasonable business purposes. The other commenter, however, expressed concern about the amendment and suggested alternative language for the golden parachute exception at §750.1(e)(2). NCUA has reviewed and analyzed both comment letters and, as discussed in more detail below, has determined to finalize the interim rule without change.

## **III. Final Rule**

Part 750 establishes a comprehensive framework for golden parachute and indemnification payments made by a FICU to an IAP. The intent of the rule is to prevent

the wrongful or improper disposition of FICU assets and inhibit unwarranted rewards to IAPs that can contribute to a FICU's troubled condition. The purpose of the rule is not, however, to prohibit post-employment payments having reasonable business purposes. Accordingly, the rule excludes from the definition of "golden parachute payment" certain qualified retirement plans such as those permitted under §401 of the IRC. As discussed in the preamble to the final rule, in response to comments on the proposed rule, the NCUA Board (Board) intended to provide similar treatment to retirement plans that are permissible under §457 of the IRC, which are frequently used by credit unions and other tax exempt organizations.

Plans qualifying as eligible deferred compensation plans under §457(b) of the IRC exhibit characteristics that are similar to the more common §401(k) deferred compensation plans that many employers make available to their employees. For example, the amount of income that may be deferred under such a plan is equivalent to that which may be deferred under §401, which for 2011 is \$16,500. As with §401 plans, moreover, manipulation of the timing and amount of the payout are also closely circumscribed by law. For example, these plans may not typically provide for an in-service distribution prior to retirement. Accordingly, the Board intended for §457(b) plans to be treated like §401 plans and excluded from the definition of golden parachute payment.

Although the preamble to the final rule made reference to plans under subsection (b) and (f) of §457, it did not provide any substantive discussion concerning the differences

between them. In fact, however, §457 plans that are permissible under subsection (f) are significantly broader and are accorded much greater flexibility in terms of structure, coverage, eligibility, participation, vesting, etc. Section 457(f) plans are sometimes referred to as “golden handcuffs” because the contribution rules are generous but there is a risk of forfeiture if the individual leaves prior to retirement. These plans are highly customizable, and can be designed in a broad variety of ways. As such, the intent of the rule has always been that §457(f) plans must meet the “bona fide” criteria outlined in §750.1(c) to qualify as exceptions to the otherwise applicable golden parachute restrictions. Because of the limits inherent in §457(b) and the constraints governing plans offered under that subsection, the Board intended to specify that only §457(b) plans are excluded by definition from the term “golden parachute payment”.

Accordingly, the interim final rule amended §750.1(e) to clarify that plans offered by FICUs under §457(b) of the IRC are specifically excluded from the definition of a prohibited golden parachute payment. Although not specifically excluded under §750.1(e), certain plans offered under §457(f) may also be permissible if the plan meets the “bona fide” exemption criteria outlined in §750.1(c). In other words, all §457(b) are excluded under the rule; however, §457(f) plans must meet the “bona fide” criteria outlined in §750.1(c) to qualify as exceptions to the golden parachute payment definition.

One commenter expressed concern about the amendment and suggested that the provision should specifically exclude §457(b) plans and any §457(f) plans that meet the

criteria of the “bona fide deferred compensation” definition. This commenter also suggested alternative language for the exception at §750.1(e)(2), to exclude any payment made pursuant to a deferred compensation plan under §457(b) “or under section 457(f) . . . if such payment is a “bona fide deferred compensation” plan under §750.1(c).”

The Board has determined not to adopt this commenter’s proposed language because the technical correction made by the interim rule results in the same effect but in a more clear and concise manner. Because §457(f) plans have the potential for broader flexibility than §457(b) plans, FICUs could exploit this flexibility to make abusive arrangements for their senior staff. By contrast, §457(b) plans are, by statutory definition, sufficiently narrow such that additional controls are not necessary. Accordingly, the Board permanently adopts the technical amendment to the golden parachute exception at §750.1(e) without alteration. The Board emphasizes that §457(f) plans are not prohibited outright under the rule. Rather, to be permissible such plans must be “bona fide.”

#### **IV. Regulatory Procedures**

##### Regulatory Flexibility Act

The Regulatory Flexibility Act requires NCUA to prepare an analysis to describe any significant economic impact any proposed regulation may have on a substantial number

of small entities (those under \$10 million in assets). This final rule provides clarification regarding the applicability of one of the exceptions to otherwise applicable regulatory restrictions. 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.

#### 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, Pub.L. 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 final 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.

#### 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); 5 CFR part 1320. For purposes of the PRA, a paperwork burden may take the form of either a reporting or a recordkeeping requirement, both referred to as information collections. These technical corrections do not impose any new paperwork burden.

## **List of Subjects**

### **12 CFR Part 750**

Credit Unions, Golden parachute payments, Indemnity payments.

By the National Credit Union Administration Board, this 17<sup>th</sup> day of November, 2011.

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Mary F. Rupp

Secretary of the Board



For the reasons stated in the preamble, the National Credit Union Administration amends 12 CFR part 750 as set forth below:

**PART 750—GOLDEN PARACHUTE AND INDEMNIFICATION PAYMENTS**

1. The authority citation for part 750 continues to read as follows:

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

2. Revise the definition of “Golden Parachute Payment” in §750.1(e) to read as follows:

**§750.1 Definitions**

\* \* \* \* \*

(e) Golden parachute payment

\* \* \*

2) Exceptions. The term golden parachute payment does not include:

- (i) Any payment made pursuant to a deferred compensation plan under section 457(b) of the Internal Revenue Code of 1986, 26 U.S.C. 457(b), or 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) \* \* \* \* \*

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