

7535-01-U

NATIONAL CREDIT UNION ADMINISTRATION

12 CFR Part 709

Interpretive Ruling and Policy Statement No. 03-3; Qualified Financial Contracts

AGENCY: National Credit Union Administration (NCUA).

ACTION: Notice of Interpretive Ruling and Policy Statement No. 03-3.

SUMMARY: Interpretive Ruling and Policy Statement (IRPS) No. 03-3 provides guidance on NCUA's treatment of qualified financial contracts (QFCs) and federal funds (fed funds) transactions if NCUA becomes liquidating agent or conservator of a credit union. The guidance covers the timing, form, authority, and maintenance of written agreements documenting QFC and fed funds transactions.

DATES: This IRPS will become effective October 30, 2003.

FOR FURTHER INFORMATION CONTACT: Kim Iverson, Program Officer, Office of Examination and Insurance, at (703) 518-6360; or Paul Peterson, Staff Attorney, Office of General Counsel, at (703) 518-6540.

SUPPLEMENTARY INFORMATION:

Qualified financial contracts are defined by the Federal Credit Union Act (Act) as any securities contract, forward contract, repurchase agreement, and any similar agreement the NCUA Board (Board) determines by regulation. 12 U.S.C. 1787(c)(8)(D). The Board designated swap agreements (swaps) as QFCs effective June 30, 2003. 68 FR 32355 (May 30, 2003).

The Act provides that any agreement purporting to form the basis of a claim against the liquidating agent or the NCUA Board must be in writing and executed contemporaneously with the acquisition of the asset by the credit union, be approved by the credit union's board, and be maintained continuously as an official record of the credit union. 12 U.S.C. 1787(b)(9), 1788(a)(3). Standard market practices for the creation and documentation of QFC and federal funds (fed funds) transactions, however, are often relatively informal. Representatives of potential QFC and fed funds counterparties have expressed concern to NCUA about how it might interpret the Act's formality requirements in the event of a credit union liquidation or conservatorship.

The Federal Deposit Insurance Corporation (FDIC) has previously adopted policy guidance that addresses counterparty concerns about similar formality provisions in the Federal Deposit Insurance Act applicable to bank transactions. FDIC Statement of Policy on Qualified Financial Contracts, December 12, 1989, at <http://www.fdic.gov/regulations/laws/rules/5000-1100.html>. This IRPS adopts a similar policy on the formality provisions in the Federal Credit Union Act as applied to credit union transactions.

Interpretive Ruling and Policy Statement No. 03-3 – Qualified Financial Contracts

This Interpretive Ruling and Policy Statement (“IRPS”) provides guidance to the financial markets with regard to the treatment of qualified financial contracts (QFCs) in the event NCUA is appointed liquidating agent or conservator of a credit union. The guidance covers the timing, form, authority, and maintenance of written agreements documenting QFCs and provides a safe harbor for bona fide transactions between credit unions and nonaffiliated counterparties. For purposes of the requirements set out in sections 207(b)(9) and 208(a)(3) of the Federal Credit Union Act (the Act), the Board intends that this policy statement apply to federal funds (fed funds) transactions as well as QFCs. 12 U.S.C. §§1787(b)(9) and 1788(a)(3).

The NCUA Board specifically intends that counterparties to QFCs and fed funds transactions may rely on this policy statement. The NCUA Board does not, however, intend to provide in this policy statement any indication or guidance of the treatment by a liquidating agent or conservator of any other type of contract other than fed funds or those specifically defined as QFCs in the Act or by the Board pursuant to the Act. Also, nothing in this policy statement is intended to apply to transactions between a credit union and a counterparty that is an affiliate of the credit union.

This policy statement will be effective unless revoked or otherwise withdrawn upon 45 days notice provided in the *Federal Register*. Any such revocation or withdrawal will only operate prospectively.

Written Agreement Requirements

Any QFC (including any ancillary agreements, such as a master agreement or security arrangements) that complies with the following criteria will be deemed to satisfy the requirements in sections 207(b)(9) and 208(a)(3) of the Act. 12 U.S.C. §§1787(b)(9) and 1788(a)(3).

1. The QFC is evidenced by a writing (including a confirmation) that either is sent by the credit union to the counterparty or by the counterparty to the credit union. In either case, the writing must be sent reasonably contemporaneously with the parties’ agreement to enter into the specific QFC transaction. The writing need not be signed unless otherwise required by applicable non-insolvency law;

2. The credit union, by corporate action, was authorized under applicable non-insolvency law to enter into the QFC. A credit union will be deemed to have taken such corporate action if the counterparty has relied in good faith either on a resolution (or extract thereof) provided by the credit union's board of director's secretary or on a written representation (whether in a master agreement or otherwise) from an officer of the level of vice president or higher, as to the credit union's authority; and
3. The writing (or a copy thereof) evidencing the QFC and the evidence of authority must be maintained by the credit union in its official books and records. However, the counterparty may, by appropriate evidence (including the production of copies maintained by the counterparty) establish the existence of the writing and the evidence of authority.

The NCUA will apply the above criteria and the Act's requirements in a manner generally consistent with reasonable business trading practices in the QFC markets, in view of Congress's recognition in the Financial Institutions Reform, Recovery, and Enforcement Act of 1989 (FIRREA) of the important role QFCs play in providing liquidity and portfolio and risk management to depository institutions. Without limiting the criteria set forth above, NCUA will look to the totality of the circumstances surrounding such transactions including the counterparty's good faith attempt to comply with all reasonable trading practices and requirements, any non-insolvency law requirements, and the requirements stated herein.

By the National Credit Union Administration Board on October 23, 2003.

Becky Baker
Secretary of the Board