

## **Part 709 Involuntary Liquidation of Federal Credit Unions and Adjudication of Creditor Claims Involving Federally Insured Credit Unions in Liquidation**

### **§ 709.0 Scope.**

The rules and procedures in this part apply to charter revocations of federal credit unions under 12 U.S.C. §1787(a)(1)(A), (B), the involuntary liquidation and adjudication of creditor claims in all cases involving federally-insured credit unions, the treatment by the Board as conservator or liquidating agent of financial assets transferred in connection with a securitization or participation or of public funds held by a federally-insured credit union, and the allowance of prepayment fees to Federal Home Loan Banks under specified conditions.

### **§ 709.1 Definitions.**

For the purposes of this Part, the following definitions apply:

- (a) “General Counsel” means the General Counsel of the National Credit Union Administration or any attorney assigned to the General Counsel’s staff.
- (b) “Liquidating Agent” means the NCUA Board or person(s) appointed by it with delegated authority to carry out the liquidation of the credit union.
- (c) “Insolvent” means insolvency as that term is defined in § 700.1(j) of these Regulations.
- (d) “Claim” means a creditor’s claim against the credit union in liquidation. This term does not include insurance claims arising out of the liquidation of a federally insured credit union. Insurance claims are decided pursuant to Part 745 of this Chapter.
- (e) “Shareholder” means members, non-members, accountholders, or any other party or entity that is the owner of a share, share certificate or share draft account or the equivalent of such accounts under state law.

### **§ 709.2 NCUA Board as Liquidating Agent.**

- (a) The Board, as liquidating agent, by operation of law and without any conveyance or other instrument, act or deed, shall succeed to all the rights, titles, powers, and privileges of the credit union, and of its shareholders, officers, and directors, with respect to the credit union and its assets, and such shareholders, officers, or directors shall not thereafter have or exercise any such rights, powers, or privileges or act in connection with any assets or property of any nature of the credit union.
- (b) The Board, as liquidating agent, shall take possession of and title to books, records, and assets of every description of such credit union to which such credit union has rights of possession and title to all offices and other facilities of such credit union.

### **§ 709.3 Challenge to Revocation of Charter and Involuntary Liquidation N/A.**

### **§ 709.4 Powers and Duties of Liquidating Agent.**

- (a) Inventory of assets—As soon as practicable after taking possession, the liquidating agent shall inventory the assets of such credit union as of the date of taking possession, showing the value as carried on the books of the credit union, and the

security therefor, if any, a brief description of the assets and any security, and a record of the credit union's creditor and accounts liabilities.

- (b) Notice to creditors—The liquidating agent shall promptly publish a notice to the credit union's creditors to present their claims, together with proof, to the liquidating agent by a date specified in the notice. This date shall be not less than 90 days after the publication of the notice. The liquidating agent shall republish such notice approximately one and two months, respectively, after the initial publication. At the time of initial publication, the liquidating agent shall mail a notice similar to the published notice to any creditor shown on the credit union's books at the last address appearing therein. If the liquidating agent discovers the name of a creditor whose name does not appear on the credit union's books, a notice similar to the published notice shall be mailed to such creditor within 30 days after the discovery of the name and address.
- (c) General—The liquidating agent shall collect all obligations and money due such credit union and may, to the extent consistent with its appointment, do all things desirable or expedient in its discretion to wind up the affairs of the credit union including, but not limited to, the following:
- (1) exercise all rights and powers of the credit union including, but not limited to, any rights and powers under any mortgage, deed of trust, chose in action, option, collateral note, contract, judgment or decree, or instrument of any nature;
  - (2) institute, prosecute, maintain, defend, intervene, and otherwise participate in any and all actions, suits, or other legal proceedings by and against the liquidating agent or the credit union or in which the liquidating agent, the credit union, or its creditors or shareholders, or any of them, shall have an interest, and in every way to represent the credit union, its shareholders and creditors, subject to the direction of General Counsel;
  - (3) employ on a salary or fee basis such persons as in the judgment of the liquidating agent are necessary or desirable to carry out its responsibilities and functions, including, but not limited to, appraisers and Certified Public Accountants, and pay the costs out of the assets of the liquidated credit union;
  - (4) employ or retain any attorney or attorneys designated by, or acceptable to, the General Counsel in connection with litigation or for legal advice and assistance, for the liquidation generally or in particular instances, and pay compensation and retainers of such attorney or attorneys, together with all expenses, including, but not limited to, the costs and expenses of any litigation, as approved by the General Counsel, out of the assets of the liquidated credit union;
  - (5) execute, acknowledge, and deliver any and all deeds, contracts, leases, assignments, bills of sale, releases, extensions, satisfactions, and other instruments necessary or proper for any purposes, including, but not limited to, the effectuation, termination, or transfer of real, personal or mixed property, or that shall be necessary or proper to liquidate the credit union, and any deed or other instrument executed pursuant to the authority hereby given shall be as valid and effective for all purposes as if the same had been executed as the act and deed of the credit union;
  - (6) with concurrence of General Counsel, disaffirm or repudiate any contract or lease to which the credit union is a party, the performance of which the liquidating

- agent, in his sole discretion, determines to be burdensome, and which disaffirmance or repudiation in the liquidating agent's sole discretion will promote the orderly administration of the credit union's affairs;
- (7) deposit, withdraw, or transfer funds, and otherwise exercise complete control over all investment or depository accounts maintained by or for the credit union at financial depository or similar institutions;
  - (8) do such things, and have such rights, powers, privileges, immunities, and duties, whether or not otherwise granted in the rules and regulations of this Part 709, as shall be authorized, directed, conferred, or imposed from time to time by the Board, or as shall be conferred by the Federal Credit Union Act;
  - (9) exercise such other authority as is conferred by the Federal Credit Union Act; and
  - (10) where acting as liquidating agent for a state-chartered federally insured credit union, exercise all the rights, powers, and privileges granted by state law to such a liquidating agent.
- (d) Expenditure of funds of the liquidation—The liquidating agent shall have power to:
- (1) pay all costs and expenses of the liquidation as determined by the liquidating agent;
  - (2) pay off and discharge taxes and liens;
  - (3) pay out and expend such sums as are deemed necessary or advisable for or in connection with the preservation, maintenance, conservation, protection, remodeling, repair, rehabilitation, or improvement of any asset or property of any nature of the credit union or the liquidating agent;
  - (4) pay off and discharge any assessments, liens, claims, or charges of any kind against any asset or property of any nature on which the credit union or the liquidating agent has a lien by way of mortgage, deed of trust, pledge, or otherwise, or in which the credit union or liquidating agent has any interest;
  - (5) settle, compromise, or obtain the release of, for cash or other consideration, claims and demands against the credit union or the liquidating agent; and
  - (6) indemnify its employees and agents from the assets of the credit union against liabilities incurred in the good faith performance of their duties.
- (e) Assets, claims, and contracts—The liquidating agent shall have power to:
- (1) sell for cash or on terms, exchange, assign, or otherwise dispose of, in whole or in part, any or all of the assets and property of the credit union, real, personal and mixed, tangible and intangible, of any nature, including any mortgage, deed of trust, chose in action, bond, note, contract, judgment, or decree, share or certificate of share of stock or debt, owing to the credit union or the liquidating agent; and
  - (2) surrender, abandon, and release any chose in action, or other assets or property of any nature, whether the subject of pending litigation or not, and settle, compromise, modify, or release, for cash or other consideration, claims and demands in favor of the credit union or the liquidating agent.

### **§ 709.5 Payout Priorities in Involuntary Liquidation.**

- (a) Claimants whose claims are secured shall receive their security. To the extent their respective claims exceed the value of the security for those claims, as determined to

the satisfaction of the liquidating agent, they shall each have an unsecured claim against the credit union having priority as provided in paragraph (b) of this section.

- (b) Unsecured claims against the liquidation estate that are proved to the satisfaction of the liquidating agent shall have priority in the following order:
- (1) administrative costs and expenses of liquidation;
  - (2) claims for wages and salaries, including vacation, severance, and sick leave pay;
  - (3) taxes legally due and owing to the United States or any state or subdivision thereof;
  - (4) debts due and owing the United States, including the National Credit Union Administration;
  - (5) general creditors, and secured creditors (to the extent that their respective claims exceed the value of the security for those claims);
  - (6) shareholders to the extent of their respective uninsured shares and the National Credit Union Share Insurance Fund to the extent of its payment of share insurance;
  - (7) in a case involving liquidation of a corporate credit union, membership capital of corporate credit unions;
  - (8) in a case involving liquidation of a low-income designated credit union, any outstanding secondary capital accounts issued pursuant to the authority of §§ 701.34 or 741.204(c) of this chapter, and
  - (9) in a case involving liquidation of a corporate credit union, paid-in capital.
- (c) Priorities are to be based on the circumstances that exist on the date of liquidation.
- (d) If the repudiation or disaffirmance of any contract or lease gives rise to a claim for damages, such claim shall be considered a general creditor claim under paragraph (b)(5) of this section and not a cost or expense of liquidation under paragraph (b)(1) of this section.
- (e) All unsecured claims of any category or class or priority described in paragraphs (b)(1) through (b)(7) of this section shall be paid in full, or provisions made for such payment, before any claims of lesser priority are paid. If there are insufficient funds to pay all claims of a category or class, payment shall be made pro rata. Notwithstanding anything to the contrary herein, the liquidating agent may, at any time, and from time to time, prior to the payment in full of all claims of a category or class with higher priority, make such distributions to claimants in priority categories described in paragraphs (b)(1), (b)(2), (b)(3), (b)(4), and (b)(5) of this section as the liquidating agent believes are reasonably necessary to conduct the liquidation, provided that the liquidating agent determines that adequate funds exist or will be recovered during the liquidation to pay in full all claims of any higher priority. If a surplus remains after making distribution in full on all allowed claims described in paragraphs (b)(1) through (b)(9) of this section, such surplus shall be distributed pro rata to the credit union's shareholders.

#### **§ 709.6 Initial Determination of Creditor Claims by the Liquidating Agent.**

- (a)
- (1) Any party wishing to submit a claim against the liquidated credit union must submit a written proof of claim in accordance with the requirements set forth in the notice to creditors. A failure to submit a written claim within the time provided

- in the notice to creditors shall be deemed a waiver of said claim and claimant shall have no further rights or remedies with respect to such claim.
- (2) Notwithstanding paragraph (a)(1) of this section, the liquidating agent may, at his discretion, consider an untimely claim provided the following two criteria are present:
- (i) the claimant did not receive notice of the appointment of the liquidating agent in time to file a claim before the date provided for in the notice; and
  - (ii) the claim is filed in time to permit payment of the claim.
- (b) The liquidating agent may require submission of supplemental evidence by the claimant and by interested parties in the event of a dispute concerning a claim against any asset of the liquidated credit union. In requiring the submission of supplemental evidence, the liquidating agent may set such limitations of time, scope, and size as the liquidating agent deems reasonable in the circumstances, and may refuse to include in the record submissions or portions of submissions not in compliance with such limitations or requirements. The liquidating agent shall compile such written record of a claim or dispute as, in its discretion, is deemed sufficient to provide a reasonable basis for allowing or disallowing a claim or resolving a dispute. This written record shall be considered the administrative record.
- (c) The liquidating agent shall determine whether to allow or disallow a claim and shall notify the claimant within 180 days from the date a claim against a credit union is filed pursuant to paragraph (a)(1) of this section. This 180 day period may be extended by written agreement between the claimant and the liquidating agent. Failure by the liquidating agent to determine a claim and notify the claimant within the 180 day period or, if the period is extended, within the extended period, shall be deemed a denial of the claim.
- (d) If a claim or any portion thereof is disallowed, the notice to the claimant shall contain a statement of the reasons for the disallowance and an explanation of appeal rights pursuant to Section 709.7 of this Part.
- (e) Notice of any determination with respect to a claim shall be sufficient if mailed to the most recent address of the claimant which appears:
- (1) on the credit union's books;
  - (2) in the claim filed by the claimant; or
  - (3) in the documents submitted in the proof of claim.
- (f) In the event the liquidating agent disallows all or part of a claim, the liquidating agent shall file with the Board, or its designated agent, a report of its determination. This report shall become part of the record and shall include the notice to the claimant and findings on all issues raised and decided by the liquidating agent.

### **§ 709.7 Procedures for Appeal of Initial Determination.**

In order to appeal all or part of an initial decision which disallows a claim, in whole or in part, a claimant must, within 60 days of the mailing of the initial determination, file an administrative appeal pursuant to Section 709.8 of this Part, or file suit against the liquidated credit union in the United States District Court for the District of Columbia or in the United States District Court having jurisdiction over the place where the credit union's principal place of business is located, or continue an action commenced before the appointment of the liquidating agent. If the claimant does not appeal or file or

continue a suit, any disallowance shall be final and the claimant shall have no further rights or remedies with respect to such claim.

### **§ 709.8 Administrative Appeal of the Initial Determination.**

- (a) General—A claimant requesting an administrative appeal may request review pursuant to any of the procedures listed in paragraphs (b) or (c) of this section. Any appeal of the initial determination must be in writing and must specify what type of appeal the claimant requests. The determination of whether to agree to a request for administrative appeal shall rest solely with the Board, which shall notify the claimant of its decision in writing. The 60 day period for filing a lawsuit in United States District Court, provided for in Section 709.7 of this Part, shall be tolled from the date of claimant's request for an administrative appeal to the date of the Board's decision regarding that request.
- (b) Hearing on the record—Except as provided herein, any hearing requested pursuant to this section shall be conducted in accordance with the provisions of Subpart A, Part 747, of this Chapter. The Board shall render a final decision with respect to such claim after consideration of the hearing record and recommended decision. The Board's determination shall be subject to judicial review under Chapter 7 of Title 5, United States Code. Any claimant seeking judicial review of the Board's final decision under this paragraph must file a petition in the court of appeals for the circuit in which the principal office of the credit union is located, or in the United States Court of Appeals for the District of Columbia Circuit, within 30 days of the date of the Board's final decision. If a claimant does not file a petition before the end of the 30 day period, the Board's decision shall be final, and the claimant shall have no further rights or remedies with respect to such claim.
- (1) Burden of proof—In any hearing on the record, the burden of proof to establish entitlement to any modification of the initial determination shall rest solely upon the claimant.
- (2) Order of procedure—In any hearing on the record, at the time for opening arguments, counsel for the claimant shall argue first, and at the time for closing arguments, counsel for the claimant shall argue last.
- (c) Alternative dispute resolution—Paragraphs (c) (1) and (2) of this section list alternatives for dispute resolution which may be available at the discretion of the Board. From time to time, the NCUA Board may authorize additional alternative dispute resolution processes.
- (1) Appeal to the Board—Pursuant to this paragraph (c)(1), the claimant may file an appeal with the NCUA Board within the time provided for in Section 709.7. The appeal must be in writing and filed with the Secretary of the Board, National Credit Union Administration, 1775 Duke Street, Alexandria, VA 22314-3428. There shall be no personal appearance before the Board in connection with an appeal under this paragraph (c)(1).
- (i) Content of appeal—Any appeal must include:
- (A) a statement of the facts on which the appeal is based;
- (B) a statement of the basis for the initial determination to which the claimant objects and the alleged error in such determination, including citations to applicable statutes and regulations;

- (C) any other evidence relied upon by the claimant which was not previously provided to the liquidating agent.
  - (ii) Procedures for review of the appeal—
    - (A) Within 60 days of the date of the Board's receipt of an appeal, pursuant to paragraph (c)(1) of this section, the Board may request in writing that the claimant submit supplemental evidence in support of its appeal. If additional evidence is requested, the claimant shall have 45 days from the date of issuance of such request to provide such additional information. Failure by the claimant to provide such additional information may, as determined solely by the Board, result in denial of the claimant's appeal.
    - (B) Within 60 days from the date of the Board's receipt of an appeal, pursuant to paragraph (c)(1) of this section, the claimant may amend or supplement the appeal in writing. In the event the claimant does amend or supplement the appeal, the provisions of paragraph (c)(1)(ii)(A) of this section, with respect to requests for additional information and responses to such requests, shall apply with equal force to any such amendment or supplement to an appeal.
  - (iii) Determination on appeal—
    - (A) Within 180 days from the date of receipt of an appeal by the Board, the Board shall issue a decision allowing or disallowing claimant's appeal.
    - (B) The decision by the Board on appeal shall be provided to the claimant in writing, stating the reasons for the decision, and shall constitute a final agency decision regarding the claimant's claim.
    - (C) Failure by the Board to issue a decision on appeal of the claimant's claim within the 180 day period provided for under paragraph (c)(1)(iii)(A) shall be deemed to be denial of such appeal for the purposes of paragraph (c)(1)(iv) of this section.
  - (iv) Judicial review—
    - (A) For the purposes of seeking judicial review of actions taken pursuant to paragraph (c)(1) of this section, only a determination on appeal issued by the NCUA Board pursuant to this section shall constitute a final determination regarding a claim.
    - (B) A final determination by the Board is reviewable in accordance with the provisions of Chapter 7, Title 5, United States Code, by the United States Court of Appeals for the District of Columbia or the court of appeals for the Federal judicial circuit where the credit union's principal place of business is located. Any request for judicial review under this subparagraph must be filed within 60 days of the date of the Board's final decision. If any claimant fails to file before the end of the 60 day period, the Board's decision shall be final, and the claimant shall have no further rights or remedies with respect to such claim.
- (2) The following additional procedures for dispute resolution may be made available at the sole discretion of the Board: mediation; non-binding arbitration; and neutral fact finding.

**§ 709.9 Expedited Determination of Creditor Claims.**

- (a) General—The provisions of this section establish procedures under which claimants may request expedited relief in lieu of the procedures set forth in Section 709.6 of this Part. A claimant shall be entitled to expedited determination of a claim only upon a showing that there exists a legally valid and enforceable or perfected security interest in assets of the liquidated credit union and that irreparable injury will occur if the routine claims procedure is followed.
- (b) Filing of request for expedited relief—All requests for expedited relief must be filed within 30 days from the date of mailing, by the liquidating agent, of the notice to the creditor concerned. The request shall be deemed to be filed when received by the Secretary of the Board, National Credit Union Administration, 1775 Duke Street, Alexandria, VA 22314–3428. A copy of the request must be simultaneously served upon the liquidating agent for the credit union concerned. There shall be no right of personal appearance before the Board in connection with any claim submitted under this paragraph.
- (c) Content of request for expedited relief—Any Request for Expedited Relief must contain the following:
  - (1) a clear and concise statement of the facts and issues on which the request is based;
  - (2) a clear and concise statement describing the nature of any security interests in any assets of the credit union;
  - (3) a clear and concise statement of the probable, imminent and irreparable harm likely to occur if expedited relief is not granted;
  - (4) an assessment of the likelihood of success on the merits of the underlying claim, including statutory citations and relevant documentation supporting the merits of the claim;
  - (5) any other relevant documentation that supports the request;
  - (6) citations to applicable statutes, regulations, or other legal authority; and
  - (7) a signed statement certifying that a copy of the request has been mailed or hand delivered to the liquidating agent on or before the day that the request was filed with the Board.
- (d) Burden of proof—The burden of proving entitlement to expedited relief rests at all times with the requester.
- (e) Additional information—The Board may order the filing of additional information and/or documentation in order to make its determination. Such filing shall be on a date certain, and failure to provide the additional documentation or information may constitute the sole grounds for denial of the request.
- (f) Decision—Before the end of the 90 day period beginning on the date a request is filed, the Board shall render its decision and provide it to the requester. The Board will determine whether to grant expedited review and allow or disallow the claim or whether such claim should be resolved pursuant to the claims process described in Section 709.6 of this Part.
  - (1) Expedited review denied—A decision by the Board that expedited review is not appropriate shall be final and the claim shall be decided pursuant to the claims adjudication process set forth in Section 709.6 of this Part.

- (2) Expedited review granted—If expedited review is granted, the Board shall decide the claim. If the claim is disallowed, in whole or part, the decision shall contain a statement of each reason for the disallowance and the procedure for obtaining judicial review.
- (g) Period for filing or renewing suit—Any claimant who files a request for expedited relief shall be permitted to file a suit, or to continue a suit filed before the appointment of the liquidating agent, seeking a determination of the claimant's rights with respect to its security interest after the earlier of:
  - (1) the end of the 90 day period beginning on the date of the filing of a request for expedited relief; or
  - (2) the date the Board denies all or part of the claim.

**§ 709.10 Treatment by Conservator or Liquidating Agent of Financial Assets Transferred in Connection with a Securitization or Participation.**

(a) *Definitions.*

- (1) *Beneficial interest* means debt or equity (or mixed) interests or obligations of any type issued by a special purpose entity that entitle their holders to receive payments that depend primarily on the cash flow from financial assets owned by the special purpose entity.
- (2) *Financial asset* means cash or a contract or instrument that conveys to one entity a contractual right to receive cash or another financial instrument from another entity.
- (3) *Legal isolation* means that transferred financial assets have been put presumptively beyond the reach of the transferor, its creditors, a trustee in bankruptcy, or a receiver, either by a single transaction or a series of transactions taken as a whole.
- (4) *Participation* means the transfer or assignment of an undivided interest in all or part of a loan or a lease from a seller, known as the “lead,” to a buyer, known as the “participant,” without recourse to the lead, under an agreement between the lead and the participant. *Without recourse* means that the participation is not subject to any agreement that requires the lead to repurchase the participant's interest or to otherwise compensate the participant due to a default on the underlying obligation.
- (5) *Securitization* means the issuance by a special purpose entity of beneficial interests:
  - (i) The most senior class of which at time of issuance is rated in one of the four highest categories assigned to long-term debt or in an equivalent short-term category (within either of which there may be subcategories or gradations indicating relative standing) by one or more nationally recognized statistical rating organizations; or
  - (ii) Which are sold in transactions by an issuer not involving any public offering for purposes of section 4 of the Securities Act of 1933, as amended, or in transactions exempt from registration under such Act under 17 CFR 230.91 through 230.905 (Regulation S) thereunder (or any successor regulation).

- (6) *Special purpose entity* means a trust, corporation, or other entity demonstrably distinct from the federally-insured credit union that is primarily engaged in acquiring and holding (or transferring to another special purpose entity) financial assets, and in activities related or incidental thereto, in connection with the issuance by such special purpose entity (or by another special purpose entity that acquires financial assets directly or indirectly from such special purpose entity) of beneficial interests.
- (b) The Board, by exercise of its authority to disaffirm or repudiate contracts under 12 U.S.C. 1787(c), will not reclaim, recover, or re-characterize as property of the credit union or the liquidation estate any financial assets transferred to another party by a federally-insured credit union in connection with a securitization or participation, provided that a transfer meets all conditions for sale accounting treatment under generally accepted accounting principles, other than the “legal isolation” condition addressed by this section.
- (c) Paragraph (b) of this section will not apply unless the federally-insured credit union received adequate consideration for the transfer of financial assets at the time of the transfer, and the documentation effecting the transfer of financial assets reflects the intent of the parties to treat the transaction as a sale, and not as a secured borrowing, for accounting purposes.
- (d) Paragraph (b) of this section will not be construed as waiving, limiting, or otherwise affecting the power of the Board, as conservator or liquidating agent, to disaffirm or repudiate any agreement imposing continuing obligations or duties upon the federally-insured credit union in conservatorship or the liquidation estate.
- (e) Paragraph (b) of this section will not be construed as waiving, limiting or otherwise affecting the rights or powers of the Board to take any action or to exercise any power not specifically limited by this section, including, but not limited to, any rights, powers or remedies of the Board regarding transfers taken in contemplation of the credit union’s insolvency or with the intent to hinder, delay, or defraud the credit union or the creditors of such credit union, or that is a fraudulent transfer under applicable law.
- (f) The Board will not seek to avoid an otherwise legally enforceable securitization agreement or participation agreement executed by a federally-insured credit union solely because such agreement does not meet the “contemporaneous” requirement of sections 207(b)(9) and 208(a)(3) of the Federal Credit Union Act.
- (g) This section may be repealed by the NCUA upon 30 days notice and opportunity for comment provided in the **Federal Register**, but any such repeal or amendment will not apply to any transfers of financial assets made in connection with a securitization or participation that was in effect before such repeal or modification. For purposes of this paragraph, a securitization would be in effect on the earliest date that the most senior level of beneficial interests is issued, and a participation would be in effect on the date that the parties executed the participation agreement.

**§ 709.11 Treatment by Conservator or Liquidating Agent of Collateralized Public Funds.**

An agreement to provide for the lawful collateralization of funds of a federal, state, or local governmental entity or of any depositor or member referred to in section 207(k)(2)(A) of the Act will not be deemed to be invalid under sections 207(b)(9) and 208(a)(3) of the Act solely because such agreement was not executed contemporaneously with the acquisition of collateral or with any changes, increases, or substitutions in the collateral made in accordance with such agreement, provided the following conditions are met:

- (a) The agreement was undertaken in the ordinary course of business, not in contemplation of insolvency, and with no intent to hinder, delay or defraud the credit union or its creditors;
- (b) The secured obligation represents a bona fide and arm's length transaction;
- (c) The secured party or parties are not insiders or affiliates of the credit union;
- (d) The grant or creation of the security interest was for adequate consideration; and,
- (e) The security agreement evidencing the security interest is in writing, was approved by the credit union's board of directors, and has been continuously an official record of the credit union from the time of its execution.

**§ 709.12 Prepayment Fees to Federal Home Loan Bank.**

The Board as conservator or liquidating agent of a federally-insured credit union in receipt of any extension of credit from a Federal Home Loan Bank will allow a claim for a prepayment fee by the Bank if:

- (a) The claim is made pursuant to a written contract that provides for a prepayment fee but the prepayment fee allowed by the Board will not exceed the present value of the loss attributable to the difference between the contract rate of the secured borrowing and the reinvestment rate then available to the Bank; and
- (b) The indebtedness owed to the Bank is secured by sufficient collateral in which a perfected security interest in favor of the Bank exists or as to which the Bank's security interest is entitled to priority under section 306(d) of the Competitive Equality Banking Act of 1987, 12 U.S.C. 1430(e) footnote (1), or otherwise so that the aggregate of the outstanding principal on the advances secured by the collateral, the accrued but unpaid interest on the outstanding principal and the prepayment fee applicable to the advances can be paid in full from the amounts realized from the collateral. For purposes of this paragraph, the adequacy of the collateral will be determined as of the date the prepayment fees are due and payable under the terms of the written contract.