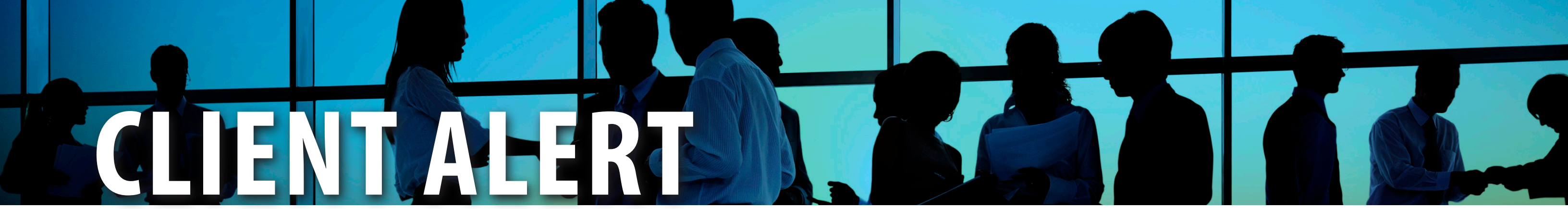

FINANCIAL INSTITUTIONS ADVISORY: NCUA ISSUES PROPOSED AMENDMENT TO SUBORDINATED DEBT RULE

by Eric R. Slutsky and Joseph E. Silvia

On Wednesday, October 5, 2022, the National Credit Union Administration ("NCUA") issued a proposed rule ("Proposed Rule") to amend its *Subordinated Debt Rule* (the "Sub Debt Rule"), which they previously published in December 2020 and which became effective on January 1, 2022.[1] Under the Sub Debt Rule, credit unions designated as low-income credit unions ("LICUs"), complex credit unions, and new credit unions are permitted to issue Subordinated Debt for purposes of regulatory capital treatment. The NCUA must receive comments on the Proposed Rule before December 5, 2022.

The NCUA is proposing two changes to the Sub Debt Rule regarding (i) Grandfathered Secondary Capital ("GSC"), as defined under the Sub Debt Rule, and (ii) the maturity of subordinated debt notes ("Notes"). First, the Proposed Rule would extend the regulatory capital treatment of GSC to the later of 30 years from the date of issuance, or January 1, 2052. This change is meant to align the regulatory capital treatment with the maximum permissible maturity for secondary capital issued under the Emergency Capital Investment Program ("ECIP"), and would align the regulatory capital treatment across GSC.

Second, the Proposed Rule would replace the maximum maturity of Notes with a requirement that any credit union seeking to issue Notes with maturities longer than 20 years must demonstrate how such Notes would continue to be considered "debt" under the NCUA regulations. Since January 1, 2022, the maturity of Notes has been restricted to a minimum of five years and a maximum of 20 years. In alignment with this maximum maturity, Regulatory capital treatment is terminated after 20 years, beginning on the date of issuance or January 1, 2022.

The NCUA is also making four minor modifications to the Sub Debt Rule. The NCUA is proposing to:

1. Amend the definition of "Qualified Counsel" to clarify that such person(s) is not required to be licensed to practice law in every jurisdiction that may relate to an issuance;
2. Remove the "statement of cash flow" from the Pro Forma Financial Statements requirement in the Sub Debt Rule and replace it with a requirement for "cash flow projections;"
3. Revise the filing requirements and inspection of documents provisions of the Sub Debt Rule to align with current NCUA procedures; and
4. Remove a parenthetical reference related to GSC that no longer counts as Regulatory Capital in order to align with recent changes made to the Call Report.

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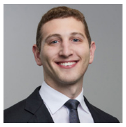

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[1] *See* 86 Fed. Reg. 11060 (February 23, 2021).