

National Credit Union Administration
SUPPORTING STATEMENT

Safe Harbor; Treatment of Financial Assets Transferred in Connection
with a Securitization or Participation, §709.9
OMB No. 3133-0197

A. JUSTIFICATION

1. Circumstances that make the collection of information necessary.

The NCUA, as liquidating agent or conservator for failed FICUs, has a unique responsibility and interest in ensuring that residential mortgage loans and other financial assets originated by FICUs are originated for long-term sustainability. The NCUA's responsibilities to protect insured depositors and resolve failed insured banks and thrifts and its responsibility to the NCUSIF require it to ensure that, where it provides a safe harbor consenting to special relief from the application of its liquidation or conservatorship powers, it must do so in a manner that fulfills these responsibilities.

It would be imprudent for the NCUA to provide consent or other clarification of its application of its liquidation or conservatorship powers without imposing requirements designed to realign the incentives in the securitization process to avoid these devastating effects. The NCUA's adoption of 12 CFR § 709.10 in 2000 provided clarification of "legal isolation." In view of the accounting changes and the effects they have upon the application of the Safe Harbor Rule, it is crucial that the NCUA provide clarification of the application of its liquidation or conservatorship powers in a way that reduces the risks to the NCUSIF by better aligning the incentives in securitization to support sustainable lending and structured finance transactions. Section 709.10 was later redesigned §709.9 on October 30, 2017, by 82 FR 50288.

The Safe Harbor Rule provided a "safe harbor" by confirming "legal isolation" if all other standards for off balance sheet accounting treatment, along with some additional conditions focusing on the enforceability of the transaction, were met by the transfer in connection with a securitization or a participation. Satisfaction of "legal isolation" was vital to securitization transactions because of the risk that the pool of financial assets transferred into the securitization trust could be recovered in bankruptcy or in a bank receivership. Generally, to satisfy the legal isolation condition, the transferred financial assets must have been presumptively placed beyond the reach of the transferor, its creditors, a bankruptcy trustee, or in the case of an FICU, the NCUA as conservator or receiver. Since its adoption, the Safe Harbor Rule has been relied on by participants as assurance that investors could look to financial assets for payment without concern that the financial assets would be interfered with by the NCUA as conservator or receiver.

The NCUA must address the evident defects in many subprime and other mortgages originated and sold into securitizations in order to fulfill its responsibilities as liquidating

agent or conservator. The defects and misalignment of incentives in the securitization process for residential mortgages were a significant contributor to the erosion of underwriting standards throughout the mortgage finance system. Insured banks and thrifts made many troubled loans as underwriting standards declined under the competitive pressures created by the returns achieved by lenders and service providers through the “originate to distribute” model.

Defects in the incentives provided by securitization through immediate gains on sale for transfers into securitization vehicles and fee income directly led to material adverse consequences for insured banks and thrifts. Among these consequences were increased repurchase demands under representations and warranties contained in securitization agreements, losses on purchased mortgage and asset-backed securities, severe declines in financial asset values and in mortgage- and asset-backed security values due to spreading market uncertainty about the value of structured finance investments, and impairments in overall financial prospects due to the accelerated decline in housing values and overall economic activity. These consequences, and the overall economic conditions, directly led to the failures of many banks and thrifts and to significant losses to the Federal Deposit Insurance Fund.

In the context of a conservatorship or receivership, the conditions applicable to all securitizations will improve overall transparency and clarity through disclosure and documentation requirements along with ensuring effective incentives for prudent lending by requiring that the payment of principal and interest be based primarily on the performance of the financial assets and by requiring retention of a share of the credit risk in the securitized loans.

The conditions applicable to RMBS are more detailed and explicit and require additional capital structure changes, disclosures, and documentation, the establishment of a reserve and deferral of compensation. These standards are intended to address the factors that caused significant losses in current RMBS securitization structures as demonstrated in the 2007-2008 financial crisis. Confidence can be restored in RMBS markets only through greater transparency and other structures that support sustainable mortgage origination practices and requiring increased disclosures. These standards respond to investor demands for greater transparency and alignment of the interests of parties to the securitization. In addition, they are generally consistent with industry efforts while taking into account legislative initiatives.

2. Purpose and use of the information collected.

The conditions are designed to provide greater clarity and transparency to allow a better ongoing evaluation of the quality of lending by credit unions and reduce the risks to the NCUSIF from the opaque securitization structures and the poorly underwritten loans that led to the onset of the financial crisis. In addition, these conditions are designed to address the difficulties provided by the existing model of securitization. However, greater transparency is not solely for investors but will serve to more closely tie the

origination of loans to their long-term performance by requiring disclosure of that performance.

3. Use of information technology.

Compliance with disclosure provisions and other requirements of the rule may be facilitated by whatever technology is available.

4. Duplication of information.

There is no duplication.

5. Efforts to reduce burden on small entities.

The information is collected only from a limited group of FICUs who engage in securitization transactions. Small entities are not affected.

6. Consequences of not conducting the collection.

The conditions are designed to provide greater clarity and transparency to allow a better ongoing evaluation of the quality of lending by banks and reduce the risks to the NCUSIF from the opaque securitization structures and the poorly underwritten loans that led to the onset of the financial crisis. Less frequent disclosure would render the information stale and unable to be used by investors to evaluate the credit risk of a given securitization.

7. Inconsistencies with guidelines in 5 CFR 1320.5(d)(2).

There are no special circumstances. The collection of information is conducted in a manner consistent with the guidelines in 5 CFR 1320.5(d)(2).

8. Efforts to consult with persons outside the agency.

This is an extension of a currently approved collection. A 60-day notice was published in the *Federal Register* on August 27, 2021, at 86 FR 48251, soliciting comments from the public. No public comments were received in response to this notice.

9. Payment or gifts to respondents.

No payment or gifts to respondents are made.

10. Assurance of confidentiality.

There is no assurance of confidentiality other than that provided by law.

11. Questions of a sensitive nature.

No information of a sensitive nature is requested. No personally identifiable information (PII) is collected.

12. Estimate of burden of information collection.

	No. of Respondents	No. Responses Per Respondent	Annual Responses	Hours Per Response	Total Annual Burden
10K Annual Report –					
Non Reg AB Compliant	2	1	2	27	54
Reg AB Compliant	2	1	2	4.5	9
8K Disclosure Form –					
Non Reg AB Compliant	2	2	4	27	108
Reg AB Compliant	2	2	4	4.5	18
10D Reports –					
Non Reg AB Compliant	2	5	10	27	270
Reg AB Compliant	2	5	10	4.5	45
12b-25 Notification	4	1	4	2.5	10
TOTALS			36		514

Based on an average wage rate of \$35 an hour, the cost to respondent = \$17,990.

13. Capital start-up or on-going operation and maintenance costs.

There are no capital start-up or maintenance costs.

14. Annualized costs to the Federal government.

Any incremental costs associated with reviewing information submitted by private capital investors are encompassed within the NCUA’s personnel and data processing budgets and are not separately identifiable.

15. Changes in burden.

This is an extension of a currently approved collection, without change.

16. Information collection planned for statistical purposes.

The information collected from covered FICUs will not be published by the NCUA.

17. Request non-display the expiration date of the OMB control number.

The OMB control number and expiration date associated with this PRA submission will be displayed on the Federal Government’s electronic PRA docket site at www.reginfo.gov.

18. Exceptions to the Certification for Paperwork Reduction Act Submission.

There are no exceptions to the certification statement.

B. COLLECTIONS OF INFORMATION EMPLOYING STATISTICAL METHODS

This collection does not employ statistical methods.