

# Cooperative Credit Union Association

Delaware • Massachusetts • New Hampshire • Rhode Island

*Creating Cooperative Power*

August 15, 2022

Frank Kressman  
General Counsel  
Office of General Counsel  
National Credit Union Administration  
1775 Duke Street  
Alexandria, Virginia 22314-3428  
OGCMAIL@NCUA.GOV

**RE: Cooperative Credit Union Association, Inc. Comments on NCUA Regulatory Review (2022): Credit Union Fintech Indirect Lending Programs and Section 701.21 (“Loans to members and lines of credit to members”), Section 701.22 (“Loan participations”), and Section 701.23 (“Purchase, sale, and pledge of eligible obligations.”)**

Dear Mr. Kressman,

On behalf of its member credit unions, the Cooperative Credit Union Association, Inc. (“Association”) appreciates the opportunity to comment on the National Credit Union Administration’s (NCUA) Regulatory Review (2022). The Association is the state trade association representing approximately 200 state and federally-chartered credit unions located in the states of Delaware, Massachusetts, New Hampshire, and Rhode Island, which further serve over 3.6 million consumer members. The Association has developed these comments in consultation with our members.

### **The Association’s High-Level Comments**

- We urge NCUA to clarify that loans made by credit unions through indirect lending arrangements involving Fintech platforms like Upgrade or Upstart qualify as loans to members under Section 701.21 when the credit union makes the final underwriting decision, and the loan is assigned to the credit union soon after it is signed.
- Our members have reported that some examiners believe credit unions should treat these Fintech loans as Eligible Obligations under Section 701.23 even though these programs should meet that rule’s subsection (b)(4)(iv) exemption for indirect lending. Similar questions apply to loan participations involving these loans under Section 701.22.
- Fintech platform indirect lending is just classic indirect lending using updated technology. It is helping many credit unions attract new members in the 21<sup>st</sup> Century.

## The Association's Detailed Comments

We urge NCUA to provide examiner training or issue updated guidance to clarify that loans made by credit unions through indirect lending arrangements involving Fintech platforms like Upgrade or Upstart qualify as loans to members when the credit union makes the final underwriting decision, and the loan is assigned to the credit union soon after it is signed. Specifically, the agency should clarify that credit unions qualify as the “originating lender” under NCUA rules when they partner with Fintech companies in most indirect lending relationships.

Many of our member credit unions have partnered with Fintech platforms like Upgrade and Upstart to connect with existing and potential members (i.e. those within the credit union's field of membership) who may not have otherwise considered the credit union for a loan. Partnering with Fintechs has also helped credit unions with aging memberships come into the 21<sup>st</sup> Century and attract new, younger members who are in the borrowing phase of their lives, allowing better financial intermediation between the credit union's savers and borrowers. “Creating a source of credit for provident or productive purposes,” 12 U.S.C. § 1752(1), is one of the core purposes of credit unions, and loans are one of the few sources of reasonable yield available to credit unions in a raising rate environment.

In the case of a federal credit union, existing NCUA regulations and guidance should already treat these Fintech indirect loans as Section 701.21 loans to members, 12 C.F.R. § 701.21, however, there is reportedly confusion among examiners in the field on this issue because Fintechs use new technology and procedures not previously employed by more traditional credit union indirect lending partners that did business with a physical presence, like auto dealers.

NCUA has previously authorized online lending relationships to bring in new members even with “fully automated” loan underwriting and funding similar to Upgrade's and Upstart's technology and operations. See “Automated Loan Underwriting and Funding,” Letter of Hattie M. Ulan, Assistant General Counsel, NCUA, OGC Legal Op. No. 09-0944 (October 2010), available at <https://www.ncua.gov/regulation-supervision/legal-opinions/2010/automated-loan-underwriting-and-funding>.

The Section 701.23(b)(4)(iv) exemption from the federal credit union Eligible Obligations rule already specifies that indirect lending relationships create loans to members subject to Section 701.21, not Eligible Obligations, so long as the following conditions are met:

“An indirect lending or indirect leasing arrangement that is classified as a loan and not the purchase of an eligible obligation because the Federal credit union makes the final underwriting decision and the sales or lease contract is assigned to the Federal credit union very soon after it is signed by the member and the dealer or leasing company.” 12 C.F.R. § 701.23(b)(4)(iv).

This perfectly describes a typical credit union Fintech indirect lending program. In a Fintech indirect lending arrangement, the credit union contracts with the Fintech to establish legally the requirement to follow the credit union's underwriting criteria as well as warranties concerning

the loans including the right to put the loan back to the Fintech if the credit union's underwriting criteria or other warranties are not met, and so forth. These arrangements should meet all the requirements of the Section 701.23(b)(4)(iv) exemption from the Eligible Obligations rule and therefore be loans to members under Section 701.21.

When these requirements are met, existing NCUA guidance clarifies that federal credit unions are making "indirect loan arrangements under the authority to make loans to members, 12 U.S.C. §107(5); 12 C.F.R. § 701.21, rather than the authority to purchase eligible obligations, 12 U.S.C. §107(13)" and 12 C.F.R. § 701.23, even when a third-party performs functions such as automated underwriting. "Indirect Lending," Letter of Sheila A. Albin, Associate General Counsel, NCUA, to Linda J. Lehnertz, Associate General Counsel, CUNA Mutual Group (Aug. 6, 1997), available at <https://www.ncua.gov/regulation-supervision/legal-opinions/1997/indirect-lending>.

Although Sections 701.21 and 701.23 only apply to federal credit unions, NCUA clarifying this issue would also help state-chartered credit unions. The closely related Section 701.22 Loan Participations rule applies to both federal and state-chartered credit unions. This issue is also relevant to state-charters because of state "Wildcard" statutes giving state-chartered credit unions parity with federal credit unions, *see, e.g.*, Mass. Gen. Laws ch. 171, § 6A; N.H. Rev. Stat. Ann. § 383-E:4-411; R.I. Gen. Laws § 19-5-25, and also for Rhode Island credit unions because of Rhode Island's Eligible Obligations statute that is based on the NCUA Section 701.23 rule. *See* R.I. Gen. L. § 19-5-15.1.

Regarding loans participations, NCUA has previously opined that loans made as part of indirect lending relationship should qualify as loans to members if they would normally be exempt from the Eligible Obligations rule, making such loans eligible to be participated pursuant under 12 C.F.R. § 701.22. *See* "Loan Participations in Indirect Loans – Originating Lenders," Letter of Michael J. McKenna, General Counsel, NCUA, OGC Letter No. 15-0813 (2015), available at <https://www.ncua.gov/regulation-supervision/legal-opinions/2015/loan-participations-indirect-loans-originating-lenders>.

Although this guidance uses a traditional physical auto dealer indirect lending relationship as an example, this guidance should be applicable to all types of credit union indirect lending programs. There is no substantive difference, for example, between an indirect auto loan application being made using a member's mobile phone app or with the member sitting in the back office of an auto dealer making a deal with the dealer's state-licensed non-bank finance affiliate that is acting as an agent on the dealer's behalf.

Although some Fintechs like Upgrade use an FDIC-insured bank as its agent to help process the loans and provide treasury services due to technological and operational limitations, the credit union's contractual relationship is with the Fintech (not the bank) and the bank is neither lending on its own account nor in direct privity of contract with the credit union. To the contrary, the credit union sets the underwriting standards, qualifies the member, and receives the loan very soon after it is made. The Fintech simply arranges that specific loan specifically for that credit union; the Fintech is not lending on its own account, nor is its agent bank.

In addition, an FDIC-insured bank acting as the finance affiliate/agent of the Fintech is safer and sounder than a state-licensed non-bank lender because the FDIC-insured bank is subject to federal regulation and examination as an insured depository institution.

We urge NCUA to provide examiner training or issue updated guidance to clarify that loans made by credit unions through indirect lending arrangements involving Fintech platforms like Upgrade or Upstart qualify as loans to members when the credit union makes the final underwriting decision, and the loan is assigned to the credit union soon after it is signed. Specifically, the agency should clarify that credit unions qualify as the “originating lender” under NCUA rules when they partner with Fintech companies in most indirect lending relationships.

The Association appreciates the opportunity to comment on NCUA’s Regulatory Review (2022). If you have any questions about our comments or require further information, please do not hesitate to contact the Association at [govaff-reg@ccua.org](mailto:govaff-reg@ccua.org).

Sincerely,

A handwritten signature in black ink, appearing to read "Ronald McLean". The signature is fluid and cursive, with a large initial "R" and a long horizontal stroke at the end.

Ronald McLean  
President/CEO  
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