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National Association of Federally-Insured Credit Unions

October 27, 2021

Melane Conyers-Ausbrooks
Secretary of the Board
National Credit Union Administration
1775 Duke Street
Alexandria, VA 22314-3248

RE: **Subordinated Debt; RIN: 3133-AF38**

Dear Ms. Conyers-Ausbrooks:

On behalf of Inclusiv and the National Association of Federally-Insured Credit Unions (NAFCU) (the Associations), we are writing to share comments regarding the National Credit Union Administration's (NCUA) proposed amendments to the agency's 2020 Subordinated Debt Rule (Subordinated Debt Rule).

Inclusiv is a national association for Community Development Financial Institution (CDFI) and low income credit unions (LICUs). NAFCU advocates for all federally-insured not-for-profit credit unions that, in turn, serve 127 million consumers with personal and small business financial service products. The Associations represent credit unions participating in the U.S. Department of Treasury's Emergency Capital Investment Program (ECIP).

The Associations support the NCUA's grandfathering of secondary capital plans approved in conjunction with LICU ECIP applications. The proposed rule ensures that LICUs that have already submitted ECIP applications will not need to revise an accompanying secondary capital plan to conform with new procedural requirements in the Subordinated Debt Rule when ECIP investment decisions are made in 2022. Providing this accommodation will facilitate efficient deployment of ECIP funding in low- and moderate-income (LMI) communities, particularly those that have borne the brunt of pandemic related economic hardship. The Associations are also encouraged by the NCUA Board's progress at the October 2021 board meeting in developing a process to move toward resolving the issue of credit unions accepting long-term capital as a debt obligation.

More generally, the Associations believe the parameters of the current secondary rule are more than sufficient to address regulatory capital treatment of ECIP investments. The more burdensome disclosure and application requirements found in the Subordinated Debt Rule are not only excessive in relation to the current secondary capital rule, but were developed to account for non-LICU, complex credit union issuers interacting with private investors (including those without experience issuing secondary capital). The ECIP, being administered exclusively by Treasury, involves a more structured type of subordinated debt offering, and the issuances contemplated by the program were developed around the requirements of the current secondary capital rule. Accordingly, the Associations agree that LICUs should be able to rely on already approved secondary capital plans, regardless of when ECIP funds are issued.

The Associations do not support a maximum maturity for ECIP investments that truncates the useful life of the funding as regulatory capital. Limiting the regulatory capital treatment of an ECIP investment in accordance with the Subordinated Debt Rule's twenty-year maximum maturity would impair the impact of the funding in low- and moderate-income communities that need longer term capital infusion. Additionally, failure to recognize thirty-year ECIP investments as secondary capital would place LICUs at a disadvantage relative to banks and other eligible institutions that face no equivalent limits on their ability to leverage ECIP funding.

The Associations support and appreciate the NCUA's responsiveness to these concerns and believe the agency's recent Letter to Credit Unions (LCU) is a positive step forward.[1] The LCU contemplates a multi-step approach for accommodating thirty-year ECIP investments, which would have otherwise received no secondary capital treatment under the terms of the proposed rule. With the publication of the LCU, LICUs will be able to obtain 30-year ECIP investments without foregoing the critical benefit of secondary capital treatment. However, until further Board action is taken, ECIP investments will still be subject to a twenty-year maximum maturity as required under the Subordinated Debt Rule.

The Associations are encouraged by the Board's intention to pursue future action in 2022 to address this limitation and ultimately recognize ECIP funding as regulatory capital for the life of the investment.[2] However, the NCUA must meet this commitment without delay, as prolonged uncertainty regarding the future regulatory capital treatment of thirty-year ECIP investments could erode the full potential of this funding in communities that need financial assistance now more than ever. As long as the regulatory capital issue remains only partially resolved, LICUs will need to consider capital planning contingencies that could prevent them from fully leveraging ECIP investments in the near term.

More generally, the imposition of a twenty-year maximum maturity for all other subordinated debt appears to be the result of overbroad and opaque agency analysis concerning the distinction between debt and equity investments. While differentiating between debt and equity is necessary given statutory constraints on the organization of credit unions and their capital structure, the NCUA has not provided sufficient analysis to support the legally dubious conclusion that all other investments in credit union subordinated debt, including future government programs, must abide by a uniform maturity limit.

A single citation to the agency's 2020 Subordinated Debt Rule (and its antecedent rulemaking) offers no reasonable basis for finding that a broadly applicable twenty-year maturity is appropriate for resolving the question of whether an instrument might be considered an equity investment or reasonable when there is no willingness to consider the finer details of individual investment programs.[3] Moreover, it would be inefficient for the NCUA to impose a one-size-fits-all maturity

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[1] *See* NCUA, Letter to Credit Unions, Emergency Capital Investment Program Participation, 21-CU-11 (Oct. 2021).
[2] *See* NCUA, "NCUA Issues Guidance, Announces Upcoming ECIP Action," (Oct. 20, 2021) ("The third step will be additional NCUA action to permit ECIP funding to count as regulatory capital for the entire time it is held").
[3] In its March 2020 Subordinated Debt proposal, the NCUA justified a twenty-year maximum maturity with the following statement: "[t]he Board is proposing the maximum maturity of 20 years to help ensure the Subordinated Debt is properly characterized as debt rather than equity….[g]enerally, by its nature, debt has a stated maturity,

limit for all subordinated debt outside the ECIP context, and then, when confronted with future periods of economic stress and attendant capital assistance programs, need to amend its rules to accommodate specific government investment parameters, much like it has for ECIP.

To develop a more reasonably tailored framework for subordinated debt, the Associations encourage the NCUA to commit to a broader reevaluation of the Subordinated Debt Rule in 2022. While the Subordinated Debt Rule has helped expand access to regulatory capital for non-LICUs, credit union issuers with limited legal and administrative resources will likely face significant costs once the new rule takes effect in 2022. The complexity of the new regulation has already dampened enthusiasm for subordinated debt and could compromise the health of existing secondary capital markets for LICUs that cannot afford specialized counsel to evaluate compliance with offering rules or other novel requirements. To cultivate a sustainable market for subordinated debt in the future and preserve LICUs' ability to leverage secondary capital to improve their communities' financial well-being, the NCUA should invite future comment on ways to adjust subordinated debt requirements to be less burdensome.

The Associations appreciate the opportunity to comment on the proposed rule and thank you for your consideration. The Associations urge the NCUA to act quickly to permit LICUs to realize the full potential of the ECIP program and recognize ECIP funding as secondary capital for the life of the investment. Doing so will greatly enhance the ability of LICUs to leverage a historically significant capital assistance program and provide critical assistance to disadvantaged communities. If you have any questions, please don't hesitate to contact Andrew Morris, Senior Counsel for Research and Policy at amorris@nafcu.org, or Jules Epstein-Hebert, Director of Membership at jhebert@inclusiv.org

Sincerely,

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whereas equity does not." *See* 85 Fed. Reg. 13986, 14000 (Mar. 10, 2020). By this logic, a subordinated debt note would only need a definite maturity to be distinguishable from an equity investment.