

CHAPTER 13-03-20 PARTICIPATION LOANS

Section

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13-03-20-01. Definitions.

For purposes of this section:

1. "Associated borrower" means any other person or entity with a shared ownership, investment, or other pecuniary interest in a business or commercial endeavor with the borrower. This means any person or entity named as a borrower or debtor in a loan or extension of credit, or any other person or entity, such as a drawer, endorser, or guarantor, engaged in a common enterprise with the borrower, or deriving a direct benefit from the loan to the borrower. Exceptions to this definition for partnerships, joint ventures, and associations are as follows:
 - a. If the borrower is a partnership, joint venture, or association, and the other person with a shared ownership, investment, or other pecuniary interest in a business or commercial endeavor with the borrower, is a member or partner of the borrower, and neither a direct benefit nor a common enterprise exists, such other person is not an associated borrower.
 - b. If the borrower is a member or partner of a partnership, joint venture, or association, and the other entity with a shared ownership, investment, or other pecuniary interest in a business or commercial endeavor with the borrower is the partnership, joint venture, or association and the borrower is a limited partner of that other entity, and by the terms of a partnership or membership agreement valid under applicable law, the borrower is not held generally liable for the debts or actions of that other entity, such other entity is not an associated borrower.
 - c. If the borrower is a member or partner of a partnership, joint venture, or association, and the other person with a shared ownership, investment, or other pecuniary interest in a business or commercial endeavor with the borrower is another member or partner of the partnership, joint venture, or association, and neither a direct benefit nor a common enterprise exists, such other person is not an associated borrower.
2. "Common enterprise" means:
 - a. The expected source of repayment for each loan or extension of credit is the same for each borrower and no individual borrower has another source of income from which the loan, together with the borrower's other obligations, may be fully repaid. An employer may not be treated as a source of repayment because of wages and salaries paid to an employee, unless the standards described in subdivision b of this definition are met;
 - b. Loans or extensions of credit are made to borrowers who are related directly or indirectly through common control, including if one borrower is directly or indirectly controlled by another borrower and:
 - (1) Substantial financial interdependence exists between or among the borrowers. Substantial financial interdependence means fifty percent or more of one borrower's gross receipts or gross expenditures, on an annual basis, are derived from transactions with another borrower. Gross receipts and expenditures include gross revenues or expenses, intercompany loans, dividends, capital contributions, and similar receipts or payments; or

- (2) Separate borrowers obtain loans or extensions of credit to acquire a business enterprise of which those borrowers will own more than fifty percent of the voting securities or voting interests.
3. "Control" means a person or entity directly or indirectly, or acting through or together with one or more persons or entities:
 - a. Owns, controls, or has the power to vote twenty-five percent or more of any class of voting securities of another person or entity;
 - b. Controls, in any manner, the election of a majority of the directors, trustees, or other persons exercising similar functions of another person or entity; or
 - c. Has the power to exercise a controlling influence over the management or policies of another person or entity.
4. "Credit union" means any state-chartered credit union.
5. "Credit union organization" means any organization as determined by the state credit union board established primarily to serve the daily operational needs of its member credit unions. The term does not include trade associations, membership organizations principally composed of credit unions, or corporations, or other businesses which principally provide services to credit union members as opposed to corporations or businesses whose business relates to the daily in-house operations of credit unions.
6. "Direct benefit" means the proceeds of a loan or extension of credit to a borrower, or assets purchased with those proceeds, which are transferred to another person or entity, other than in a bona fide arm's-length transaction where the proceeds are used to acquire property, goods, or services.
7. "Eligible organization" means a credit union, credit union organization, or financial organization.
8. "Financial organization" means any federally chartered or federally insured financial institution and any state or federal government agency, or its subdivisions, including the Bank of North Dakota.
9. "Loan participation" means a loan where one or more eligible organizations participate pursuant to a written agreement with the originating lender, and the written agreement requires the originating lender's continuing participation throughout the life of the loan. It does not include a loan interest into a pool of loans.
10. "Originating lender" means the participant with which the borrower initially or originally contracts for a loan and who, thereafter or concurrently with the funding of the loan, sells participations to other lenders.

History: Effective January 1, 2007; amended effective January 1, 2019.

General Authority: NDCC 6-01-04

Law Implemented: NDCC 6-06-06

13-03-20-02. Authorization.

1. Subject to the provisions of this section, any state-chartered credit union may participate in making loans with eligible organizations within the limitations of the board of directors' written participation loan policies, provided it meets the requirements of this subsection.

- a. The purchase complies with all regulatory requirements to the same extent as if the purchasing credit union had originated the loan, including the loans to one borrower provisions in 12 CFR 723.
 - b. A written master participation agreement shall be properly executed, acted upon by the state-chartered credit union's board of directors, or if the board has so delegated in its policy, the investment committee, loan committee, or senior management officials and retained in the state-chartered credit union's office. The master agreement shall:
 - (1) Be properly executed by authorized representatives of all parties under applicable law;
 - (2) Be properly authorized by the credit union's board of directors or, if the board has so delegated in its policy, a designated committee or senior management official, under the federally insured credit union's bylaws and applicable law; and
 - (3) The original and copies be retained in the credit union's office.
 - c. Prior to purchase, the identification of the specific loan participation being purchased, either directly in the agreement or through a document that is incorporated by reference into the agreement, shall state:
 - (1) The interest the originating lender will retain in the loan to be participated. The retained interest must be at least ten percent of the outstanding balance of the loan through the life of the loan;
 - (2) The location and custodian for original loan documents;
 - (3) An explanation of the conditions under which parties to the agreement can gain access to financial and other performance information about a loan, the borrower, and the servicer so the parties can monitor the loan;
 - (4) An explanation of the duties and responsibilities of the originating lender, servicer, and participants with respect to all aspects of the participation, including servicing, default, foreclosure, collection, and other matters involving the ongoing administration of the loan; and
 - (5) Circumstances and conditions under which participants may replace the servicer.
 - d. The board establishes a limit on the aggregate amount of loan participations that may be purchased from any one originating lender.
 - e. The board establishes limits on the amount of loan participations that may be purchased by each loan type, not to exceed a specified percentage of the credit union's net worth;
 - f. The board establish a limit on the aggregate amount of loan participations that may be purchased with respect to a single borrower, or group of associated borrowers, not to exceed fifteen percent of the credit union's net worth, unless this amount is waived by the state credit union board and the national credit union administration; and
 - g. A state-chartered credit union may sell to or purchase from any participant the servicing of any loan in which it owns a participation interest.
2. An originating lender which is a state-chartered credit union shall:
 - a. Originate loans only to its members;
 - b. Retain an interest of at least ten percent of the face amount of each loan;

- c. Retain the original or copies of the loan documents; and
 - d. Require the credit committee or loan officer to use the same underwriting standards for participation loans used for loans that are not being sold in a participation agreement unless there is a participation agreement in place prior to the disbursement of the loan. If a participation agreement is in place prior to disbursement, either the credit union's loan policies or the participation agreement shall address any variance from nonparticipation loan underwriting standards.
3. A participant state-chartered credit union that is not an originating lender shall:
- a. Participate only in loans it is empowered to grant, having a participation policy in place which sets forth the loan underwriting standards prior to entering into a participation agreement;
 - b. Participate in participation loans only if made to its own members or members of another participating credit union, or loans made to persons located within the purchasing credit union's field of membership by eligible organizations, or financial organizations;
 - c. Retain the original or a copy of the written participation loan agreement and a schedule of loans covered by the agreement; and
 - d. Obtain the approval of the board of directors or investment committee, loan committee, or credit manager of the disbursement of proceeds to the originating lender.

History: Effective January 1, 2007; amended effective January 1, 2013; January 1, 2019.

General Authority: NDCC 6-01-04

Law Implemented: NDCC 6-06-06

13-03-20-03. Waivers.

A credit union may seek a waiver from any of the limitations in subdivision f of subsection 1 of section 13-03-20-02. A credit union shall submit a written request to the commissioner containing an explanation for the purpose of the waiver. The commissioner may request the credit union provide documentation in support of its request. Upon receipt of the written request and all supporting documentation the request must be brought before the state credit union board for consideration. The board shall consider all relevant information related to the request including the safety and soundness of the credit union. If approved, the waiver application must be forwarded to the national credit union administration for consideration. Approval by the state credit union board is contingent on approval by the national credit union administration.

History: Effective January 1, 2019.

General Authority: NDCC 6-01-04

Law Implemented: NDCC 6-06-06