



Credit Union National Association

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Filed via [regcomments@ncua.gov](mailto:regcomments@ncua.gov)

September 13, 2011

Ms. Mary Rupp  
Secretary of the Board  
National Credit Union Administration  
1775 Duke Street  
Alexandria, Virginia 22314-3428

Re: CUNA's Comments on NCUA's Notice of Proposed Rulemaking (CUSO),  
12 C.F.R. Parts 712 and 741; 76 Federal Register 44866, July 27, 2011

Dear Ms. Rupp:

This comment letter represents the views of the Credit Union National Association (CUNA) regarding the National Credit Union Administration (NCUA) Board's proposal to amend its credit union service organization (CUSO) regulation. Our letter was developed under the auspices of the CUNA Examination and Supervision Subcommittee chaired by Ohio League President Paul Mercer and includes input from several CUNA groups, including the Federal Credit Union Subcommittee and CUNA Council members. By way of background, CUNA is the largest credit union advocacy organization in this country, representing approximately 90% of our nation's 7,300 state and federal credit unions, which serve about 92 million members.

### **General Comments**

CUNA does not support the proposal as issued for comments and urges the Board to withdraw it or revise it substantially. Our general concerns are addressed first followed by particular concerns as they relate to individual provisions.

CUNA is a strong supporter of CUSOs and the ability of credit unions to utilize them to improve their product offerings to their members. CUSOs are one of the few outlets that credit unions have to develop innovative mechanisms to help support their operations and enhance their ability to provide the kinds of financial services their members need and want.



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CUSOs as a whole do not pose a systemic risk to the credit union system or overall concerns to the National Credit Union Share Insurance Fund (NCUSIF). One of the major concerns with the proposal is that the agency has provided absolutely no data or analysis regarding current problems that could be used to substantiate the need for the proposal.

That does not mean, of course, that certain CUSOs have not had some issues. CUNA is aware that a small number of CUSOs, including ones mentioned in the press in recent months, have had serious problems, primarily with lending operations.

Yet rather than issuing a new proposed regulation that is tailored to address only identified problem areas, NCUA is proposing to issue a comprehensive regulation that is perceived by many in the credit union movement as an attempt to stifle CUSOs. We urge the agency to target its amendments to demonstrated problem areas. That is an approach credit unions would likely support. Credit unions, leagues, and CUNA do not oppose reasonable supervision or the agency's ability to address concerns appropriately. Credit unions do understandably oppose blanket regulations that are not targeted to specific concerns and that stymie innovation due in part to their overly broad application.

In addition, federally insured credit unions are already required to comply with due diligence responsibilities. These include performing an adequate review before becoming involved with a CUSO. These responsibilities also include undertaking subsequent, ongoing reviews on a periodic basis to ensure the CUSO is providing intended services and does not present an undue risk that threatens its performance or poses a threat to the operations of its credit unions. Rather than issuing new requirements, the agency should focus on targeting problem areas and implementing existing requirements, such as due diligence.

Most significant and as discussed further below, we seriously question whether the agency has sufficient legal basis for several provisions contained in the new proposal.

Congress provided NCUA authority for purposes of Y2K to examine CUSOs but allowed those provisions that were included in the Federal Credit Union Act (FCU Act) to expire in December 2001. See Examination Parity and Year 2000 Readiness for Financial Institutions Act, P.L. 105-164. Congress has also given the federal bank regulators permanent statutory authority to examine bank and thrift service companies, which are generally comparable to CUSOs, pursuant to The Bank Service Company Act. See 12 U.S.C. § 1867 ("Regulation and Examination of Bank Service Companies."). In our view, the fact that the authority was not made permanent is a clear expression from Congress that it did not intend the agency to regulate CUSOs directly as the proposal would do. NCUA should not require by regulation what Congress does not permit it to do by statute. See, e.g., NCUA v. First Nat'l Bank & Trust Co., 522 U.S. 479, 499-501 (1998); Indep. Ins. Agents v. Hawke, 211 F. 3d, 638, 643-45 (D.C. Cir. 2000). Instead, NCUA should significantly revise the proposed provisions regarding

agency oversight of CUSOs and delete those provisions that are not supported by the FCU Act.

Of particular concern are provisions concerning the agency's access to the books and records of CUSOs and the new reporting requirements for CUSOs that would result in their providing financial data directly to NCUA. In our view, it remains unclear that NCUA has sufficient authority to examine the books and records of CUSOs (authority which would not be changed by the proposal). While Subsections 1757(5)(D) and 1757(7)(I) of the FCU Act authorize federal credit unions to lend to and invest in CUSOs, they do not address NCUA's authority over CUSOs. In fact, unlike other federal financial regulators, which have service company examination authority under the Bank Service Company Act, NCUA does not have express statutory authority over service organizations, such as CUSOs. In light of that, the agency has relied upon Section 204, general safety and soundness authority, as well as other general safety and soundness rulemaking provisions, as its legal support for reviewing the books and records of a CUSO. The agency cites other general provisions as authority for the new proposal. Given the fact that Congress removed NCUA's specific authority to examine CUSOs ten years ago, we think reliance on general authority to examine federal or state credit union CUSOs is tenuous at best. We also think that the proposed language to allow NCUA to require direct reporting by CUSOs to NCUA and state regulators, as applicable, is clearly not supported by the FCU Act.

We are also concerned that there are important agency budget implications associated with this proposal. If NCUA is more involved with CUSO regulation and examination, we can foresee that additional agency staff resources would be provided to perform those tasks – costs that credit unions will have to bear. Further, to the extent that CUSOs allow credit unions to develop products, there is a real concern that examiners, who will focus exclusively on minimizing if not eliminating risk, will limit the ability of CUSOs to help credit unions initiate innovative products and delivery systems.

Another significant concern relates to the agency's recent efforts to make new requirements a condition of National Credit Union Share Insurance Fund (NCUSIF) coverage of a federally insured credit union's members' accounts. The proposal would provide that the requirements for financial statements and financial audits be prepared under GAAP or GAAS would be conditions that must be met for all federally insured credit unions lending to or investing in CUSOs or these institutions will risk losing NCUSIF coverage. Other proposed requirements such as those regarding CUSO subsidiaries addressed below would also become conditions of NCUSIF coverage.

We think this is regulatory overkill and there is no reason to add this layer of potentially punitive authority for the agency. We think this is particularly significant since the agency could possibly remove a credit union's NCUSIF coverage if for example, a CUSO fails to provide direct reports to NCUA, a requirement that the FCU Act does not support. We urge the agency to delete

the reference to NCUSIF coverage and to refrain from invoking the extraordinary step of loss of NCUSIF coverage for future regulatory requirements. This action is wholly unnecessary to ensure compliance by credit unions since the agency can already invoke a range of supervisory tools to achieve compliance.

Finally regarding our general concerns, the American Bankers Association (ABA) has submitted a comment letter supporting the proposal, although it includes additional recommendations to make the CUSO rule even more draconian than the proposal. It is well known that the ABA's primary concern regarding any credit union issue is limiting competition from not-for-profit, member-owned cooperatives. The ABA sees in the proposal what credit unions fear—an unneeded layer of regulatory involvement that will prevent CUSOs from helping credit unions serve their members' needs. We urge NCUA not to facilitate the ABA's objectives by proceeding with the proposal.

### **Specific Comments**

#### **Proposed 12 C.F.R. § 712.2(d)(3)—“Special Rule in the Case of Less than Adequately Capitalized FICUs”**

Currently, federal credit unions that are less than adequately capitalized may not invest in a CUSO if the investment would require a total cash outlay of more than 1% of the credit union's paid in and unimpaired capital and surplus, unless the credit union receives prior written approval from its NCUA regional director. The proposal would apply this general requirement to undercapitalized state credit unions, which would have to obtain approval from their state regulator and notify NCUA of the request for approval. The limit on the amount of the investment would be determined by state law; if such limits do not exist under a state credit union's state laws, the 1% limit on undercapitalized federal credit unions would apply.

While CUNA does not support the proposal generally, this provision is consistent with safety and soundness and we do agree that it is an appropriate requirement. Federal credit unions are already subject to it, and we have not heard of problems that it has created for them. There are some issues, however, with this provision that we feel should be clarified before it is adopted.

First, there should be a procedure for making the request and a reasonable time frame in the final amendment for when NCUA must respond to the credit union to let it know whether its request to continue participating with a CUSO has been approved.

Second, we think the criteria on which the agency will make its determination should be addressed in the amendment as well as the fact that credit unions should be able to appeal a regional office's decision denying the credit union's request.

### **Section 712.3, Access to Information from the CUSO by Regulators**

As indicated in our general comments, CUNA strongly opposes the provisions to increase the agency's authority to oversee CUSOs through direct reporting to NCUA and state regulators, and we urge the agency to remove them based on a lack of legal support for these revisions.

However, even though we must oppose NCUA's effort to increase its oversight of CUSOs because Congress did not provide such authority, CUNA does support enhanced transparency for credit unions, including more information from CUSOs to participating credit unions. This would include quarterly financial statements prepared under GAAP, an annual audit under GAAS, and that CUSOs should agree with their credit unions to provide necessary information in order for the credit union to perform proper due diligence as it relates to the CUSO. CUNA recognizes that for smaller CUSOs, such requirements would be a significant burden. While they should provide financial statements and any additional information a credit union may need for appropriate due diligence, they should not be required to use a CPA to prepare their reports.

One of the documents NCUA would require CUSOs to provide to the agency and state regulators as applicable is a list of the CUSO's customers. Credit unions have raised a number of concerns about this proposed requirement, including the possibility that such information could end up in the hands of a CUSO's competitors. NCUA has provided no justification for this requirement, and we do not see why the agency would need the list for safety and soundness reasons. If the agency determines that it will retain the provisions for additional oversight such as the reporting requirements, we urge this requirement be deleted.

### **Section 712.10, Exemption Authority for State Regulators**

If this rule goes forward, we do agree that state regulators should be able to seek an exemption from provisions of the rule. However, we question how meaningful the exemption will be if state regulators must agree to provide co-extensive authority to NCUA to have direct access to a CUSO's books and records at any time. We also think that federal credit unions that are well-managed and CUSOs associated with them should be able to seek waivers from the regulation.

### **Section 712.11, Subsidiary CUSOs**

The proposal would subject subsidiary CUSOs to all the requirements of the proposal. We do not believe NCUA has provided sufficient justification for this step and feel it is not warranted. In addition, as with the provisions regarding oversight of parent CUSOs, we also do not believe the agency has sufficiently explained its legal basis for exercising this authority. We urge the agency to drop these provisions.

## Conclusion

Credit unions, leagues, and CUNA are extremely concerned about this proposal, and we urge the agency not to proceed with the proposal as issued for comments. NCUA already has a number of options it can employ to ensure credit unions do not get into trouble by participating in a CUSO without having to adopt the CUSO oversight provisions in the proposal. Credit unions must already engage in reasonable due diligence regarding their CUSOs and examiners should check to make certain they do so and that they are receiving the information and accountability from their CUSOs that they need to make sure there are no material problems. Examiners should also be reviewing 5300 reports and other documents from the credit union regarding its involvement with its CUSO. Under the proposal, no undercapitalized federally insured credit unions would be able to make new investments in CUSOs without prior approval from their regional director. This is a very significant supervisory tool for NCUA that should allow the agency to address virtually all issues that would jeopardize the credit union or the NCUSIF. Also, we do not think NCUA has the legal authority to oversee CUSOs directly as it seeks to do under this proposal. Rather than adopt those provisions, we urge NCUA to work with credit unions to help ensure they are fulfilling due diligence requirements and work with examiners to ensure they are vigilant to any problems by using existing supervisory authority.

Thank you for your consideration of CUNA's concerns. We would welcome the opportunity to talk with agency officials about our comments. Please feel free to contact me at 202-508-6736 if you have questions or would like further information about our letter.

Sincerely,



Mary Mitchell Dunn

CUNA Senior Vice President and Deputy General Counsel