OHIO CREDIT
UNION LEAGUE

September 26, 2011

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

Re: Comments on Notice of Proposed Rulemaking (CUSO)
12 CFR Parts 712 and 741 RIN 3133-AD93

Dear Ms. Rupp:

The Ohio Credit Union League, the trade association for credit unions in Ohio, appreciates the opportunity to provide comments on the National Credit Union Administration (NCUA) Board's proposal to amend its Credit Union Service Organization (CUSO) regulation. The Ohio Credit Union League (OCUL) represents 384 credit unions – both federal- and state-chartered – and advocates on behalf them and their 2.7 million credit union members.

Overview

The NCUA Board has proposed amending 12 C.F.R. Part 712 to expand reporting requirements for Credit Union Service Organizations. The proposed rule would require that all CUSOs file financial reports directly with NCUA, and, if a federally-insured, state-chartered credit union (FISCU) has invested in or made loans to the CUSO, the appropriate state supervisory authority (SSA). Any CUSO subsidiary would also have to comply with the regulation as though it were a CUSO if the rule is finalized as proposed.

In addition, the proposed rule would require FISCUs to comply with certain requirements regarding CUSOs that federal credit unions (FCUs) must currently meet, such as requiring a CUSO to agree to follow NCUA rules on accounting and allow supervisory access to its books and records, and making FISCUs subject to NCUA's CUSO investment limitations for less than adequately capitalized credit unions.

The NCUA has determined that this proposal is necessary because of the lack of accurate and complete financial information about CUSOs and their potential impact on the National Credit Union Share Insurance Fund (NCUSIF), and its concern about undercapitalized credit unions investing in CUSOs.

General Comments

OCUL does not support this proposed regulation as it is currently drafted and respectfully requests and urges the NCUA to withdraw this proposal or, at the very least, rewrite and resubmit the proposal as redrafted for comment.

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In reviewing this proposed rule, OCUL has a number of concerns that include, but are not limited to, the following issues set forth below:

- CUSOs do not pose a systemic risk to the credit union system.
- NCUA lacks authority for a number of the provisions included in this proposal.
- NCUA continues to expand the requirements under which a credit union could risk losing NCUSIF coverage.
- NCUA has not taken into consideration potential conflicts with state laws.
- In general, the proposal is vague and overbroad in its scope and application.
- The proposed regulation is onerous and burdensome and NCUA should review and streamline its regulatory system to eliminate excessive and duplicative rules, rather than impose a greater regulatory burden on credit unions, CUSOs, and other organizations.
- NCUA continues to promulgate rules that are excessive and duplicative.

Credit Union Service Organizations do not pose a systemic risk to the credit union system.

CUSOs are an important aspect of the credit union system. By establishing and expanding CUSOs, credit unions are able to leverage their expertise to provide expanded services and innovative and emerging products to credit union members. CUSOs also provide an additional source of income for the participating credit unions, as well as risk management strategies for offering products and services in a safe and sound manner. Federally-insured credit unions are required to meet specific requirements to establish or join a CUSO, ensure compliance with approved CUSO products and services, and document a written legal opinion on whether "the CUSO is established in a manner that will limit potential exposure of the federally insured credit unions to no more than the loss of funds invested in, or lent to, the CUSO."

It is OCUL's belief that CUSOs as a whole do not pose a systemic risk to the credit union system or to the National Credit Union Share Insurance Fund (NCUSIF). It is OCUL's understanding that there are approximately 22 basis points of total industry assets invested in CUSOs and up to 2% of assets per individual credit union. This does not pose a high degree of systemic risk. The NCUA has provided no data or analysis regarding current policies that would justify a proposal of this nature.

OCUL does recognize that there are some issues facing CUSOs, but that is true of the credit union movement as a whole. If there are problems, it is OCUL's belief that NCUA has the tools and authority to address those issues. NCUA should not overreact and establish expansive and onerous regulatory constraints and overreaching corrective actions for all credit unions and CUSOs. Rather, NCUA should use the abundance of authority it already possesses to target corrective measures to specific and known instances of risk exposure.

NCUA lacks sufficient legal authority for a number of provisions included in this proposal.

OCUL is concerned about a number of provisions in the proposed rule pertaining to NCUA's authority to examine CUSOs, including the records of the CUSOs, their financial accounts, and their vendor list. In 1998, Congress provided NCUA regulatory authority over CUSOs, but only for the limited purposes of Y2K. Under the legislation, the Federal Credit Union Act was amended to permit NCUA to examine CUSOs. However, this provision in the Federal Credit Union Act contained a sunset provision that was not renewed by Congress and was allowed to expire. By not renewing this provision, it was a clear indication that it was not the intent of Congress to allow NCUA to have that authority in perpetuity. Further, it is well established that the authority of a governmental administrative agency to promulgate regulations must not be contrary to the statute itself.

The fact that Congress allowed the sunset provision of CUSO oversight to expire is an expressed indication that NCUA has no authority to adopt a regulation on this matter and does not have the authority to enforce it. Further, NCUA's reliance on Section 204, safety and soundness authority of the Federal Credit Union Act, and its reliance on other general safety and soundness authority rulemaking provisions as its legal support for reviewing the books and records of the CUSO is also not sufficient. Promulgation of a regulation under a general statue is not sufficient in that there is no authority in law to promulgate such a rule. Congress was specific in providing that authority to NCUA in 1998, and it was specific in allowing that provision to sunset. If NCUA wants to extend its oversight and regulatory authority to CUSOs, it must go to Congress and get legislation passed.

This proposal also raises another issue of concern – NCUA's perceived power to extend its regulatory authority in direct contradiction of its position regarding The Secure and Fair Enforcement for Mortgage Licensing Act (S.A.F.E. Act). NCUA has continued to state that it does not have regulatory authority over CUSOs (the latest example is not exempting CUSOs from the burdensome S.A.F.E. Act requirements) yet it wants CUSOs to submit information directly to NCUA. (See Letter to John Reed, Chairman, American Credit Union Mortgage Association attached as Exhibit A). As a result of this position, employees of mortgage CUSOs that qualify as mortgage loan originators (MLOs) must be licensed, in most instances by state and/or federal agencies and be regulated under the S.A.F.E. Act. It also requires that MLOs pass both a state and federal exam on this subject matter in order to be licensed, thereby increasing the regulatory burden on credit unions.

Therefore, for reasons cited above, OCUL must oppose adoption of this proposal in that NCUA lacks the authority to promulgate this proposed provision in the rule.

NCUA continues to expand the requirements and/or conditions under which a credit union could risk losing NCUSIF coverage.

OCUL is concerned that NCUA has chosen inject additional requirements and conditions for federally insured credit unions to continue in good standing with the NCUSIF and receive coverage for credit union members' accounts. Under this proposal, CUSOs would be required to provide financial statements and financial audits under GAAP or GAAS as a condition for all federally-insured credit unions lending to or investing in CUSOs. If the CUSO does not provide the respective information under GAAP or GAAS, the federally-insured credit unions would risk losing NCUSIF coverage. In addition, CUSO subsidiaries would also be subject to whether or not NCUSIF coverage would continue, or be terminated for the investing credit union.

OCUL does not support threatening federally-insured credit unions and subjecting them to termination of their NCUSIF coverage as an additional punishment if there is insufficient compliance with this proposed rule. It is OCUL's position that this action is not only punitive, but it could be invoked for even the most minor infraction. OCUL is also concerned that the use or tone of threatening a credit union with termination of NCUSIF insurance has become the norm and not the exception. Moreover, it is OCUL's belief that NCUA has sufficient authority to address many of these issues without invoking unrealistic and seriously overreaching measures.

NCUA has not taken into consideration potential conflicts with state laws.

In general, most CUSOs are organized and incorporated under state law. As such they are subject to state law and may very well fall under a myriad of state laws and regulations. For example, CUSOs may be subject to the respective state laws if the CUSO engages in insurance, securities, and mortgage brokerage activities. These activities may require the CUSO to be regulated and licensed by the respective state agency. CUSOs may also be regulated by federal agencies such as the Securities and Exchange Commission as well as others. NCUA fails to acknowledge the fact that CUSOs may already be covered by state oversight, thereby creating an increased and unnecessary regulatory burden on both the credit union and the CUSO.

Two examples of state oversight on CUSOs are those that are engaged in mortgage lending and insurance. CUSOs engaged in mortgage lending are required to be licensed by the Nationwide Mortgage Licensing System and Registry (NMLS) and file detailed quarterly financial statements, as well as required licensure under the State Mortgage Broker Act and the State Small Loan Act in Ohio. The second example involves CUSOS that engage in selling or marketing insurance products that are required to be licensed under state law and subject to filing requirements with the state insurance regulator.

In addition, NCUA has proposed expanded access to information from CUSOs. OCUL is concerned about the inadequate justification for how and why the information should be provided, and the unexplained regulatory purposes for which the information would be used. For example, NCUA would require that a list of CUSO customers must be provided to NCUA and the respective state regulator. This requirement is concerning in that it could put CUSOs at a distinct competitive disadvantage if other entities would have access to financial information, customer lists, and trade secrets, just to name a few. OCUL believes that information such as this would be difficult for the respective federal or state agencies to protect due to potential access of the information like the Freedom of Information Act or the respective state's Public Records Acts.

One provision by NCUA under this proposed rule would be to allow state regulators to seek exemptions from the provisions of the rule. OCUL questions 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. If this provision is included in the final rule, OCUL respectfully recommends that federal credit unions that are well-managed and CUSOs associated with them should be able to seek waivers and exemptions from the regulation.

In general, the proposal is vague and overbroad in its scope and application.

It is OCUL's position that the rule as proposed is vague and overly broad in its scope and application. NCUA has proposed amending 12 C.F.R. Part 712 to expand reporting requirements for CUSOs and would require any "CUSO subsidiary" to comply with this regulation as if it were a CUSO. It is OCUL's opinion that, in the aggregate, CUSOs do not pose a systemic risk to the credit union system, nor to the NCUSIF. First, NCUA has not provided any data or analysis regarding current issues or problems that would provide justification for the need for this proposal. Second, OCUL does recognize that there have been some issues with CUSOs that have encountered problems as a result of current economic conditions. However, it is OCUL's position that NCUA should address those CUSOs that have been identified as having real or potential risk management concerns, rather than promulgating a comprehensive regulation that is overly broad and all encompassing; a regulation that would not only place a huge regulatory burden on credit unions and CUSOs, but would restrict the CUSO charter in its ability to provide products and services to credit union members and others.

It is important to note that OCUL does not oppose reasonable supervision of the credit union system or NCUA's ability to address concerns in a fair and reasonable manner. We support common sense regulations. It is also important to note that the increased regulatory burdens placed on credit unions and the credit union system continues to affect a credit union's ability to provide affordable financial products and services to its members.

The CUSO rule as proposed presents more questions than answers and it OCUL's recommendation that many of them must be sufficiently clarified prior to moving forward. Below are several issues and questions that OCUL respectfully requests that NCUA take into consideration for clarification of the proposed rule:

- A definition of a CUSO subsidiary needs to be provided. Under state law, a subsidiary has a specific definition. Also, does a CUSO need to have a controlling interest in the subsidiary, or is any and every ownership position considered a subsidiary?
- NCUA suggests it will limit CUSO investments for credit unions with less than 6% capital. What steps will be taken if NCUA determines a CUSO is over invested? What steps will be required in order to obtain permission to make additional investments? What is the timeline for the approval process? How would NCUA accommodate the plainly evident reality that CUSO participation may be an essential element of a sound plan to build capital?
- What measurements or metrics will be used to determine the success of a CUSO? Some CUSOs purposely have minimal balance sheets and minimum capital to reduce the exposure of their owners. Other CUSOs attempt to operate at breakeven level in order to pass operational cost savings along to their owners. How will this be considered in the review?

Will the impact of the CUSO on the credit union owners' financial status be considered? Will NCUA shutter a CUSO without a sizeable balance sheet or income statement? Applying credit union performance standards to CUSOs makes little sense and is fundamentally impractible; is this NCUA's intent?

- If reporting requirements are created, what will be the frequency by which they are submitted? The proposal indicates "at least annually" but gives no guidance as to how that will be determined.
- If the audited financial statements are required, will NCUA establish a minimum threshold for the audit? For example, if the ownership stake is less than $50,000 in assets and annual revenue less than $40,000, the cost of the audit would be inordinate for an organization of this size.
- What training will NCUA examiners receive in order to adequately examine a CUSO? What expertise do NCUA examiners have now, or will they be able to reasonably develop, to assess a CUSO operation? What business experience is resident in NCUA's examination force to support NCUA's reach beyond credit unions into diverse and highly specialized CUSO operations?
- Will NCUA distinguish between credit unions with investments in CUSOs and credit unions that merely make loans to CUSOs in which they have no ownership interest?

It is OCUL's recommendation that these, as well as other issues, be clarified before proceeding with adoption of these proposed regulations. The proposal is onerous and burdensome and NCUA should review and streamline its regulatory system to eliminate excessive and duplicative rules rather than posing a greater regulatory burden on credit unions, and credit union organizations.

Excessive and Duplicative Rules

Finally, OCUL respectfully requests that the NCUA review its regulatory system to eliminate excessive and duplicative rules that increase costs and create confusion, increasing the regulatory burden on credit unions. Several states, including Ohio, have initiated a common sense approach for the stated purpose of "promoting and ensuring that regulations serve the public interest and contribute to economic development." NCUA should follow this course rather than promulgating rule after rule after rule seemingly dealing with every conceivable aspect of credit union operations.

A quick review of regulations proposed from 2008 to 2011 by federal agencies that have an actual or potential impact on credit unions shows that 160 proposed rules were issued by 27 federal agencies. The federal agencies proposing the highest number of regulations over this four-year period are NCUA (with 59) and the Federal Reserve Board (with 40). This includes 15 proposed regulations by NCUA and 11 proposed regulations by the Federal Reserve Board in 2011 alone. From 2008 through 2011, NCUA proposed a total of 21 regulations, of which 9 are based on the same subject matter.

It is OCUL's concern that the scope and volume of the now hyper-active rulemaking process continues to take a tremendous toll on both NCUA and credit unions. These CUSO regulation issues will have important budget implications for NCUA, in that significant and costly new staff resources will be necessary to provide examinations and regulatory oversight of CUSOs. Clearly, additional costs will be incurred by credit unions in supervisory fees. We expect this latest example of regulatory overreach (the proposed CUSO rule) to further exacerbate NCUA's recent struggles to bring discipline to its spending and budgeting practices.

Conclusion

OCUL is not in support of this proposal as set forth. OCUL respectfully requests the NCUA to withdraw the regulations as currently drafted and consider the comments provided by the credit union system. OCUL suggests that NCUA work with credit unions to ensure that they are following due diligence requirements and address any problems through the existing supervisory structure. OCUL also suggests that, based on the overall negative response to this proposal by the credit union system, NCUA should withdraw the rule as proposed, redirect its energies toward a program of regulatory relief, adopt a common sense approach to regulation, and target its supervision of credit unions based on existing and abundant authorities.

The Ohio Credit Union League appreciates the opportunity to provide comments on these proposed regulations and is available to provide additional information or any questions if so requested. Thank you again for your consideration. I can be of additional assistance, please do not hesitate to contact me at jkozlowski@ohiocul.org or (614) 923-9766.

Sincerely,

John F. Kozlowski

John F. Kozlowski
General Counsel

David J. Shoup
Director, Compliance & Information

cc: Mary Dunn, SVP and Deputy General Counsel, CUNA
Paul Mercer, President, Ohio Credit Union League
Tim Boellner, Chair, Ohio Credit Union League
Jennifer Ferguson, Chair, OCUL Government Affairs Committee

Exhibit A

October 3, 2008

John Reed, Chairman
American Credit Union Mortgage Association
P.O. Box 400955
Las Vegas, NV 89140

Re: Secure and Fair Enforcement for Mortgage Licensing Act of 2008.

Dear Mr. Reed:

You have asked several questions regarding the Secure and Fair Enforcement for Mortgage Licensing Act of 2008 (SAFE Licensing Act), which was enacted as Title V of Subdivision A of the Housing and Economic Recovery Act of 2008. Pub. L. No.110-289, 122 Stat. 2659 (July 30, 2008). Your questions and our responses are set out below.

The SAFE Licensing Act reflects congressional intent to encourage uniformity among the states in terms of licensing and regulation for the residential mortgage industry. Among other provisions, the law encourages the states, acting through the Conference of State Bank Supervisors and the American Association of Residential Mortgage Regulators, to establish a nationwide mortgage licensing system and registry. All loan originators would be licensed through or registered with the system. SAFE Licensing Act, §1502. If a state fails to adopt a law requiring mortgage loan originators to register with the nationwide system within a specified time, the law directs the Department of Housing and Urban Development to establish a parallel system to accomplish the same objectives. *Id.* at §1508. The law makes other provisions governing background checks, initial training for loan originators, and maintenance of a publicly-accessible database of employment and disciplinary history concerning loan originators. *Id.* at §§1505, 1512(d).

Your questions focus on the scope of the new law. First, you ask if the law extends to individuals who are engaged in the origination of second mortgages and home equity lines of credit. Yes, the law defines residential mortgage loan as "any" loan primarily for consumer or household purposes secured by a mortgage, deed of trust or similar instrument creating a security interest in a dwelling, as defined in the Truth in Lending Act, or real property on which a dwelling is intended to be constructed. *Id.* at §1503(8). The definition is not limited to first mortgages and includes second mortgages and home equity loans.

Second, you ask if the definition of a loan originator includes front line credit union staff, including call center employees. As you noted, the new law determines whether an individual meets the definition based on the individual's duties, not job title. The distinction is between an individual assisting a consumer in applying for a mortgage, for example, by discussing rates and terms, including different substantive options that might be available, or an individual engaged simply in completing administrative or clerical tasks necessary for the processing of the loan. If an individual has authority to negotiate terms, discuss and counsel about available options, and provide and explain legally required disclosures, the individual is fulfilling loan originator duties. *Id.* at §1503(3). If, on the other hand, an individual is merely receiving calls and referring the caller to a loan officer who will actually accept the application, or making calls to obtain information necessary for loan processing or underwriting, without engaging in a discussion of available rates or terms, the individual is not an originator. *Id.* at §1503(4).

Third, you ask if individuals who are employees of a state chartered credit union must obtain a license or if they need only register. As you noted, the law creates a distinction between employees of depository institutions and other individuals, but makes no distinction between state and federally chartered depository institutions. *Id.* at §§1503(2),(7),(11). The law directs the federal bank regulatory agencies (defined to include NCUA) to develop a system through which depository institution employees must register with the nationwide system and obtain a unique identifier. *Id.* at §1507. At present, no such system exists; however, in our view, individuals who are loan originators and employees of a state chartered credit union need not obtain a state license in order to engage in loan origination activities on behalf of their employer credit union. Instead, these individuals must only register with the nationwide system and obtain the unique identifier once the federal regulators develop the system for doing so.

We think the answer with respect to credit union service organizations (CUSOs) is different. The law treats employees of depository institution subsidiaries the same as employees of the depository institution, if the subsidiary is owned by the depository institution <u>and</u> regulated by a federal banking agency. *Id.* at §1503(7)(A)(ii). In the case of CUSOs, however, NCUA does not have direct regulatory oversight or enforcement authority. Instead, our regulation permits federal credit unions to invest in or lend only to CUSOs that conform to the limits specified in the CUSO rule. 12 C.F.R. Part 712. NCUA has not, historically, asserted that CUSOs or their employees are exempt from applicable state licensing regimes, and the SAFE Mortgage Licensing Act does not alter that approach. Nor does our rule have any applicability to CUSOs owned by state chartered credit unions.[1] Individuals employed by CUSOs that engage in loan origination activities, whether the CUSO is owned by a state or a federal credit union, would need to be licensed in accordance with applicable state requirements.

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[1] In April 2008, the NCUA Board issued a proposed rule that would extend some provisions of the CUSO rule to state chartered institutions. *See* 73 Fed.Reg. 23982 (May 1, 2008). The proposal has not yet been finalized.

You may address any questions concerning this matter to Staff Attorney Ross Kendall or me.

Sincerely,

/S/

Sheila A. Albin
Associate General Counsel

GC/RPK:bhs
08-0843