

**7535-01-U**

**NATIONAL CREDIT UNION ADMINISTRATION**

**12 CFR Parts 701 and 708b**

**RIN 3133-AE73**

**Bylaws; Voluntary Mergers of Federally Insured Credit Unions**

**AGENCY:** National Credit Union Administration (NCUA).

**ACTION:** Final Rule.

**SUMMARY:** The NCUA Board (Board) is revising the procedures a federally insured credit union (FICU) must follow to merge voluntarily with another FICU. The changes: (1) revise and clarify the contents and format of the member notice; (2) require merging credit unions to disclose certain merger-related financial arrangements for covered persons; (3) increase the minimum member notice period; and (4) provide a method for members and others to submit comments to the NCUA regarding the proposed merger. In addition, the NCUA has replaced its Merger Manual with revised model forms that

conform to the requirements of this rule. The Appendix to Part 708b now includes these forms.

**DATES:** This rule is effective October 1, 2018.

**FOR FURTHER INFORMATION CONTACT:** Elizabeth Wirick, Senior Staff Attorney, Office of General Counsel, 1775 Duke Street, Alexandria, VA 22314-3428 or telephone (703) 518-6540.

## **SUPPLEMENTARY INFORMATION**

### **I. Background**

In June 2017, the Board issued proposed revisions to the NCUA's voluntary merger rule.<sup>1</sup> The proposed rule was designed to address shortcomings in the current rule which did not always provide credit union members sufficient time to consider the merger or adequately communicate all information relevant to the merger decision.

The proposed revisions addressed the timing and contents of the notice provided to members of a merging federal credit union (FCU), provided FCU members with an opportunity to make their views known to the general membership, clarified the material that must be submitted to the NCUA for review, and revised definitions. In addition, the

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<sup>1</sup> 82 FR 26605 (June 8, 2017).

proposed rule reorganized the current rule to improve readability and clarity. These revisions were designed to ensure that a merging FCU's member-owners have more complete and accurate information regarding a proposed merger, including disclosure of financial arrangements that could create potential conflicts of interest. The proposal also sought comments on whether the final rule should apply to all merging FICUs rather than only to merging FCUs.

The Board is now finalizing the proposed rule, with some changes. The changes significantly narrow the definition of a "merger-related financial arrangement" that is subject to disclosure, adopt a less burdensome method for members to communicate their views on the merger, and apply the entire rule to all FICUs.

The Board received 84 comments on the proposed rule. Seventy of the commenters opposed the rule. Of the remaining 14 commenters, eight supported the proposed rule, four supported the proposed rule except for the member-to-member communication provision, one addressed only the question of whether the rule should apply to federally insured, state-chartered credit unions (FISCUs), and one requested an extension of the comment period.

In addition to the comments on the proposed rule, the Board has also been informed by a more thorough review of voluntary merger proposals since early 2017 (merger review). NCUA staff reviewed the member disclosure documents and ballot for every merger application submitted by an FCU, with an eye toward identifying ongoing

issues. The direction of the final rule reflects the experience and knowledge the NCUA has gained from the merger review process.

## **II. General Comments on Proposed Rule**

The section-by-section summary of the final rule, below, discusses comments on specific provisions of the rule. This section explains the Board's views on general comments relating to: (1) the nature of the NCUA's authority; (2) credit union membership; and (3) the state of the merger landscape for credit unions generally.

The NCUA's authority to regulate mergers: Several commenters questioned the NCUA's authority to regulate credit union mergers, or suggested that the NCUA's role is limited to safety and soundness concerns. These comments are inaccurate. The FCU Act explicitly requires the Board's "prior written approval" before a FICU merges with another FICU.<sup>2</sup> Moreover, as detailed in the preamble to the proposed rule, the FCU Act requires the Board to consider six factors in determining whether to approve FICU mergers and other types of transactions.<sup>3</sup> While several of the factors are safety and soundness-related, the factors also include "the convenience and needs of the members" and "whether the credit union is a cooperative association organized for the purpose of promoting thrift among its members and creating a source of credit for provident or productive purposes."<sup>4</sup> Clearly, the FCU Act expects the Board to consider the effect of

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<sup>2</sup> 12 U.S.C. 1785(b)(3).

<sup>3</sup> 82 FR 26605 (June 8, 2017) (citing 12 U.S.C. 1785(c)).

<sup>4</sup> 12 U.S.C. 1785(c).

the proposed merger on credit union members and gives the Board authority to deny mergers that do not, in its judgment, serve members well.

Need for a rule change: Many commenters considered the proposed rule unnecessary. Twenty-two commenters opined that the NCUA has sufficient authority to address any issues related to particular mergers under the current rule. Twenty-two commenters also asserted that evidence of a widespread problem with mergers was lacking. While the Board agrees that the FCU Act and current regulation provide it authority to impose requirements on specific merger transactions on a case-by-case basis,<sup>5</sup> it questions whether this is the best approach in the long term. Further, the merger review confirmed prior anecdotal reports that the current regulation and model forms do not encourage clear member disclosures in many situations, particularly in the area of insider benefits. The use of terminology that may not be clear to all credit union members, combined with the lack of instructions around how to disclose merger-related financial arrangements, often resulted in disclosures that obscured critical information. The Board has determined that adopting a uniform, explicit standard for disclosures, with updated regulatory language and a conforming sample form, is a more cost-effective and efficient use of agency resources than the case-by-case approach it utilized during the merger review.

Nature of Credit Union Membership: Several commenters stated that while shareholders of public companies can sell their shares of stock at any time, credit union

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<sup>5</sup> Id. 1785(b)(3); 12 CFR 708b.105(b).

members have no right to the net worth of a credit union except in liquidation. This assertion ignores the reality that hundreds of credit unions annually return excess net worth to members via bonus dividends or interest rebates. Further, the fact that ownership of a portion of a credit union's net worth is less negotiable than a share of stock in a public company is irrelevant at the time of a proposed merger transaction. A credit union in good condition has the option of voluntary liquidation instead of voluntary merger. In recommending a proposed merger transaction, the board of directors of a merging credit union has made the determination to transfer its net worth to the continuing credit union instead of voluntarily liquidating and disbursing the credit union's net worth to its members.

Factors contributing to mergers: A number of commenters offered thoughtful analyses about how conditions, in the credit union industry and at the NCUA, tend to favor mergers and disfavor a robust appraisal of whether the merger meets the convenience and needs of the credit union's members. Several commenters who supported the rule argued that mergers have become the NCUA's method to resolve issues such as CEO succession and worrisome financial trends. Also, two commenters opposed to the rule stated the NCUA should acknowledge that many mergers occur because the merging credit union has determined it cannot keep up with increasing and changing regulation. The Board agrees that mergers should not be the first resort when an otherwise healthy credit union faces succession issues or lack of growth. The changes implemented in the final rule, particularly to the member notice, will provide members the information they need to determine whether the merger meets their needs.

Role of Boards of Directors and the NCUA: Several commenters who supported the rule also asserted that the boards of directors of merging credit unions were failing to conduct sufficient due diligence and that the NCUA was not enforcing its rule on fiduciary duties for directors of FCUs. The merger review documented many instances where boards of merging credit unions discussed the possibility of a merger with multiple credit unions and approached the merger transaction with the best interests of their members as the highest priority. For example, one merging credit union wrote to nine different CUs, soliciting a merger partner, and conducted interviews with representatives of the credit unions that submitted the three best responses. The Board acknowledges, however, that not all boards of directors are as conscientious about fulfilling their fiduciary duties. The Board believes that this final rule, which will provide members with a more complete and understandable picture of the merger transaction, addresses these concerns. The revised member notice clearly communicates information about the merging credit union's net worth relative to the continuing credit union's net worth and whether insiders will be receiving significant payouts from that net worth. The revised member notice will also clearly convey how the proposed merger will affect access to locations and services. These changes give members greater ability to assess whether the proposed merger is in their best interests. The Board also confirms that, for merging FCUs, the NCUA's regional offices must ensure that boards and management have fulfilled their fiduciary duties under 12 C.F.R. § 701.4.

### **III. Comments on Specific Provisions of Proposed Rule and Summary of Final Rule**

#### *A. Applicability to FISCUs*

In the proposed rule, the Board noted that its concerns may not be limited to mergers where the merging credit union is an FCU. The plain language of section 205 of the FCU Act provides the NCUA with authority to approve mergers for all FICUs, not only FCUs.<sup>6</sup> Accordingly, the Board requested specific comments on whether it should use the authority in the FCU Act to also apply the rule to merging FISCUs.<sup>7</sup>

Thirty-one of the thirty-five commenters addressing this issue thought the voluntary merger rule should not apply to merging FISCUs. These commenters argued that extending the merger rule's applicability to FISCUs was unwarranted because merger procedures are already regulated under state law and issues related to voluntary mergers do not present a safety and soundness threat.

The Board disagrees with the majority of commenters. Instead, as expressed by a minority of commenters, the Board finds that merger transactions may present safety and soundness risks which endanger the continuing credit union regardless of whether the merging credit union is an FCU or a FISCU. For example, members of a merging credit union who discover, after the fact, that they were inadequately informed about the details of the merger may become disgruntled. The dissatisfied members could create bad publicity, creating a reputation risk for the continuing credit union. Unhappy members

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<sup>6</sup> 12 U.S.C. 1785(b)(3).

<sup>7</sup> 82 FR 26605, 26613 (June 8, 2017).



could also choose to stop doing business with the continuing credit union, affecting earnings projections. In contrast to commenters' assertions, the statutory factors the Board must consider in granting or withholding approval of a merger transaction include several factors related to safety and soundness, such as the financial condition of the credit union,<sup>8</sup> the adequacy of the credit union's reserves,<sup>9</sup> the economic advisability of the transaction,<sup>10</sup> and the general character and fitness of the credit union's management.<sup>11</sup>

Further, several commenters also affirmed the Board's observation in the preamble to the proposed rule that the same incentives for potential conflicts of interest exist in both FISCUs and FCUs. The amended disclosure requirements of the final rule address this potential by providing credit union members with information about how the merger transaction will affect their interests. The disclosures are in keeping with the statutory factors that require the Board to consider "the convenience and needs of the members to be served by the credit union"<sup>12</sup> as well as whether the credit union conforms to its purpose "of promoting thrift among its members and creating a source of credit for provident or productive purposes."<sup>13</sup> The Act does not limit these concerns to FCUs and FCU members.

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<sup>8</sup> 12 U.S.C. 1785(c)(1).

<sup>9</sup> *Id.* (c)(2).

<sup>10</sup> *Id.* (c)(3).

<sup>11</sup> *Id.* (c)(4).

<sup>12</sup> *Id.* (c)(5).

<sup>13</sup> *Id.* (c)(6).

Finally, the other regulations the Board has adopted under the authority of Section 205 apply to all FICUs rather than only FCUs. These regulations address:

FICU conversions to banks;<sup>14</sup>

FICU mergers with banks;<sup>15</sup> and

FICU mergers with credit unions not insured by the National Credit Union Share Insurance Fund (NCUSIF).<sup>16</sup>

Applying all portions of the merger rule to all FICUs conforms to the approach the Board has taken in these other regulations promulgated under the same authority in the FCU Act.

For the reasons above, the Board has determined to apply the final rule to all FICUs. To allow time for FISCUs to comply with the final rule, the Board has delayed the effective date until October 1, 2018. The final rule will apply only to new merger applications submitted after the rule's effective date.

#### *B. Section 708b.2 Definitions*

##### Covered Person

The proposed rule requires merging FCUs to disclose to members any “merger-related financial arrangement” provided to a “covered person.” As discussed in the

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<sup>15</sup> 12 CFR 708a, Subpart C.

<sup>16</sup> 12 CFR 708b, Subpart B.

preamble to the proposed rule,<sup>17</sup> the definition of “senior management official” in current § 708b.2 frequently resulted in FCU members having incomplete information about the benefits provided to FCU insiders as part of a merger transaction. The proposed rule amended § 708b.2 by removing the definition of “senior management official” and adding a definition for “covered person.” The term “covered person” means the credit union’s chief executive officer or manager; the four most highly compensated employees other than the chief executive officer or manager; and any member of the board of directors or supervisory committee.

Thirty-six commenters who addressed the definition of covered person opposed it, and suggested a variety of alternatives. Six commenters did not object to the definition, and one of these commenters suggested expanding it to include family members of covered persons. In addition, two commenters agreed the definition of “senior management official” in the current rule was under-inclusive without offering an explicit opinion about the proposed changes.

The most common objection, stated by twenty-six commenters, was that the proposed definition of “covered person” would encompass all employees at smaller credit unions, when many of these employees are not in a position to influence merger discussions. This is an inaccurate characterization of many small credit unions. In the course of the merger review, the NCUA observed that all of the employees in many smaller credit unions exercised leadership or management roles and were in a position to

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<sup>17</sup> 82 FR 26605, 26606 (June 8, 2017).

influence merger negotiations. For example, in one credit union, an employee with the title of “teller” was involved in locating a merger partner and negotiating the terms of her severance payment.

Many of the objections to the definition of “covered person” were related to concerns with the proposed rule’s expanded definition of “merger-related financial arrangement.” The final rule has a narrower definition of merger-related financial arrangement than the proposed rule or even the current rule, as detailed below. As a result, fewer covered persons will have arrangements that are subject to disclosure. Further, the merger review revealed very few instances where family members of covered persons received merger-related financial arrangements, so the Board does not see the need to expand the definition of covered person to include family members. Accordingly, the Board is adopting the definition of covered person as proposed.

#### Merger-Related Financial Arrangements

The NCUA’s merger rule has required merging credit unions to disclose “merger-related financial arrangements” to members since 2007. “Merger-related financial arrangements” include any increases in compensation or benefits that exceed the greater of 15% or \$10,000.<sup>18</sup> The proposed rule expanded the definition of “merger-related financial arrangement” to cover increases in compensation or benefits received by a covered person, of any amount. Compensation includes bonuses, early payout of

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<sup>18</sup> 12 CFR 708b.2.

retirement benefits, increased insurance benefits, and any other financial rewards or benefits. The proposed rule also considered any increases in the 24 months before ratification of the merger proposal, as well as any related increases occurring after the merger, as merger-related.

Thirty-seven commenters objected to the proposed expansion of the definition of merger-related financial arrangement. Twenty-three of these commenters thought that the NCUA should retain a threshold similar to or higher than that in the current rule. Fourteen commenters suggested that increases in compensation and benefits for staff transferring to continuing credit unions from merging credit unions are to be expected, because continuing credit unions are usually significantly larger than merging credit unions. A number of these commenters said disclosure should not be required in situations where an employee receives an increase as a result of transferring to the continuing credit union. Two commenters recommended disclosure of merger-related financial arrangements as an aggregate amount rather than broken out by individual recipient.

A smaller number of commenters either had no issues with the proposed definition of merger-related financial arrangement or wanted more detail in disclosures about merger-related financial arrangements. Two emphasized that all payments to management should be disclosed to members. One commenter suggested that the rule should provide for clawback of any merger-related financial arrangement not disclosed at the time of merger.

The final rule adopts a narrower definition of the term “merger-related financial arrangement” than proposed based on commenters’ suggestions as well as experience gained from the merger review. The final definition covers fewer types of compensation than the definition in the current rule. In particular, the final rule will not require employer-provided medical insurance, retirement, and other benefits offered on a non-discriminatory basis to all employees of the continuing credit union to be disclosed as merger-related financial arrangements. All of the seven commenters who responded to the Board’s question about whether such benefits should be subject to disclosure specifically requested that these types of benefits not be subject to disclosure.

The merger review provided further support for revising the definition of “merger-related financial arrangement.” The NCUA experienced significant difficulties in obtaining sufficient information about benefits at the continuing and merging credit unions because, in most cases, staff for the merging credit union were genuinely uninformed about the relevant details of their benefits plans at the merging and continuing credit unions. It thus seems unlikely that benefits offered to all employees of the continuing credit union would be a source of potential conflicts of interest. The merger review also confirmed the difficulties in quantifying and explaining these benefits in the member notice. Even after obtaining information on plan costs and benefits, it was often difficult to determine whether, for example, a particular health insurance plan at a continuing credit union was superior to that at a merging credit union. Potential benefits from new retirement plans are too far removed in time to accurately project what

benefits, if any, might result. The Board agrees with commenters that benefits offered on a non-discriminatory basis to all employees of the continuing credit union need not be disclosed as merger-related financial arrangements for employees of the merging credit union. The definition of merger-related financial arrangement in the final rule thus excludes employer-provided medical insurance, retirement, and other benefits offered on a non-discriminatory basis to all employees of the continuing credit union.

The final rule also retains the current threshold for the value of merger-related financial arrangements in the current rule. This means that only merger-related increases that exceed the greater of \$10,000 or 15% of compensation must be disclosed. As discussed in the preamble to the proposed rule, the Board believed eliminating the threshold would offer regulatory relief and promote clarity. In light of the number of comments requesting a de minimis threshold such as this, the Board has determined to retain the current rule's requirement that only increases that exceed the greater of \$10,000 or 15% are subject to disclosure. Increases below this threshold are less likely to incentivize staff of merging credit unions to promote a merger that is not in members' best interests.

The proposed rule also includes any increases received in the 24 months before the merger, as well as related increases paid after the merger, in the definition of "merger-related financial arrangement." Commenters objected to not having a date certain after a merger when compensation increases will not be deemed merger-related. Several commenters also stated that the NCUA should retain its "but for" test when considering

whether an increase is merger-related and only require disclosure for increases that would not have occurred but for the merger. The Board has determined that the definition of “merger-related financial arrangement” in the final rule will include only increases that occurred because of, or in anticipation of, a merger (i.e., the “but for” test).

Merging credit unions should, however, be aware that any increases occurring in the 24 months before the merger may be deemed merger-related after review of board minutes, examination reports, and other relevant information. Similarly, continuing credit unions should be on notice that compensation provided only to staff transferred from the merging credit union is likely also merger-related and should be disclosed in the member notice if it is above the threshold amounts. If the NCUA discovers that a member notice was misleading or inaccurate about the amount of merger-related financial arrangements, it may take appropriate enforcement action.

While benefits that are available to all employees of a continuing credit union are not merger-related financial arrangements under the final rule, the Board emphasizes that any benefits that apply only to certain employees must be disclosed as merger-related financial arrangements if they meet the threshold in the rule. Some examples of these types of benefits include supplemental retirement plans for high-ranking employees, additional life insurance for certain employees, and additional paid leave time. Also, the following arrangements, identified during the merger review, provide other examples of the types of benefits that must be disclosed if they exceed the threshold amount.



Life insurance and annuities: One merging credit union had reduced the value of an executive's life insurance policy when the original premiums failed to yield the desired amount. Because the value of the policy was reduced, the executive became 100% vested in the policy several years earlier than scheduled. This reduction occurred several years before the merger. Shortly before the merger, and at the request of the continuing credit union, the merging credit union made another payment to restore the life insurance policy to the original amount, but without reverting to the original vesting schedule. This is a merger-related financial arrangement because, but for the merger, the executive's life insurance would have had a lower value.

Payment for accrued leave: In many mergers, executives or staff receive payment for accrued leave. The Board recognizes that many merging credit unions permit employees to cash out accrued leave under certain circumstances. Some credit union policies give employees the option to receive payment for accrued leave at specified times like year-end, some allow payouts when employees leave the credit union, and some policies allow both types of payments. Credit unions and their employees who have such policies often take the view that any payments for accrued leave should not be deemed merger-related financial arrangements. This is an overly narrow approach. Regardless of whether a merging credit union's policies give employees the right to cash out leave, the test is whether the payment for leave occurs earlier in time or in a greater amount because of the merger.

Bonuses: The Board is aware that the boards of directors of many merging credit unions want to recognize employees for their service to the credit union and do this by authorizing some type of payment to employees during the merger process. Some commenters and merging credit unions have argued that such payments in recognition of past service should not be deemed merger-related. In determining whether such payments must be disclosed, the NCUA will, as discussed above, apply the “but for” test and only require disclosure of payments that would not have occurred but for the merger.

Severance payment agreements: In several mergers, continuing credit unions executed employment agreements with employees of the merging credit union that constituted merger-related financial arrangements. Some contracts guaranteed employment for a number of months or years, with the proviso that if the employee was terminated for any reason other than for cause, the continuing credit union would pay the employee compensation for the remainder of the period. Other contracts were even more generous and promised to pay the employee compensation for the agreed-upon period even if the employee quit. Employment contracts that guarantee payment of compensation for a set period are merger-related financial arrangements if they result from the merger and meet the threshold in the definition.

The above examples are not an exhaustive list. The general rule is that any benefit that an employee from a merging credit union will receive at the continuing credit union that is greater than the threshold amount must be disclosed as a merger-related financial arrangement unless an identical benefit is offered to all employees of the continuing

credit union. Also, any benefit under an existing arrangement that is triggered by a change in control provision is, by definition, a merger-related financial arrangement if it is greater than the threshold amount.

While the Board agrees with many commenters on various aspects of the subject of merger-related financial arrangements, a number of commenters made flatly erroneous comments on this topic. These include comments that: (1) discounted the nature of member ownership and the obligations a credit union has to its member-owners; (2) made incorrect statements about disclosure requirements applicable to other entities; and (3) ignored the potential for conflicts of interest due to increases in compensation. For example, five commenters suggested that the NCUA's review of merger-related compensation alone would suffice and disclosure to members was unnecessary. Another suggested that members have no role in considering merger-related payments to employees. These comments are legally inaccurate and philosophically off-base. The net worth of a credit union belongs to its members. Payments to insiders, especially in the context of a voluntary merger where a credit union could choose to liquidate and distribute its net worth among its members, are distributions of the credit union's net worth. Accordingly, members should be informed when a significant payout occurs.

Another objection the NCUA heard frequently during the merger review was that requiring such disclosures would cause merger votes to fail. The merger review demonstrates these fears have no basis in reality. During the merger review, despite

heightened scrutiny and disclosures of merger-related financial arrangements, no mergers failed for this reason.<sup>19</sup>

Similarly, some commenters opined that the proposed rule would subject the compensation of employees of merging credit unions to a higher level of scrutiny than employees of any other type of industry. Contrary to these assertions, even if the proposal's requirement to disclose increases in compensation related to the merger had been adopted as proposed, employees of merging credit unions are subject to far fewer disclosures about their compensation than employees of other industries. The existing rule and proposed rule only require disclosure of the amount of increases above the threshold amount. In contrast, many employees and executives in other industries are subject to disclosure of the entire amount of their compensation. Salary information for the CEO, CFO and the three other most highly compensated employees of publically-traded companies is available in filings with the Securities and Exchange Commission. Salary information for CEOs of non-profit organizations, including state-chartered credit unions, is available on Form 990 filed with the Internal Revenue Service.

Other commenters seemed unaware of the potential for conflicts of interest associated with merger-related financial arrangements. Several stated that higher salaries at the continuing credit union do not present a conflict of interest necessitating disclosure, or that such increases should only be subject to disclosure if the total amount of an employee's salary would be above what is customary for similar positions at the continuing credit union. The Board disagrees. The prospect of a significantly higher

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<sup>19</sup> Of the 139 mergers reviewed as of May 7, 2018, NCUA is aware of only two that were not approved by members and those mergers had no merger-related financial arrangements.

salary at the continuing credit union could be a motivating factor in an individual's choice to advocate for a merger, both internally within the credit union leadership and with members. Credit union management may well have considerable influence with members, who may look to management for trusted opinions and advice about whether the proposed merger is in the best interests of the credit union and its members. It is not unimaginable that the prospect of a significantly higher compensation package could affect an individual manager's thinking about the desirability of the merger.

The Board does not object to the fact that employees of merging credit unions may be seeking or receiving higher remuneration through a merger. The Board agrees that in many cases, employees of merging credit unions are receiving below-market pay, and some of these credit unions do not have the ability to appropriately compensate their deserving employees. During the merger review, the vast majority of mergers that included compensation increases had increases that were below the threshold amount for merger-related financial arrangements in the current and final rule. Thus, the continuing credit union was able to adjust compensation to market rates without triggering a disclosure requirement. The final rule simply requires that members be informed of significant increases, so that they understand all of the factors potentially contributing to the merger.

One commenter requested the disclosure requirement only apply to the amount of the increase, not entire compensation. The Board reiterates that, as stated in the rule text and

discussed in the preamble to the proposal, and as under the current rule, only the amounts of the increases are subject to disclosure.

The merger review identified many instances where a merging credit union had not disclosed all merger-related financial arrangements in their member notices. In some of these cases, credit union representatives asserted that the payment should not be deemed merger-related if the merging credit union had the ability to make this payment. The determinative factor is not whether the merging credit union could have chosen to make this payment had it remained a separate credit union. If that were the standard, many payments by a merging credit union would fall outside the definition. Rather, the relevant question is, “Would this payment have occurred if the credit union were not merging?” If the answer is no, then the payment is merger-related and the merging credit union must disclose it on the member notice if it exceeds the threshold amount.

Finally, during the merger review, staff identified a number of instances where merging credit unions with significant levels of merger-related financial arrangements made the required disclosures, but surrounded the disclosure of the amounts with voluminous text. Some draft disclosures, particularly those prepared by outside attorneys, seemed designed to obscure or bury the fact of the payments in the name of providing “context” about the need for the payments. Again, nothing in the FCU Act or the final rule prohibits payments, in any amount, to insiders of a merging credit union. The Board neither encourages nor discourages such payments, as this determination rests with the boards of the merging and continuing credit unions and the members of the

merging credit union. The Board, however, is requiring that disclosures to members of the merging credit union be clear and understandable, as provided in the revised model member notice.

#### Record Date

The proposed rule also adds a definition of “record date” to clarify which FCU members are eligible to vote on a proposed merger. The NCUA received only two comments on this provision, both of which supported adding this definition. Accordingly, the definition of “record date” in section 708b.2 is unchanged from the proposed rule.

#### *C. Section 708b.105 Submission of Merger Proposal to the NCUA*

The proposed rule required the merging and the continuing credit unions to submit their respective board minutes to the NCUA that reference the merger during the 24 months before the boards of directors of the credit unions approved the merger plan. Twelve commenters thought this time period was excessive and suggested a shorter period, while one commenter observed that merger-related discussions might have begun earlier than two years before the merger. The merger review documented many merger-related discussions that occurred before the six-or twelve-month lookback some commenters favored. Also, while examiners review board minutes during exams, these are not, as

some commenters claimed, available for the Regional Office to download when a merger package is submitted. Accordingly, the final rule adopts this requirement as proposed.

The proposed rule also added a requirement that the merging and continuing credit unions certify that there are no other merger-related financial arrangements other than those disclosed in the notice to the members of the merging credit union. The final rule adopts this requirement as proposed, with one addition. As suggested by one commenter, the final rule adds the requirement that the CEOs of both credit unions also sign the certification.

*D. Section 708b.106 Approval of the Merger Proposal by Members*

Timing Requirements for Member Notice

The proposed rule increased the length of the minimum notice period preceding the meeting to discuss and vote on the merger proposal. Under the current rule, a merger meeting and vote could occur as few as seven days after the merging FCU mails notice of the meeting to its members. The proposal required a merging FCU to mail notice of the meeting and vote at least 45, but no more than 90, days before the meeting. Twenty-three commenters expressed an opinion about the notice period. Sixteen of the commenters suggested a shorter notice period, although several of these commenters also agreed the current seven-day minimum was too short. Six commenters supported the proposal's



timeframe or requested a longer notice period. One commenter agreed the current seven-day notice period was insufficient but did not suggest an alternative.

The Board is adopting the timing requirements for the member notice as proposed, except for FICUs seeking to terminate NCUSIF coverage. The Board agrees with commenters who noted that the process of relinquishing the charter of a functioning credit union, and determining the disposition of the merging credit union's net worth, merits allowing members sufficient time to consider the merger proposal. The value of a credit union charter is considerable even without considering the net worth of the merging credit union. Obtaining a new credit union charter is time-consuming and requires organizers to raise capital. Moreover, usually most or all of the merging credit union's net worth transfers to the continuing credit union. For these reasons, an expanded notice period is appropriate.

The Board does not agree with some commenters' concerns that the 45-day minimum notice period will create problems when a quick merger is necessary. The Board reminds these commenters that the merger rule already permits the NCUA to waive the member vote if it finds that a merging credit union is in danger of insolvency and that a merger would avoid a loss to the NCUSIF.<sup>20</sup> If a merging credit union's situation is severe enough to warrant a waiver of the member vote, obviously the 45-day notice requirement would not apply. For other merging credit unions, the addition of a reasonable number of days to the process will not affect the merger. OGC's merger review did not identify any

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<sup>20</sup> 12 CFR 708b.105(b).

mergers where changing the required notice period would have caused the merger proposal to fail. Further, once credit unions build in the increased notice period into their estimates of the timeframe required to merge, the effect on merger transactions should be minimal.

The Board is not lengthening the notice period for mergers where a FICU is proposing to terminate NCUSIF coverage by merging with a non-federally insured credit union. For terminations of NCUSIF coverage, the FCU Act specifies a notice period of at least seven days, but no more than 30 days.<sup>21</sup> The Board cannot adopt a regulation that would conflict with the statute and so is retaining the requirement in the current rule for a notice period of seven to 30 days for mergers that result in termination of NCUSIF coverage.

Ideally, the Board would prefer to impose requirements for providing member notice in mergers that involve termination of federal share insurance that are the same as requirements for member notices in mergers that do not include federal share insurance termination. The required statutory notice period for federal share insurance termination,<sup>22</sup> however, makes this impossible. Accordingly, the final rule retains the existing requirement that FICUs proposing to merge into a non-federally insured credit union must send their members notice at least 7 but not more than 30 days before the member vote.

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<sup>21</sup> 12 U.S.C. 1786(d)(2).

<sup>22</sup> Id.

In practice, however, many members of FICUs seeking to terminate NCUSIF coverage already receive a notice period that is closer to the notice period the final regulation imposes for other types of mergers. The FCU Act requires that at least 20% of members participate in the vote to terminate federal share insurance coverage.<sup>23</sup> Because of this participation requirement, some credit unions seeking to terminate NCUSIF coverage provide an additional, pre-notice communication to increase the likelihood of achieving the required member participation. The 7- to 30-day notice period in the FCU Act applies only once a credit union's board approves a proposal to terminate insurance coverage.<sup>24</sup> As the FCU Act is silent about notices before the credit union board approves an NCUSIF termination proposal, the NCUA has permitted credit unions seeking to terminate NCUSIF coverage to send an additional notice in advance of the credit union board's approval to advise members that the credit union's board will be considering the matter.<sup>25</sup>

#### Contents of Member Notice

The proposed rule also included changes to the contents of the notice members of merging credit unions receive. These changes were designed to improve the quality and readability of the information provided in the member notice. Relatively few commenters made specific observations about these provisions, and the comments were mixed. Three commenters, who were otherwise opposed to the rule, affirmatively noted

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<sup>23</sup> Id.

<sup>24</sup> Id.

<sup>25</sup> 70 FR 3279, 3285 (Jan. 24, 2005).

they had no objections to these changes or that they improved clarity. Two commenters deemed the goal of having a short, understandable notice unrealistic. One commenter said that merging credit unions should determine what information is most relevant to their members. Several commenters worried that lengthy disclosures would make members less likely to read them.

Several commenters thought the member disclosure documents should contain more information. One requested the notice include more information about the factors the credit union's board considered in determining to merge and in selecting a merger partner. Five suggested the disclosures should include additional information about the disposition of the merging credit union's net worth. These suggestions included: (1) requiring the merging credit union to disclose the ratio of member benefits to the merging credit union's net worth compared to the ratio of merger-related financial arrangements to the merging credit union's net worth; (2) requiring the notice to discuss the possibility of a merger dividend to members; and (3) requiring the notice to state the dollar amount of the merging credit union's net worth. Another commenter requested specific disclosures when an acquiring credit union books "negative good will" due to the merger, including the merging credit union's estimated book value and market value presented in terms of dollars per member. Other commenters requested that instead of requiring information about life savings and loan protection insurance, which are infrequently offered, the notice should require specific information about more common products and services.

The Board is adopting the amended disclosures mostly as proposed. The only change in the final rule is the addition of information in the member notice about the effect of the merger on ATM access. In the proposal, the Board inquired whether the required disclosures in the notice should be expanded to include items such as ATM access or fee comparisons.<sup>26</sup> Several commenters requested the member notice include information about any ATM access changes, as well as other suggestions. The Board believes that the amended disclosures adequately convey to members the most relevant information – how the merger will affect locations and services and how or if there will be a distribution of the merging credit union’s net worth. In addition, as discussed below, the NCUA has added to the Appendix to Part 708b revised sample member notice and ballot forms that conform to these requirements.

The Board also clarifies that the member notice and ballot should not be combined with other types of notices. For example, one draft member notice submitted during the merger review attempted to combine the merger notice with the Supervisory Committee audit.<sup>27</sup> The merger notice included a statement at the very end that the member should check their account balances as listed on an enclosed sheet, and unless they returned another document disputing the balance, the credit union’s records were presumed correct. Although this procedure is the most common way credit unions conduct Supervisory Committee audits and is not problematic on its own, in this case, members who failed to read to the end of the member notice would not have realized they also

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<sup>26</sup> 82 FR 26605, 26610 (June 8, 2017).

<sup>27</sup> The Act requires an FCU’s Supervisory Committee to verify member account balances at least once every two years. 12 U.S.C. 1761d.

needed to verify their account balances. The Board understands the appeal of consolidating information into fewer mailings, but this convenience for the credit union is outweighed by the danger that members will miss information about the proposed merger, the other issue, or both.

### Member Comments on the Proposed Merger Transaction

The proposed rule included provisions to facilitate member discussions about the merger transaction. These provisions, modelled on a similar requirement in the NCUA's rule governing credit union to bank conversions, would establish procedures to allow for member-to-member (MTM) communication in advance of a member vote. The MTM communication provision was the least popular part of the proposed rule, with 45 commenters opposing it. The most common objection was that the MTM communication process would delay the merger process, make mergers more complicated and costly, or discourage them entirely. Another frequently expressed fear was that disgruntled members, employees or competitors would use the MTM communication to convey misleading or inaccurate information. Other commenters opined that the MTM would expose the merging and continuing credit unions to reputation or litigation risk, raise the costs of mergers, and that members prefer alternate methods of receiving communications from other members. Finally, a few commenters objected to the NCUA's role in overseeing the MTM communication process and disagreed with the NCUA's observation that the proportion of votes in favor of merger is lower for ballots

cast in person than for ballots cast by mail and, therefore, justifies the need for additional MTM communication.

Commenters suggested a variety of alternatives to the MTM provisions of the proposed rule. Two commenters suggested the merging credit union aggregate all member comments and either distribute one communication, or share the aggregated comments at or before the special meeting. Three commenters suggested holding an extra member meeting either during the voting period or before the voting period where members can obtain information on and discuss the merger, with a summary of the meeting posted online. Two commenters suggested that the NCUA create an online posting for each merger that allows members to submit comments. Further, one commenter requested public notice at the time a merger application is filed with the NCUA.

The Board believes many of the commenters' fears about the MTM communication provision are unlikely to materialize. The MTM communication provisions were modelled after those in the NCUA's Part 708a regulation on credit union conversions to banks. Since the MTM communication provisions of Part 708a took effect in early 2007, there have been eleven bank conversion attempts. An MTM communication occurred in fewer than half of these attempts. As most proposed bank conversions, which have a greater effect on member rights than a merger with another credit union, do not have an MTM communication, the Board finds it unlikely that many credit union merger proposals would evoke MTM communications.

In terms of the potential for abuse, the Board reminds commenters that the proposed rule provided for the NCUA to review MTM communications that merging credit unions find inaccurate or misleading. While this process would require time and effort on the NCUA's part, the Board expects this commitment would not be major because only a small proportion of credit union mergers would involve MTM communications.

In summary, the Board believes many of the commenters' fears about the effects of the MTM communication provisions are exaggerated. Nevertheless, the Board agrees that there may be an alternative way to accomplish the Board's goal of permitting members to dialogue about the proposed merger transaction while avoiding the features that made the MTM communication objectionable to commenters. The Board requested comments about all aspects of the proposed rule, which includes the MTM communication provision. The Board is now adopting the suggestions of two commenters who requested that the NCUA provide publicly accessible information about proposed merger transactions on the NCUA's website, with a section for member comments. The final rule requires the member notice to include information about the NCUA website where merger information and member comments are posted, as well as the email and physical addresses where members may submit their comments for posting.

Other regulators regularly provide similar information on their websites about pending transactions of regulated institutions. The Office of the Comptroller of the



Currency (OCC), for example, posts a weekly listing of all applications it has received and actions it has taken.<sup>28</sup> The actual applications for transactions such as mergers, are also posted on the OCC's website, along with a section for posting public comments.<sup>29</sup>

The Board intends to establish a page on the NCUA's website similar to the OCC's, allowing credit union members and the public to view non-confidential portions of merger applications. The member notice will include a link to the website where the merger application and comments will be available, as well as information about how to submit a comment. Because the purpose of the website is to encourage dialogue between credit union members, the NCUA will post comments only from credit union members, as well as any responses from credit union management. Members must include their name and their city and state of residence, at a minimum, or their comment will not be posted. The NCUA will review comments before posting to ensure that the comments are appropriate and limited to the topic of the proposed merger.

For the reasons above, the merger applications website replaces the MTM communication provisions of the proposed rule. The NCUA is in the process of developing the website, and it will be operational by the effective date of this rule.

#### Electronic Notification and Voting

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<sup>28</sup> <https://www.occ.gov/topics/licensing/corporate-activities-weekly-bulletin/index-weekly-bulletin.html>;

<sup>29</sup> <https://www.occ.gov/topics/licensing/public-comment/index-public-comments.html>.

As part of the merger review, a credit union inquired if it could supply the member notice, and conduct the member vote, electronically. The Board does not object to providing member notices and other documents electronically to members who have previously agreed to electronic notification. Nor does the Board object to providing the option to vote electronically. Credit unions using electronic means, however, must also allow members to vote by paper ballot in person or by mail and should ensure that their bylaws allow for voting by electronic means.

#### Return of Net Worth to Members

Several times during the merger review, credit unions inquired about the permissible methods of calculating how to return some net worth to members. In particular, some credit unions wanted to base the calculation on loan balances as well as, or in addition to, the traditional methodology of using share account balances to calculate a merger dividend. The FCU Act does not specify a particular methodology for returning net worth to members of a merging credit union. Also, the Act has general authority for loan-related rebates; credit union boards may “authorize interest refunds to members of record at the close of business on the last day of any dividend period from income earned and received in proportion to the interest paid by them during that dividend period.”<sup>30</sup> The merger regulation is also not specific, simply requiring that a merging credit union must provide an explanation of “any provisions for reserves, undivided earnings or

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<sup>30</sup> 12 U.S.C. 1761b(9).

dividends.”<sup>31</sup> Borrowers, as well as savers, contribute to building a credit union’s net worth. Accordingly, the Board clarifies that the regulation does not prohibit returning a portion of net worth to members based on loan balances. The Board cautions that merging credit unions that are returning a portion of net worth based on loan balances must describe the payment accurately. Payments based on loan balances should use a term such as “interest rebate,” as dividends only apply to share accounts. Also, the NCUA will review benefits provided to covered persons and will require disclosure if a return of net worth occurs in an amount that exceeds the threshold for merger-related financial arrangements.

*E. Forms*

In the proposed rule, the NCUA committed to issue revised forms and revisions to its Merger Manual in conjunction with any final rulemaking.<sup>32</sup> In light of the fact that Subpart C of Part 708b already contains many merger-related forms, the Board has determined to eliminate a separate merger manual and incorporate all relevant forms into the rule. Having all merger-related information in the same location will ease compliance for credit unions. It will also prevent the Merger Manual and forms from falling out of conformance over time due to regulatory changes.

The final regulation now includes a new § 708b.304 that includes all of the merger-related forms for a FICU merging into another FICU. Most of the forms are

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<sup>31</sup> 12 CFR 708b.104(a)(6).

<sup>32</sup> Id.

substantially identical to existing forms in the merger manual. The Member Notice, however, has been significantly revised. The revisions incorporate all of the requirements of the final rule. The NCUA, is not, however, making this format mandatory and will consider other notices that provide the same level and type of information to members. Merging credit unions should be aware, however, that NCUA approval of alternate forms of member notices will require extra time, as Regional Offices will likely need to consult with the Office of General Counsel about the modified language.

### **III. Conforming and Clarifying Amendments to Other NCUA Regulations**

#### *Appendix A to Part 701, Federal Credit Union Bylaws*

As discussed above, the Board is requiring merging credit unions to mail member notices at least 45 days, but no more than 90 days, before the meeting to vote on a proposed merger. Accordingly, the Board is proposing to amend Article IV of the FCU Bylaws to be consistent with the proposed amendments to part 708b.

### **IV. Regulatory Procedures**

#### *A. Regulatory Flexibility Act*

The Regulatory Flexibility Act requires the NCUA to prepare an analysis of any significant economic impact a regulation may have on a substantial number of small entities (primarily those under \$100 million in assets).<sup>33</sup> This rule will affect relatively few small credit unions. Accordingly, the NCUA certifies that this regulation will not have a significant economic impact on a substantial number of small entities.<sup>34</sup>

*B. Paperwork Reduction Act*

The Paperwork Reduction Act of 1995 (PRA) (44 U.S.C. 3501 *et seq.*) requires that the Office of Management and Budget (OMB) approve all collections of information by a Federal agency from the public before they can be implemented. Respondents are not required to respond to any collection of information unless it displays a current, valid OMB control number.

The proposed increase in burden under 708b.106 associated with member-to-member communications has been eliminated. NCUA will offer a website where members can post comments on proposed mergers.

NCUA believes that the certification requirement under 708b.104 does not warrant an increase to the 5 hours already allotted a respondent to submit the merger proposal to NCUA. Similarly, the requirement to supply two years of board meeting minutes will also not add to the burden since FICUs must maintain these minutes and

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<sup>33</sup> 5 U.S.C. 603(a).

<sup>34</sup> *Id.* 605(a).

make them available for examiners. This also applies to 708b.106(b) where the final rule specifies the contents of a member notice. This notice is to include the addition of the website where members can share comments and a targeted listing of branch locations of merging credit unions. This will not increase the 7 hours currently approved for a respondent to provide this notice.

In accordance with the PRA, the information collection requirements included in this final rule have been submitted to OMB for approval under control number 3133-0024. The proposed rule made revisions to the information collection requirements under OMB control number 3133-0182; but with the removal of the member-to-member communications, there is no change to the burden.

*Estimated number of respondents: 214 FICU.*

*Estimated total annual burden hours: 7,490.*

#### *C. Executive Order 13132*

Executive Order 13132 encourages independent regulatory agencies to consider the impact of their actions on state and local interests. The NCUA, an independent regulatory agency as defined in 44 U.S.C. § 3502(5), voluntarily complies with the executive order to adhere to fundamental federalism principles. The final rule does not

have substantial direct effects on the states, on the relationship between the national government and the states, or on the distribution of power and responsibilities among the various levels of government. Nothing in the rule precludes states from adopting more rigorous requirements. Further, the requirements for FISCUs are the same as for FCUs, and are designed to provide disclosure to members, that are similar to, or less burdensome than the requirements imposed by the SEC on state-chartered publicly-traded companies, or by the IRS on state-chartered non-profits (including many FISCUs). The NCUA has therefore determined that this final rule does not constitute a policy that has federalism implications for purposes of the executive order.

*D. Assessment of Federal Regulations and Policies on Families*

The NCUA has determined that this rule will not affect family well-being within the meaning of § 654 of the Treasury and General Government Appropriations Act, 1999, Pub. L. 105-277, 112 Stat. 2681 (1998).

*E. Small Business Regulatory Enforcement Fairness Act*

The Small Business Regulatory Enforcement Fairness Act of 1996 (SBREFA) provides generally for congressional review of agency rules. A reporting requirement is triggered in instances where NCUA issues a final rule as defined by Section 551 of the Administrative Procedure Act. NCUA does not believe this final rule is a “major rule”

within the meaning of the relevant sections of SBREFA. NCUA has submitted the rule to the OMB for its determination in that regard.

**List of Subjects in**

**12 CFR Part 701**

Advertising, Credit, Credit unions, Fair housing, Insurance, Reporting and recordkeeping requirements.

**12 CFR Part 708b**

Credit unions, Mergers of credit unions

By the National Credit Union Administration Board, on \_\_\_\_\_, 2018.

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Gerard Poliquin  
Secretary of the Board



For the reasons discussed above, the National Credit Union Administration amends 12 CFR parts 701 and 708b as follows:

**PART 701--ORGANIZATION AND OPERATIONS OF FEDERAL CREDIT UNIONS**

1. The authority citation for part 701 continues to read as follows:

**Authority:** 12 U.S.C. 1752(5), 1755, 1756, 1757, 1758, 1759, 1761a, 1761b, 1766, 1767, 1782, 1784, 1786, 1787, 1789. Section 701.6 is also authorized by 15 U.S.C. 3717. Section 701.31 is also authorized by 15 U.S.C. 1601 et seq.; 42 U.S.C. 1981 and 3601-3610. Section 701.35 is also authorized by 42 U.S.C. 4311-4312.

2. Revise the first sentence of Section 2 of Article IV of appendix A to part 701 to read as follows:

**Appendix A to Part 701 – Federal Credit Union Bylaws**

**Article IV. Meetings of Members**

\* \* \* \* \*

Section 2. **Notice of meetings required.** The secretary must give written notice to each member: at least 30 but no more than 75 days before the date of the annual meeting; at least 7 days before the date of any special meeting; and at least 45 but no more than 90 days before the date of any meeting to vote on a merger with another credit union.

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**PART 708b -- MERGERS OF FEDERALLY-INSURED CREDIT UNIONS;  
VOLUNTARY TERMINATION OR CONVERSION OF INSURED STATUS**

3. The authority citation for part 708b continues to read as follows:

**Authority:** 12 U.S.C. 1752(7), 1766, 1785, 1786, and 1789.

4. Amend § 708b.2 as follows:

a. Add a definition in alphabetical order for “covered person”.

b. Revise the definition of “merger-related financial arrangement”.

c. Add a definition in alphabetical order for “record date”.

d. Remove the definition for “senior management official”.

**§ 708b.2 Definitions.**

\* \* \* \* \*

*Covered person* means the chief executive officer or manager (or a person acting in a similar capacity); each of the four most highly compensated employees other than the chief executive officer or manager; and any member of the board of directors or the supervisory committee.

\* \* \* \* \*

*Merger-related financial arrangement* means a material increase in compensation or benefits because of, or in anticipation of, a merger that any covered person of a merging credit union has received during the 24 months before the date the boards of directors of both credit unions approve the merger plan. It also means a material increase in compensation or benefits that any covered person of a merging credit union will receive in the future because of the merger. This includes the sum of all increases in direct and indirect compensation, such as salary, bonuses, leave, deferred compensation, early payout of retirement benefits, or any other financial rewards, other than benefits available to all employees of the continuing credit union on identical terms and conditions. A

material increase is an increase in value that exceeds the greater of 15 percent of existing compensation or benefits or \$10,000.

\* \* \* \* \*

*Record date* means a date announced by the board of directors of a merging credit union as the date by which a person must have been a member of the merging credit union to be eligible to vote on a proposed merger.

\* \* \* \* \*

8. Amend § 708b.104 by revising paragraphs (a)(5) and (8) and adding paragraphs (a)(10) and (11) to read as follows.

**§ 708b.104 Submission of merger proposal to the NCUA.**

(a) \* \* \*

(5) Copy of the form of Ballot to be sent to the members;

\* \* \*

(8) If the merging credit union's assets on its latest call report are equal to or greater than the threshold amount established and published in the Federal Register annually by the Federal Trade Commission under 15 U.S.C. § 18a(a)(2)(B)(i), a statement about whether the two credit unions intend to make a Hart-Scott-Rodino Act premerger notification filing with the Federal Trade Commission and, if not, an explanation why not;

\* \* \* \* \*

(10) Board minutes for the merging and continuing credit union that reference the merger for the 24 months before the date the boards of directors of both credit unions approve the merger plan; and

(11) A certification signed by the CEOs and Chairmen of the merging credit union and the continuing credit union, using the form in §708b.304(c) of this section, that there are no merger-related financial arrangements to covered persons other than those disclosed in the notice required by paragraph (a)(4) of this section.

9. Revise § 708b.106 to read as follows:

**§ 708b.106 Approval of the merger proposal by members.**

(a) *Advance notice of member vote.* Members of the merging credit union must receive written notice at least 45 calendar days, but no more than 90 calendar days, before any member meeting called to vote on the merger proposal.

(b) *Contents of member notice.* While the merging credit union may refer members to attachments for additional information or explanation, the notice provided to members pursuant to paragraph (a) of this section must be in the form set forth in Subpart C of this part and contain the following information:

(1) A statement of the purpose of the meeting and the time and place;

(2) A statement that members may vote on the merger proposal in person or by mail ballot (or electronically, if the credit union's Bylaws so permit) received by the merging credit union no later than the date and time announced for the member meeting called to vote on the merger proposal;

(3) A statement about the availability of a website where members of the merging credit union can share comments and questions about the merger pursuant to paragraph (d) of this section;

(4) A summary of the merger plan, including but not necessarily limited to:

(i) A statement that the merging credit union does or does not have a higher net worth percentage than the continuing credit union;

(ii) A statement as to whether the members of the merging credit union will receive a share adjustment or other distribution of reserves or undivided earnings, including a summary of reasons for the decision and, at the merging credit union's discretion, a short explanation about the capital level;

(iii) An explanation of any changes to ATM access or to services such as life savings protection insurance or loan protection insurance;

(iv) If the continuing credit union is not federally insured, an explanation of any changes related to federal share insurance; and

(v) A detailed description of all merger-related financial arrangements.

This description must include the recipient's name and title as well as, at a minimum, the amount or value of the merger-related financial arrangement expressed, where possible, as a dollar figure.

(5) A statement of the reasons for the proposed merger; and

(6) A statement identifying the physical locations of the merging credit union by street address, stating whether each location is to be closed or retained, and a list of branches of the continuing credit union by street address that are located in reasonable proximity to the merging credit union's locations.

(c) *Additional documents.* The notice provided to members pursuant to paragraph (a) of this section shall be accompanied by the following separate documents:

(1) The current financial statements for each credit union and a consolidated financial statement for the continuing credit union;

(2) Any additional information or explanatory material that the merging credit union wishes to provide that does not detract from the required disclosures and gives further detail to members regarding information disclosed pursuant to paragraph (b) of this section; and

(3) A Ballot for Merger Proposal.

(d) *Member information.* Within 30 calendar days of receiving the notice provided to members pursuant to paragraph (a) of this section, members may jointly or individually submit a comment about the merger to the NCUA. The NCUA will post these comments on a website accessible to credit union members.



(e) *Posting member comments.* The NCUA reserves the right to not post comments that it reasonably believes:

(i) Are false or misleading with respect to any material fact;

(ii) Omit a material fact necessary to make the statement in the material not false or misleading;

(iii) Relate to a personal claim or personal grievance, or solicit personal gain or business advantage by or on behalf of any party;

(iv) Address any matter, including a general economic, political, racial, religious, social, or similar cause that is not related to the proposed merger;

(v) Directly or indirectly and without expressed factual foundation impugn a person's character, integrity, or reputation;

(vi) Directly or indirectly and without expressed factual foundation make charges concerning improper, illegal, or immoral conduct; or

(vii) Directly or indirectly and without expressed factual foundation make statements impugning the safety and soundness of the credit union.

(f) *Clear and conspicuous disclosures required.* Any information required by paragraph (b) of this section to be disclosed on the notice provided to members pursuant to paragraph (a) of this section must be legible, written in plain language, and reasonably understandable by ordinary consumers.

(g) *Approval of a proposal to merge.* Approval of a proposal to merge a federally-insured credit union into a federally-insured credit union requires the affirmative vote of a majority of the members of the merging credit union who vote on the proposal. Members must be members as of the record date to vote. If the continuing credit union is not federally insured, the requirements of subpart B also apply, and the merging credit union must use the appropriate form ballot and notice in subpart C of this part unless the regional director approves the use of different forms. If the continuing credit union is federally insured, use of the sample form notice, ballot, and certification of vote forms in subpart C of this part will satisfy the requirements of this subpart A.

10. Add §708b.304 to read as follows:

**708b.304 Merger of a federally-insured credit union into another federally-insured credit union.**

(a) Merger resolution for continuing credit union, NCUA 6302. The continuing credit union's board of directors must complete this form after it votes to merge with the

merging credit union. The merger package required by Section 708b.104 of this part must include merger resolutions from both the merging and continuing credit unions.

## **Merger Resolution (Continuing Credit Union)**

### **Resolution**

The Board of Directors believes our credit union should merge with [name of merging credit union] (merging credit union). Our credit union will assume the merging credit union's shares and liabilities. The merging credit union will transfer to our credit union all of its assets, rights, and property. All members of the merging credit union will receive shares in our credit union, which will stay in business under its present charter.

### **Certification**

We, the Board Presiding Officer and Secretary of this credit union, are authorized to:

- Seek National Credit Union Administration Regional Director approval of the merger.
- Execute and deliver the merger agreement on the effective date of the merger.
- Execute all agreements and other papers required to complete the merger.

We certify to the National Credit Union Administration that the foregoing is a full, true, and correct copy of a resolution adopted by the Board of Directors of our credit union at a meeting held under our bylaws on [month and date], 20 . A quorum was present and voted. The resolution is duly recorded in the minutes of the meeting and is still in full force and effect.

\_\_\_\_\_  
Board Presiding Officer

\_\_\_\_\_  
Date

\_\_\_\_\_  
Secretary

\_\_\_\_\_  
Date

(b) Merger resolution for merging credit union, NCUA 6303. The merging credit union's board of directors must complete this form after it votes to merge with the continuing credit union. The merger package required by Section 708b.104 of this part must include merger resolutions from both the merging and continuing credit unions.

# Merger Resolution (Merging Credit Union)

## Resolution

The Board of Directors believes our credit union should merge with [name of continuing credit union] (continuing credit union). The continuing credit union will assume the shares and liabilities of our credit union. Our credit union will transfer to the continuing credit union all of our assets, rights, and property. All members of our credit union will receive shares in the continuing credit union, which will stay in business under its present charter.

## Certification

We, the Board Presiding Officer and Secretary of this credit union, are authorized to:

- Seek National Credit Union Administration Regional Director approval of the merger.
- Execute and deliver the merger agreement on the effective date of the merger.
- Execute all agreements and other papers required to complete the merger.

We certify to the National Credit Union Administration that the foregoing is a full, true, and correct copy of a resolution adopted by the Board of Directors of our credit union at a meeting held under our bylaws on [month and day], 20 . A quorum was present and voted. The resolution is duly recorded in the minutes of the meeting and is still in full force and effect.

\_\_\_\_\_  
Board Presiding Officer

\_\_\_\_\_  
Date

\_\_\_\_\_  
Secretary

\_\_\_\_\_  
Date

(c) Merger agreement, Form 6304. Submit a proposed merger agreement to the NCUA with the initial merger package required by Section 708b.104. Do not sign, date, or notarize the proposed agreement. At the completion of the merger, officials of the merging and continuing credit unions must sign this agreement and have it notarized. The continuing credit union should retain the original document. Send one copy of the executed form to the NCUA Regional Director (see Form NCUA 6309 in section (g) of this section). The date you execute this document is the effective date of the merger.

# Merger Agreement

This agreement is made and entered into on [month and day], 20 , by and between [name of continuing credit union] (continuing credit union) and [name of merging credit union] (merging credit union). The continuing credit union and the merging credit union agree to the following terms:

1. The merging credit union will transfer to the continuing credit union all of its assets, rights, and property.
2. The continuing credit union will assume and pay all liabilities of the merging credit union. In addition, the continuing credit union will issue all members of the merging credit union the same amount of shares they currently own in the merging credit union, subject to the following share adjustments (if any):

[Name of continuing credit union] by:

\_\_\_\_\_  
Board Presiding Officer

\_\_\_\_\_  
Treasurer

[Name of merging credit union] by:

\_\_\_\_\_  
Board Presiding Officer

\_\_\_\_\_  
Treasurer

Before me a Notary Public (or other authorized officer) appeared the above named [name of Board presiding officer] and [name of Treasurer], Board Presiding Officer and Treasurer of [name of continuing credit union], who being personally known to me as (or proved by the oath of credible witnesses to be) the persons who executed the annexed instrument acknowledged the same to be their free act and deed and in their respective capacities the free act and deed of said credit union.

(SEAL)

Notary Public

My commission expires \_\_\_\_\_, 20\_\_.

State of \_\_\_\_\_

County of \_\_\_\_\_

Before me a Notary Public (or other authorized officer) appeared the above named [name of Board Presiding Officer] and [name of Treasurer], Board Presiding Officer and Treasurer of [name of merging credit union], who being personally known to me as (or proved by the oath of credible witnesses to be) the persons who executed the annexed instrument acknowledged the same to be their free act and deed and in their respective capacities the free act and deed of said credit union.

(SEAL)

Notary Public  
My commission expires \_\_\_\_\_, 20\_\_.

State of \_\_\_\_\_

County of \_\_\_\_\_

(d) Sample form notice to members, NCUA 6305A. If a federally insured credit union is merging into another federally insured credit union, use of this form will meet the requirements of § 708b.106 of this part. Brackets provide instructions or indicate that the merging credit union should fill in the appropriate information, or select the appropriate option to conform the notice to the circumstances of the merger.

## **Notice of Meeting of the Members of**

### **[Name] Credit Union**

The Board of Directors of [name of merging credit union] have called a [special] meeting of the members of this credit union at [location, address], on [month, day, year] at [time]. The purpose of this meeting is:

1. To consider and act upon a plan and proposal for merging [name of merging credit union] with and into [name of continuing credit union] (hereinafter referred to as the “Continuing Credit Union”), whereby all assets and liabilities of the [name of merging credit union] will be merged with and into the Continuing Credit Union. All members of [name of merging credit union] will become members of the Continuing Credit Union and will be entitled to and will receive shares in the Continuing Credit Union for the shares they own in [name of merging credit union] on the effective date of the merger.
2. To ratify, confirm and approve the action of the Board of Directors in authorizing the officers of [name of merging credit union], subject to the approval of members, to do all things and to execute all agreements, documents, and other papers necessary to carry out the proposed merger.

The Board of Directors of [name of merging credit union] encourages you to attend the meeting and vote on the proposed merger. Whether or not you expect to attend the meeting, we urge you to sign, date and promptly return the enclosed ballot to vote on the proposed merger.

If you wish to submit comments about the merger to share with other members, you may submit them to the National Credit Union Administration (NCUA) at [insert email address] or [insert physical address]. The NCUA will post comments received from members on its website, along with the member’s name, subject to the limitations and requirements of its regulations.

**Other Information Related to the Proposed Merger:**

The Board of Directors has carefully evaluated and analyzed the assets and liabilities of the credit unions and the value of shares in both credit unions. The financial statements of both credit unions, as well as the projected combined financial statement of the continuing credit union, follow as separate documents. In addition, the following information applies to the proposed merger.

*Reasons for merger:* The Board of Directors has concluded that the proposed merger is desirable and in the best interests of members because [insert reasons].

*Net worth:* The net worth of a merging credit union at the time of a merger transfers to the continuing credit union. [Name of merging credit union] [has or does not have] a higher net worth ratio than [name of continuing credit union].

Share adjustment or distribution: [Choose option A or B and delete the other.]

A: [Name of merging credit union] will not distribute a portion of its net worth to its members in the merger. The board of directors has determined a share adjustment, or other distribution of [name of merging credit union]'s net worth is unnecessary because [insert reasons].

B: [Name of merging credit union] will distribute a portion of its net worth to its members in the merger. The board of directors has determined to distribute a portion of [name of merging credit union]'s net worth as [describe method of calculating share adjustment or other provisions for reserves, undivided earnings or dividends.]

Locations of merging and continuing credit union: [Name of merging credit union]'s main office at [street address, city] will [close/remain open/remain open for \_\_\_\_]. [If the merging credit union has branches, insert the same statement about the branch locations]. [Name of continuing credit union] has the following locations that are near [name of merging credit union]. [List address and type of location – i.e. main office, full-service branch for each non-ATM location of the continuing credit union in reasonable proximity to the locations of the merging credit unions.]

Changes to services and member benefits: [If applicable, explain any loss of services, such as increases in fees or loss of ATM access, as well as any changes to benefits such as life savings protection insurance or loan protection insurance. If inapplicable, delete entire section.]

Merger-related financial arrangements: [ ]

[If inapplicable, delete entire section.] NCUA Regulations require merging credit unions to disclose certain increases in compensation that any of the merging credit union's officials or the five most highly compensated employees have received or will receive in connection with the merger. The following individuals have received or will receive such compensation:

Name	Title	Description of increase	Amount

Please note that the proposed merger must have the approval of the majority of members who vote.

Enclosed with this Notice of Special Meeting is a Ballot for Merger Proposal. If you cannot attend the meeting, please complete the Ballot and return it to [mailing



address]. To be counted, your Ballot must be received by [month, day, year] at [time of special meeting].

BY THE ORDER OF THE BOARD OF DIRECTORS:

\_\_\_\_\_

President

\_\_\_\_\_

Date

(e) Form ballot, NCUA 6306A.

## Ballot for Merger Proposal

Name of Member:

Account Number:

Your credit union must receive this ballot by [insert date of meeting]. Please mail or bring it to:

[insert credit union address]

I have read the Notice of Special Meeting for the members of Credit Union. The meeting will be held on the above date to consider and act upon the merger proposal described in the notice. I vote on the proposal as follows (check one box):

**Approve** the proposed merger and authorize the Board of Directors to take all necessary action to accomplish the merger.

**Do not approve** the proposed merger.

Signed: \_\_\_\_\_

Member's Name

Date: \_\_\_\_\_

(f) Form certification of vote, NCUA 6308A. Within ten calendar days after the membership vote, the merging credit union must complete this form and mail it to the NCUA Regional Director.

## **Certification of Vote on Merger Proposal of the Credit Union**

[Merging]

We, the undersigned officers of the [name of merging credit union], certify the completion of the following actions:

1. At a meeting on [month and day], 20 , the Board of Directors adopted a resolution approving the merger of our credit union with [name of continuing credit union] (continuing credit union).
2. Not more than 90 days or less than 45 days before the date of the vote, our members received copies of the notice of meeting and the ballot, as approved by the National Credit Union Administration.
3. The credit union arranged for a meeting of our credit union members at the time and place announced in the notice to consider and act upon the proposed merger.
4. At the meeting, the members present received an explanation of the merger proposal and any changes in products, services and locations.
5. The members of our credit union voted on of the merger as follows:

\_\_\_\_\_ Number of members present at the meeting

\_\_\_\_\_ Number of members present who voted in favor of the merger

\_\_\_\_\_ Number of members present who voted against the merger

\_\_\_\_\_ Number of additional written ballots in favor of the merger

\_\_\_\_\_ Number of additional written ballots opposed to the merger

6. The action of the members at the meeting was recorded in the minutes.

This certification signed [month and day], 20\_\_\_\_.

\_\_\_\_\_  
Board Presiding Officer

\_\_\_\_\_  
Secretary

(g) Form certification of completion of merger, NCUA 6309: Within 30 calendar days after the effective date of the merger, the continuing credit union must complete this form and mail it to the NCUA Regional Director with the documents listed on the form.

## **Certification of Completion of Merger**

We, the undersigned officers of the above-named credit union, certify to the National Credit Union Administration as follows:

1. The merger of our credit union with [name of merging credit union] was completed as of [month day and year of the executed merger agreement], according to the terms and plan approved by this Board of Directors by a resolution adopted at the meeting held on [month day and year of board of directors meeting]. We previously provided a certified copy of the resolution to the National Credit Union Administration.
2. We completed all required steps for the merger and transferred the merging credit union's assets.

Attached to this certification are the following documents:

1. Financial reports for each credit union immediately before the completion of the merger.
2. A consolidated financial report for the continuing credit union immediately after the completion of the merger.

3. The charter of the merging federal credit union [if available].
4. The insurance certificate for the merging federally insured credit union [if available].
5. A copy of the executed merger agreement, Form NCUA 6304.

This certification signed [month and day], 20 .

\_\_\_\_\_  
Board Presiding Officer

\_\_\_\_\_  
Treasurer

(h) Form calculation of PAS ratio, NCUA 6311. The merger package required by Section 708b.104 of this part must include PAS calculations for both the merging and continuing credit unions. The Probable Asset/Share Ratio (PAS) reflects the relative worth of \$1 of shares in a credit union, assuming it will be an on-going concern. The ratio is computed by dividing the net value of assets by the credit union's total shares.

ADDITIONS: Cash is valued at book less any known potential losses. Loans are valued at book net of probable estimated loan losses (ALLL). Investments are valued at book value less any known losses. However, if a long-term investment is likely to be liquidated prior to maturity, it is valued at current market value. Fixed Assets are valued at book, except when major fixed assets are not in use or are in the process of being sold. In these instances, the asset is valued at its probable market value. Other Assets are valued at the most realistic value to the credit union, usually not to exceed book value.

DEDUCTIONS: Notes Payable are valued at book. Accounts Payable are valued at book. Other Liabilities are valued at book. Contingent and/or Unrecorded Liabilities are valued at the most realistic known value. This item should include any unrecorded dividends not accrued for the accounting period. Subsidiary Ledger Differences are deducted if the credit union is likely to suffer a loss due to the problem. Other Losses include any other known losses. Do not include deficits in undivided earnings or net losses because they have already reduced assets if properly recorded.

**PROBABLE ASSET/SHARE RATIO - CONTINUING CREDIT UNION**

	Book Value	Market Value
<b><u>ADDITIONS:</u></b>		
Cash		
Loans		
Investments		
Fixed Assets		
Other Assets		
Total (A)		
<b><u>DEDUCTIONS:</u></b>		
Notes Payable		
Accounts Payable		
Other Recorded Liabilities		
Contingent and/or Unrecorded Liabilities		
Subsidiary Ledger Differences (Losses)		
Other Losses		
Total (B)		
Net Value of Assets (A – B)		
Total Shares		
Probable Asset/Share Ratio		

**PROBABLE ASSET/SHARE RATIO - MERGING CREDIT UNION**

	Book Value	Market Value
<b><u>ADDITIONS:</u></b>		
Cash		
Loans		
Investments		
Fixed Assets		
Other Assets		
<b>Total (A)</b>		
<b><u>DEDUCTIONS:</u></b>		
Notes Payable		
Accounts Payable		
Other Recorded Liabilities		
Contingent and/or Unrecorded Liabilities		
Subsidiary Ledger Differences (Losses)		
Other Losses		
<b>Total (B)</b>		
<b>Net Value of Assets (A – B)</b>		
<b>Total Shares</b>		
<b>Probable Asset/Share Ratio</b>		

(i) Certification of no non-disclosed merger-related financial arrangements. The merger package required by Section 708b.104 of this part must include the following certification.

**Certification of No Non-Disclosed Merger-Related  
Financial Arrangements**

We, the undersigned officials of [name of merging credit union] and [name of continuing credit union], certify to the National Credit Union Administration

(NCUA) as follows:

1. The information provided to the NCUA in the merger application, and the proposed disclosure to the members of [name of merging credit union] includes a complete, true and accurate statement about all merger-related financial arrangements, if any, provided to covered persons, as those terms are defined in Part 708b of the NCUA's regulations.
2. We understand that we have an affirmative duty to revise our merger application and the notice to the members of [name of merging credit union] if merger-related financial arrangements are added or increased after our application is submitted.

This certification signed [month and day], 20 .

[name of continuing credit union]

\_\_\_\_\_  
Board Presiding Officer

\_\_\_\_\_  
CEO

[name of merging credit union]

\_\_\_\_\_  
Board Presiding Officer

\_\_\_\_\_  
CEO