From: Bailey, Tamra on behalf of Keeney, E. Andrew
To: _Regulatory Comments
Subject: E. Andrew Keeney Comments on Voluntary Mergers of Federally Insured Credit Unions
Date: Monday, August 07, 2017 3:07:33 PM

Thank you for the opportunity to comment on a Proposed Rulemaking as it pertains to Bylaws; Bank Conversions and Mergers; Voluntary Mergers of Federally Insured Credit Unions. I offer the below comments, neither on behalf of my firm nor on behalf of my clients. I offer my comments from a personal standpoint and as one who has represented credit unions from a legal standpoint for nearly 40 years. I have served as the in-house legal counsel to the State Department Federal Credit Union and the general counsel to Pentagon Federal Credit Union. On one special assignment I was requested to represent NCUA. I have a reputation of being a straight-shooter and have worked with NCUA for years. I have represented hundreds of credit unions. To gain more insight into the challenges of mergers, I filed a *Freedom of Information Act* request and obtained the listing of mergers that have been approved by NCUA during the past several years. I have participated to one extent or another in a surprising number of those mergers. Rather than a Proposed Rulemaking and Request for Comments, I would have preferred for NCUA to issue a Notice of Advance of Proposed Rulemaking and determine as to whether or not the industry, credit unions, and members feel that revised regulations are needed. This is the approach that the CFPB has begun to undertake and it seems to be, at least from their standpoint, of benefit.

I sought to determine which mergers that had been approved by NCUA had not been approved by the merging credit union's membership. This information was not readily accessible under the *Freedom of Information Act* because it was maintained and continues to be maintained separately and independently by each region. This does not support your "transparency" focus. As an aside, now that you have decided to eliminate Regions 1 and 3, I question what will happen with those records and how they will be accessible to the public. I do know for a fact that I have never worked on a merger that was not approved by the membership and although there may be dissenting members, there always seems to be at least two-thirds voting in favor and often a much higher percentage.

I believe the focus and attention on special meetings of members is misdirected. For example, this year I served as a Parliamentarian for several credit unions. One credit union had their annual meeting accompanied by a cocktail hour and heavy hors d'oeuvres. There were tremendous prizes and giveaways. There were great speakers. The credit union wanted to celebrate a very successful year. Out of a membership of approximately 20,000 there were less than 100 people who attended the event. The same can be said for the credit union that provided a full dinner at their annual meeting. They had a color guard, scholarship award winners, recognition from the community, and with a membership of over 30,000, their attendance was approximately 200.

The same can be said for those credit unions that consistently have contested board elections. I know of one credit union that has never had more than 5% of their ballots returned. Your attention on special meetings with a 45-day advance notice is misdirected.

Statistically, there are approximately 300 mergers per year, yet in the Notice of Proposed Rulemaking, you said there would be no impact on small credit unions since there were

only approximately 130 or 140 credit unions impacted. The definition of small credit union seems to be evolving by NCUA. I truly believe that some of the proposed changes and the analysis is incorrect. The process and the rulemaking should be slowed, continued, and evaluated. As I read the proposed rulemaking, there is no exception for emergency mergers or expedited mergers. The timeframe that is being proposed by NCUA is extremely burdensome and may slow down emergency mergers, expedited mergers, or the mergers that need to be undertaken for the benefit of the safety and soundness of the Insurance Fund.

In addition, there is a constant narrative concerning "approval by NCUA." Is the approval of a charter request to be approved by the NCUA Board? No. Is the approval to be made by the Office of Examinations and Insurance or ONES? It is unclear. Is the approval to be made by the Office of General Counsel? Again, the answer is unclear. Presently merger applications are submitted to Office of Examinations and Supervision. They have no accountability, no timetable, and credit unions must wait and wait and wait, often to the detriment of the membership. I believe the proposed rulemaking should be clarified so that the approval and action by NCUA must be undertaken by the Regional Director of the merging credit union and that action must be included within 30-days after the submission of the merger application. Once the approval by the Regional Director is received, the process will continue with the request for mailings and a ballot, the vote of the membership, and a determination as to what the future of the merging credit union as well as the acquiring credit union will be.

There seems to be a concern throughout the commentary or an implied view throughout the proposed rulemaking that "there is a bad apple or two in the bushel." If this is the case, why do all credit unions need to be impacted? Why is there not attention given to the bad apple? For example, here is a note that "recent merger trends in the credit union industry, however, suggest that some prospective merger partners may be seeking to influence the merging credit union by offering financial incentives to management and certain highly compensated employees to support the merger that the Board believes should be disclosed to members." Full disclosure is certainly encouraged and recommended. Transparency should be required. It is the timing of NCUA's actions and the timing of the member's actions that need to be streamlined.

There are specific comments with respect to "covered person" and note that covered person will now include the CEO or manager, the foremost highly employees other than the CEO or manager; and any members of the Board of Directors or Supervisory Committee. If this implies that there could be actual compensation or compensation in-kind being offered to a member of the Board of Directors or the Supervisory Committee, there needs to be some very strict rules and interpretations as to what compensation, if any, can be offered to a Board member or Supervisory Committee member. I think that this implication that they may receive something on the side is misdirected. There certainly needs to be further reaffirmation in the regulation that neither a Board member nor a Supervisory Committee member is to be compensated.

There is also the failure to acknowledge privacy rights of certain individuals that may now fall under the definition of covered person. For example, if a discrimination complaint that was settled and resolved made an individual one of the high four for the past two years, that confidential settlement or at least the salary or compensation relating to the settlement

is now being required to be disclosed to the entire membership. That is an unconscionable approach and the broad disclosure of compensation to covered individuals may violate individual rights. It seems to me that the entire proposal is focused on information to the membership and the rights of individuals who just happen to be working in a management position at a credit union could be trampled.

The Board seeks comments on whether the number of covered persons should be expanded to include additional employments with management responsibilities or those who are in a position of influence. This is a trap. How do we define additional employees with management responsibilities or who are in a position of influence? I am currently working on a potential merger where one of the employees may be viewed as a covered employee who is in the middle of divorce proceedings and does not want salary and benefits information widely publicized. However, your definition of a material increase being an increase which exceeds 15% of the management official's current compensation or $10,000, whichever is greater, seems to be fair and reasonable. Why not just keep the proposal narrow with that definition? Why not provide exceptions to the rule which could be documented in the application to NCUA so that if there are unique and special reasons why a particular name or compensation should not be disclosed and made public, it can be explained in a confidential manner to NCUA. Remember that there is no privity of contract by and between the Board member or Supervisory Committee member or management member and the credit union. In most cases they are at will employees. From time to time, the President/CEO or manager will have an employment contract, but most employment contracts deal with employee benefits and rules and responsibilities. There could be a breach of this contract if certain information is disclosed to NCUA. For example, I know of a sexual harassment claim that was settled and resolved. The employee continues to work at the credit union. It may fall within the definition being considered by NCUA. The settlement and confidential arrangement would now need to be made public. This would violate and shock the consciences of all. Exceptions need to be granted and authorized. It is noted that "the definition is broad in scope applying to any increase in compensation or benefits that NCUA determines would not be provided but for the merger regardless of whether that increase is made before or after the completion of the merger." If that is the standard, that would seem to be acceptable. But if it is based on compensation for the past 24 or 48-months, the above arguments and positions regarding breach of privacy need to be addressed. Especially when there is a requirement for a lookback of 24-months. Please remember that under the current NCUA guidelines there is a survival right and privileges for the members of the acquired credit union. If it is determined that there is an improper disclosure, it risks litigation against those individuals.

The requirements of NCUA, as proposed, are so complex that it could result in future litigation and perhaps even an impact on the Insurance Fund. For example, the proposed commentary notes, "Also for items such as pay raises, the Board agrees that it is appropriate to express them as a dollar figure that will be received over the course of a year instead of an absolute dollar amount. The Board seeks specific comments on this aspect of the proposed rule including whether healthcare, retirement, or other benefits offered on a nondiscriminatory basis to all employees of the credit union shall continue to be disclosed as merger-related arrangements, and if so, how those benefits should be addressed from a disclosure perspective." This is a typical gotcha. If one mistake is made, there will be class action litigation and all blame the acquired credit union or maybe the merging credit union, but truly the blame would be in the complexity in the regulation that is almost creating the potential for failure.

The last item that I seek to address is the arbitrary decision by NCUA that 45 days seems to be the magic number. This would be 45-days' notice to the members. As noted above, there is very little member participation at the annual meetings, so even if there is more notice, it is unlikely that there will be more participation at a special meeting. If you take a look at the percentage of members who vote at a special meeting on mergers, it is probably one or two percent of the membership. This is probably the same that would occur even if you give additional notice.

Timing is a concern for credit unions that have spent months if not years discussing a merger, but NCUA does not seem to give timing much merit. As noted above, if there is an application submitted for merger approval, there is no definitive deadline for NCUA to act. However, the date of the merger as noted in the merger application is usually not an arbitrary date. It often coincides with the conversion requirements for two data processors or personnel issues or financial accounting issues so to miss the date is very detrimental to both credit unions. Again, there needs to be an affirmative requirement on NCUA to establish a deadline and meet that deadline. Even if NCUA still needs "more time" to review an application, they still have further opportunity to review during the member vote and even after the member vote since one seems to forget that after the member vote, NCUA still has the right to approve or deny the application.

There seems to also be a requirement for communication within the membership to describe the views that they have regarding the proposed merger. There are "false facts" constantly alleged. There are improper reviews on the internet. There are often slanderous or defamatory comments on the internet. The requirement for posting or providing communication by mail seems to be another unnecessary burden and expense to the credit union. The deadlines to mail do not seem to be viable since the mail is becoming slower and slower. Why not merely require a credit union to have a website with merger information where people could post comments and the credit union would have a right or an opportunity to comment on the website as to whether or not the review or the comments where fair, appropriate, or misdirected. All of this could be accomplished in less than 45-days. We are now in a world of 24-hour news or less. To delay the process for 45-days is the way the government used to work and not the way the government should be working.

I encourage you to slow this process down and evaluate all the potential traps that may or may not be addressed in the multitude of comment letters you will receive. I would be happy to have further discussions with NCUA and give them in a private and confidential manner some insight as to the many mergers that I have worked on and some of the enhancements that could have been made without global/mandatory new regulations.

Thank you for your consideration.

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