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Credit Union National Association

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August 7, 2017

Gerard Poliquin
Secretary of the Board
National Credit Union Administration
1775 Duke Street
Alexandria, VA 22314-3428

Re: Comments on Voluntary Mergers of Federally Insured Credit Unions; RIN 3133-AE73

Dear Mr. Poliquin:

The Credit Union National Association (CUNA) appreciates the opportunity to submit comments concerning the National Credit Union Administration's (NCUA) Notice of Proposed Rulemaking on Bylaws, Bank Conversions and Mergers; and Voluntary Mergers of Federally Insured Credit Unions. CUNA represents America's credit unions and their 110 million members.

NCUA has proposed a rule that will alter the procedures that a federal credit union (FCU) must follow to voluntarily merge with another credit union. At the outset, CUNA supports regulatory policies that permit credit unions to merge on a voluntary basis, with a credit union's board and members determining what is in the best interest of a merging credit union.[1] The parameters under which this should occur and the proper role of the NCUA in this process will be the focus of our comment letter. As a general principle, the NCUA should not substitute its judgment for the informed decision of a credit union's management, board, and members to pursue a merger. While the NCUA has a role as the regulator and insurer in the merger, it should not interfere in any way in the decision of two credit unions to voluntarily merge.

It stands to reason that members vote to approve a merger because members believe they will benefit from the combination of two credit unions. The benefits members receive from a merger can vary greatly. For example, a struggling small credit union could merge into a financially healthy credit union in order to preserve credit union access for the merging credit union's members. Members can also make the decision to merge in order to achieve increased access to products, services, and access. The decision can also be based on the advantages of increased economies of scale resulting from the combination of two credit unions. We note that no two mergers are ever the same. Because no two mergers are the same, involving unique operations, fields of memberships, combinations of asset sizes, geographical considerations, and individual histories,

[1] For purposes of this letter, we refer to the credit union that will continue to exist following a merger as the "continuing" or "acquiring" credit union, and the credit union that will cease to exist as the "merged" or "merging" credit union.

any merger rule should be sufficiently flexible to accommodate any situation and business need of the merging partners.

An amended merger rule should not increase the burden for the merging or acquiring credit union. Credit unions have significantly benefitted from NCUA's recent efforts to reduce credit unions' regulatory burden, and we understand that every update or change in a regulation may not always decrease this burden. Nonetheless, absent a compelling reason or the mandate to satisfy the requirements of a new law, an update to a regulation should not add additional, burdensome requirements for credit unions. CUNA members have concern that this proposed rule does so.

I. DISCLOSURE OF MERGER-RELATED FINANCIAL ARRANGEMENTS

Definition of Covered Person:

The proposed rule would expand the definition of a "Covered Person" from Senior Management and the Board of a credit union to the universe of persons to include the Chief Executive Officer (CEO) or Manager, the four most highly-compensated employees other than CEO or Manager, and any member of the Board of Directors or Supervisory Committee. At the onset, we note that in a small asset sized credit union which may have only a few employees,[2] the four most highly compensated employees might include a teller or other non-managerial type of personnel. Accordingly, the standard should remain as Senior Management and the Board. CUNA would support disclosure of a highly compensated person who was receiving a material increase in their salary as a sole consequence of the merger, but not simply because the critical person was offered a position at the continuing credit union.

We also note that FCU volunteers cannot receive compensation for their time spent volunteering at a credit union. Some states do allow for board members to be compensated. Instead of requiring disclosure of a compensated volunteer's pay, the rule should only require this disclosure when there is a material increase in compensation as a sole consequence of the credit union merger.

Merger-Related Financial Arrangement (and when disclosure is triggered):

Under the current rule, the definition of a merger-related financial arrangement includes a trigger that only requires disclosure if the compensation of a covered person is considered a "material increase." A "material increase" is currently defined as an increase that exceeds the greater of 15 percent or $10,000.00. Under the proposed rule, the monetary threshold would be eliminated and substituted with the standard of "all increases in compensation or benefits that a covered person has received during the 24 months prior to the date of the approval of the merger plan by the boards of both credit unions." This would include all future compensation or benefits that would not be received but for the merger taking place, regardless of the amount. NCUA would explicitly reserve the right to review any future compensation paid to a covered person of the merging FCU by the continuing credit union. The rule also purports to expand the interpretation of "compensation" to include all compensation or benefits received in connection with a merger, including early payout of pension benefits and increased insurance coverage. In short, an increase of $0.01 would trigger disclosure under the proposed rule.

[2] The average number of employees for an under $50 million credit union is 4.8 full time equivalent employees.

While we understand the NCUA's concern that increased compensation be disclosed, it seems reasonable, at the very least, that the regulation retain a de minimis standard that could encompass routine increases in compensation that are not related to a merger. Alternately, NCUA could require credit unions' boards to require the disclosure of compensation increases related to a merger. Disclosure of routine salary increases could lead members to assume that credit union management is pursuing a merger for increased compensation when the increase in compensation is routine and would have occurred regardless of a prospective merger.

In addition, removing a de minimis threshold could adversely impact smaller credit unions and unintentionally lead members to not approve a merger that would ultimately benefit them. For example, employees of a small asset size credit union merging into a medium size credit union might receive a slightly increased benefit package available to all employees at the medium credit union. While the additional benefit package might represent a nominal increase, it certainly is not material or even germane to the merger. Similarly, the continuing credit union in a merger might offer a bonus or other compensation for employees of the merging credit union to remain after the merger for the specific reason of continuity of operations of the continuing credit union. This type of compensation should not be required to be disclosed, as it is not being used to entice support for a merger.

NCUA could also focus on whether Covered Persons compensation at the continuing credit union is in line with staff in similar positions at that credit union. An increase in compensation after a merger but in line with other employees at the credit union would demonstrate the increase in compensation is more related to retention than enticement for merger support.

The two examples demonstrate why a de minimis threshold should be maintained and also show the potential ramifications in requiring the disclosure of compensation. We appreciate the NCUA's concern that by allowing any amount, there are those who may try to game the system or circumvent this requirement. However, we believe there are enough supervisory checks in place to address any abuses.

II. REGULATORY LOOK BACK/LOOK FORWARD

The proposal seeks to clarify that the NCUA can look at increases in compensation or benefits that a covered person has received during the 24 months prior to the date of approval of the merger plan by the boards of both credit unions and further includes a "look forward" clarification indicating that the NCUA can look at future compensation or benefits that would not be received but for the merger taking place, regardless of the amount. We believe that 12 months would be a sufficient look-back period, especially if a final rule incorporates a de minimis exemption.

The proposal does not include a stated time restriction governing regulatory review of future compensation. In addition, the proposed rule is unclear in what the associated remedy might be if the NCUA determines that compensation should be disclosed. The agency should limit forward-looking review because, as mentioned above, there could be many reasons for an increase in compensation after the merger. NCUA could probably eliminate the risk by reviewing employment contracts of employees from the merging credit union. And, if there are no employment contracts, then any future benefit from a merger is not guaranteed and probably de minimis, because a reasonable person relying on compensation to agree to a merger would likely want a guarantee of the payment and would be reluctant to support a transaction which could lead to his or her unemployment.

III. MEMBER-TO-MEMBER COMMUNICATION

This provision provides for member-to-member communication similar to the approach adopted by the NCUA for conversions from a credit union to a bank charter. The administration of the communication would be by the credit union at the cost of the member requesting the communication, with distribution no later than 15 days before the member vote of the proposed merger. While this provision exists in the credit union to bank context, we are unaware of it ever having been used by a member since the adoption of the rule, thus there is no experience by the NCUA of how this provision will work. Furthermore, there is a fundamental difference when the issue before the voters is the conversion of its charter to a different entity versus the merger into a similar entity, so the justification of this provision is unclear as a member has access to a merged credit union where in a conversion a credit union no longer exists.

NCUA also must reconsider the timing requirements. The proposal indicates that timing could be problematic and offers one remedy of extending voting dates if a credit union member might want to use the communication process. Also, the proposed rule suggests that a member should provide the communication as soon as possible to the merging credit union. One would presume that a member choosing to communicate with other members is doing so to negatively impact the process, which means that this member would have every incentive to cause a delay so a vote would have to be rescheduled. In addition, even if a credit union received a request for a member communication on the first day of the time period, there would be a strong incentive to wait until the 30-calendar day requirement has expired or risk sending multiple communications.

Distribution of communication to members will be difficult, particularly to those without electronic statements or those who do not consent to electronic communications. Mailing communications is costly and time consuming. NCUA should be mindful that in 2016, roughly 20% of U.S. credit unions were operating in the red or with negative income, with most of these being small institutions. These are the institutions that would likely benefit the most from a merger but could also be scared off from a merger when costs and regulatory burden make a merger difficult. We understand that the merger-partner will generally absorb these costs, but we think that regardless, the costs represent a burden that no credit union should have to absorb. Thus, if the agency believes that member-to-member communication is necessary, then other, more modern communications methods must be allowed. For example, in the merger notice, a credit union could list a website where member-to-member communications would be posted.

Furthermore, the credit union cannot address false, misleading, or inflammatory remarks as that is left to a regional director (or ONES director). Contrast this with the rule for Federal Savings Associations 12 CFR 144.8, which allows the financial institution, and not the regulator, to determine whether a member-to-member communication should be distributed. The NCUA should provide the same flexibility as is provided by other regulators. The proposed rule also contains a myriad of standards defining an improper communication, such as the omission of a material fact, or whether the communication is inflammatory or relates to a personal claim or grievance. Even if the NCUA chooses to retain authority over the decision to distribute a communication, these comparable standards should be incorporated into the rule to prohibit the enumerated communications. This would ensure credit unions are aware of how to comply with any requirements.

IV. NCUA MERGER APPROVAL PROCEDURAL CHANGES

Numerous provisions in the proposal make procedural changes to the process, which in the aggregate will increase the time for a credit union to complete a voluntary merger. Both credit unions must submit minutes to the NCUA that reference the merger during the 24 months preceding the date of approval of the merger plans by the respective boards. This is an unnecessary paperwork burden that will unlikely result in little use for regulatory approval. CUNA believes that only the minutes related to the decision to approve the merger should be included, but if NCUA wishes to request additional information due to a specific concern, it can do so during the merger process. There is no need to require the compilation of 24 months' worth of board minutes that will likely yield little, if any, useful information. If there is an issue the NCUA needs addressed, it can be asked for in the application itself.

Voting timelines also do not sync up with the bylaw timelines for notice of a meeting. This, coupled with the 15-day advance member-to-member communication requirement, creates a timeline that is essentially unworkable. The timelines must all harmonize to ensure a smooth merger process.

V. APPLICATION TO STATE-CHARTERED CREDIT UNIONS

The proposed changes to the merger rule should not apply to state-charted credit unions. Section 708b.101(b), requires that a federally-insured credit union must receive prior written approval from the NCUA before merging with another credit union. This existing authority is for NCUA to ensure that mergers are safe and sound. Member rights at state-chartered credit unions should be protected by state laws and state regulators.

VI. OTHER MERGER ISSUES

NCUA should facilitate mergers between credit unions with dissimilar fields of membership when there is no desire to retain the merged credit union's field of membership (FOM) by establishing a process that eliminates the need for a conversion. Currently, the process first requires that the charter change be approved so that both credit unions have compatible fields of membership and then the merger follows. NCUA could simplify this process by providing clear guidance stating that the merged credit union can change its FOM and approve the merger in one step. An update to the NCUA chartering manual would be required for the charter conversion to be completely removed from the process.

VII. CONCLUSION

CUNA agrees that members of a merging credit union should be given enough information to make an informed decision. The amount and type of information required to be disclosed can aid a credit union's members in making the proper decision; however, over disclosure and/or too much information can lead to members being less informed. Moreover, NCUA already has tools in place to ensure that mergers are not unduly influenced by credit unions seeking to merge.

Thank you for the opportunity to provide comments on the voluntary merger rule. If you have any questions about our comments, please do not hesitate to contact me at (202) 508-6705.

Sincerely,

Lance Noggle
Senior Director of Advocacy & Counsel