Black Hills FEDERAL CREDIT UNION

We Improve Lives

August 7, 2017

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

Comments on Proposed Rules, 12 CFR Parts 701, 708a, and 708b – Bylaws; Bank Conversions and Mergers; and Voluntary Mergers of Federally Insured Credit Unions

Dear Secretary Poliquin:

On behalf of the Board of Directors and Executive Management Team of Black Hills Federal Credit Union, I welcome the opportunity to comment on the National Credit Union Administration's proposed rules relating to voluntary mergers of federally insured credit unions.

As President and CEO of Black Hills Federal Credit Union (BHFCU), and an active advocate in the credit union movement locally and nationally for over 30 years, I understand NCUA's concerns regarding voluntary mergers. However, we feel strongly the ramifications of a "one size fits all" rule regarding voluntary mergers will negatively impact the future of the credit union industry.

The regulatory climate of today threatens our industry. More regulation in response to unethical practices by a few, specific credit unions will further encumber the growth of the credit union movement. In visiting with credit unions from across the country, the concern I hear most often is the need for regulatory relief. The amount of time and resources required to comply with burdensome regulations is overwhelming for all credit unions, and small credit unions are finding the cost of compliance an insurmountable obstacle to their continued success.

Voluntary mergers are often the only viable option for credit unions in challenging situations. Small, rural credit unions have different needs for mergers than large credit unions or even small, urban credit unions. NCUA's rules governing voluntary mergers should protect the rights of all credit unions to form merger partnerships and ensure credit union services remain available and competitive.

Instead, the proposed rule focuses on disclosing "conflicts of interest" that could arise due to unscrupulous decisions by a few credit unions. The result is an arbitrary set of rules that punish all credit unions rather than enforcing existing rules for those would-be offenders. We are very concerned these new rules are punitive to the majority of credit unions wishing to merge for the betterment of their members and communities. Furthermore, the intent of the new rule is to simplify compliance and to eliminate confusion. The proposed rule is very unclear and confusing, in particular the member-to-member communication component.

Additionally, imposing cumbersome and difficult to understand rules on voluntary mergers could put more credit unions and members at risk during tough economic times. Good merger partners may choose to forego a voluntary merger because of these requirements, resulting in a decrease in voluntary mergers and an increase in emergency mergers. A voluntary merger is a healthy alternative that allows a credit union to continue to serve their members while helping the NCUA avoid emergency measures to save a failing credit union. Recent history shows voluntary mergers have been declining and the decline appears to be continuing in 2017.

The current voluntary merger rule, if enforced, provides adequate language to prohibit people of influence from orchestrating a merger for personal gain, rather than the betterment of the members. This proposed rule not only takes away some of that enforcement capability, it further encumbers all credit unions to a difficult process.

Below please find our specific comments related to the proposed rule.

**Section 708b.2: Definitions – "Covered Person"**

> The proposed rule defines "covered person" as the credit union's chief executive officer or manager (or a person acting in a similar capacity); 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.

The population of South Dakota is slightly over 860,000 people, our communities are mostly rural, and 20 of the 40 credit unions have six or less employees. In smaller credit unions, the top five covered persons (as referenced in the proposal) could include employees not involved in the merger recommendation, such as lenders, tellers, or even part-time employees.

This one-size-fits-all model will not work for many credit unions. Smaller credit unions with few employees should not have the same number of "covered persons" as larger, more complex credit unions. A "covered person" should also be determined by management responsibility, not compensation. For example, Mortgage Loan Officers often receive commissions for loans; as a result they may receive compensation that exceeds that of a branch manager. The Mortgage Loan Officer may have no involvement in, influence over, or even an opinion on the merits of a merger, yet that person would be considered a "covered person". A person not involved in merger discussions or due diligence should not be considered a covered person.

Additionally, the definition of "covered person" is not consistent with the narrative. The narrative states that "covered person" refers to employees and volunteers of the merging credit union and not the continuing credit union. This clarification should be added to the definition.

**Section 708b.2: Definitions – "Merger-Related Financial Arrangement"**

> "Merger-related financial arrangement" means any increase in compensation or benefits that any covered person of a merging credit union has received during the 24 months prior to the date of the approval of the merger plan by the boards of directors of both credit unions. It also means any increase in compensation, such as salary, bonuses, deferred compensation, early payout of retirement benefits, increased insurance benefits, or any other financial rewards or benefits.

In this proposal, NCUA would require merging credit unions to publicly inform members of any increase in salary or benefits received by the top five qualifying credit union employees for 24 months prior to a merger.

In some rural credit unions, a top five employee could include a teller's $.50/hour increase received 18 months prior to the merger. The teller is likely not involved in the decision or even aware of a potential merger, so this information is not relevant. The proposed rule creates the perception an employee could be colluding in support of the merger if he/she stands to gain even a slight increase in hourly pay. In reality, the teller likely didn't know about the merger prior to the member communication.

We disagree disclosing the compensation of "covered persons" should be a factor in the members' decision to approve a merger, unless an employee stands to gain personally by orchestrating the merger. Disclosing this information to members only leads to criticism of how the credit union is currently run (which the Board has been elected to oversee) or creates resentment among employees and their neighbors who are now privy to the compensation of merging credit union employees. As a private citizen, most of these employees did not sign up for such an invasion; it's a breach of privacy and has nothing to do with the facts of a merger. In many communities, employees' compensation could be the talk of grocery store aisles, local businesses, churches, or school playgrounds. Employees of other organizations do not face such scrutiny, credit union employees should not be faced with potential ridicule or harassment due to this disclosure requirement.

The proposed rule also does not take into consideration the likelihood a position at the continuing credit union may have a higher wage than the merging credit union. The release of confidential pay information to members could be misconstrued as a "payoff," when in reality the standard compensation guidelines at the continuing credit union are higher than what the merging credit union offered.

The compensation of "covered persons" is not related nor relevant to the services a member can expect to receive from their continuing credit union. Changes to bring merging employees into the continuing credit union's compensation structure should not be reported to members. If relevant, it should be provided to the NCUA only and the NCUA could certify that any compensation changes to "covered persons" are reasonable. We cannot forsake employees' right to privacy as a condition of merging for the betterment of our members. If an employee will receive greater benefits or those benefits will cost more, that could be relevant, but not to members.

We agree if an employee will receive additional compensation as an incentive to merge, that information should be reported to the NCUA and to merging credit union members.

The rule also adds a requirement that the board of directors of both credit unions certify there are no merger-related financial arrangements other than those disclosed to the members of the merging FCU in the member notice. "Merger-related financial arrangement" as defined in 708b.2 includes, "all future compensation or benefits that would not be received but for the merger taking place, regardless of the amount." The existing rule is preferential because it defines a clear threshold for reporting. The difficulty was not in reporting the 15% or $10,000 threshold, but rather in defining the value of the benefits. This issue has not been resolved with the proposed rule.

As proposed, adding merged staff to the continuing credit union's benefit package or organizational realignments and failing to report could be construed as a violation. It would be difficult for a continuing credit union to "certify" in advance future merit increases or changes in benefits for any employees.

Additionally, there is no defined "end date" for the reporting of compensation changes after the merger. How long is the continuing credit union expected to monitor changes in pay for employees from the merging credit union and what is the expected procedure for reporting?

Here are four examples to illustrate:

A. A branch manager in credit union A makes $55,000, and is likely a "covered person" based on the proposed ruling. The minimum pay for a branch manager in credit union B is $62,000. As a result of the merger, branch manager A receives a raise to $62,000, to bring his/her compensation into alignment with the continuing credit union's compensation structure. Because this is consistent with the continuing credit union's established pay structure, it should not be required information to report.

   It could be seen as relevant by the NCUA, but there is no situation where this is relevant to the members' decision. Credit union B should not be forced to reveal private compensation information to credit union A members.

B. Credit union A has chosen to pay the health insurance premiums for all employees. Credit union B charges $90/month for their health insurance benefit. If credit union A merges into credit union B's health insurance plan, merging covered persons would now have an additional expense. It would be reasonable for the credit unions to show the NCUA (not the member) that impact. If the continuing credit union chose to provide a $1,200 bonus to the merging employees to offset the new expense in the first year that could be reported to the NCUA as well.

C. If credit union A does not offer a retirement plan, such as a 401(k) or 457(b), but the continuing credit union will, that additional benefit should be articulated. It will be the employee's choice whether he/she elects to take advantage of it. It remains unclear how to value this benefit that the employee may or may not choose to participate in.

D. A manager making $55,000 annually recommends a merger. The continuing credit union has offered the manager a $50,000 bonus if he/she is able to get the merger approved. This is clearly an incentive for the individual and not for the betterment of the members and should be reported to the NCUA and merging credit union members.

Publicizing employee compensation means staff and community members are aware of the compensation of their co-workers and neighbors. Not only could this create conflict and ill-will among employees, making this information public comes at the expense of an individual's privacy. Members would not allow this public notification of their private affairs; why should credit union employees be subjected to this invasion of privacy? Reporting compensation or benefits to the membership (which includes other staff) would likely violate a credit union's internal policies regarding employee privacy and could result in legal issues for the credit union and the NCUA.

This requirement creates additional reporting for the credit union, hardship for the employees, and many members will likely take offense to their credit union sharing private information about their friends and neighbors.

**Section 708b.105: "Submission of the Merger Proposal to the NCUA"**

As part of the merger package, the proposed rule would require both the merging and continuing credit union to submit board minutes to NCUA that reference the merger during the 24 months preceding the date of approval of the merger plan by the boards of directors of both credit unions.

The Federal Credit Union Act already allows NCUA access to board minutes. Merger-related discussions should only be included in the merger packet if credit unions are allowed to redact all information not related to merger discussions and those documents are not made public. Both the continuing and merging credit union boards should have the right to discuss a merger openly without concern the discussion will be made public along with other competitive or strategic discussions.

A more detailed template should be provided to merging credit unions that includes all the relevant information the members need to make an informed decision. The NCUA would approve this communication based on the information provided to them in the merger packet as part of the approval process. This would eliminate the concern of incomplete or misleading information being provided to members, as the NCUA would approve or deny the communication in advance.

The template for communication to members should include:

A. Accurate, easy to read financial reports for both credit unions.

B. A complete listing of products and services offered by each CU, along with the intended product and service offerings going forward.

C. Certification by the credit unions that all facts relevant to the merger decision have been presented and a decision should be made based on the information provided in the communication packet.

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

The proposed requirement mandates member notices be mailed at least 45 days, but no more than 90 days, before the meeting to vote on the merger. The rule establishes procedures to allow for reasonable member-to-member communications in advance of the proposed merger. The credit union would be required to inform members that if they wish to share their opinions with other members, they can submit their opinion in writing to the merging credit union within 30 calendar days of receipt of the notice, and the credit union will forward those opinions to other members at least 15 days prior to the vote.

The existing voluntary merger notification requirement is consistent with requirements for other notices to members, including annual and special meetings which members are encouraged to attend. Members rely on some consistency from their credit union, and the 30-day notice is what members know and expect. The current requirement is satisfactory.

Perhaps the most surprising part of the proposed rule is the assumption that the merging credit union can effectively manage the transfer of communication between members. This is a daunting requirement for a small credit union and puts the actual date of the meeting to vote in jeopardy, since a lone member could wait to submit their opinion in order to stall the vote.

For example, if a vote were scheduled for September 15, a member could submit a comment at the end of the day August 31. The comment would have to be distributed to all members, the vote would need to be rescheduled, and a new meeting notice mailed to all members. This process could repeat indefinitely, which would confuse and irritate most members and affect interest, attendance, and potentially the outcome of the vote.

NCUA's proposed rule inadvertently enables this type of "posturing" by a single member or a group of members. It opens the door for a competing bank or credit union to launch a campaign to prevent the merger. It is an unacceptable practice, easily fueled by outside interests, and potentially harmful to the financial stability of the credit union. In a small community, it creates opportunity for media involvement and has the potential to shed a poor light on the credit union industry.

Credit unions should not be required to establish member-to-member communications as part of the merger process. Forcing members to filter through random communications from strangers without context is cumbersome, misleading, and may damage the reputation of the credit union. Instead, we should give them the facts, outlined clearly, and let the members decide what they think about the merger and how much they wish to engage in the process.

Members have a responsibility to perform their duty as a voting member. They should be encouraged to participate in the meeting or cast their ballot in the way they choose. If members do not desire to participate in a debate, we should not force them. We have services in place to serve members the way they want to be served (in branch, online, or mobile), why would we force them to receive member-to-member communication from people they do not know and cannot verify the validity of their statements?

Our members trust us to protect their private information, and to give them the facts. We discourage the distribution of member comments, especially if credit unions cannot speak to the accuracy of the information provided. To force us to distribute member comments that may or may not be accurate is detrimental to the trusting relationship our members expect. We also don't believe allowing members to respond to another member's comment will lead to more informed decisions.

Another reason we believe member to member communication should not occur is the lack of a defined end date for comments. If members are allowed to comment indefinitely, a vote will never occur. There must be a cut-off date for member-to-member communications.

Proposed 708b.106 also states, that the member notice must explain that members must agree to reimburse the credit union's costs of transmitting the communication to the membership.

It is unfair to task credit unions with trying to collect payment for distributing comments to the rest of the membership. Ultimately, the cost for these communications could be passed on to the rest of the membership if the commenting member refuses to pay for distribution of his/her comments.

The administration of such a program would be a true hardship for smaller credit unions who do not have the staff or infrastructure to manage this, or the financial resources to cover what could be a substantial expense. This would also be a huge expense for the member wishing to comment. Even a small membership of 3,000 could create an expected expense of $2,500 – $3,000 per communication when considering the cost of letterhead, envelope and stamp, without considering the cost of labor and equipment to produce the communication. When faced with this expense, what member would feel strongly enough to participate in the communication process? Is the credit union expected to include the estimated cost in the member notice so members know the expense of submitting an opinion letter?

It is important to remember credit union member-owners do have a voice. It is easier than ever for members to publicly express their opinions, concerns and feedback through Facebook and other social media. They can also contact their credit union, the management team or board of directors, use secure web messages, emails, and letters, or arrange for personal visits whenever needed. The system works well.

We understand and agree with the concern regarding individuals of influence recommending a merger for personal benefit. No one individual should benefit from a merger; however, credit unions should not be discouraged from merging for the betterment of the members because the process to do so is overly cumbersome. Ultimately, the members will decide what is in their best interest. Rulemaking should focus on providing them with facts to make decisions with, not flooding members with meaningless or invalid information.

This rule is not practical and does not address NCUA's concerns; rather, it seeks to punish all credit unions for the misdeeds of a few. Surely, the transparency NCUA seeks could be better addressed without hampering the future day-to-day management of the continuing credit union.

We ask that you reconsider the cumbersome requirements of this proposed rule and urge you to question the merits of adding complex requirements for all, when so few have abused the current rules.

Thank you for the opportunity to comment on the proposed rules. I am happy to speak with you to answer any questions you may have, and can be reached at (605) 858-6110.

Sincerely,

Roger Heacock
President & CEO