August 07, 2017

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

RE: Comments on Voluntary Mergers of Federally Insured Credit Unions

Dear Mr. Gerald Poliquin,

I am writing on behalf of the California and Nevada Credit Union Leagues (Leagues), one of the largest state trade associations for credit unions in the United States, representing the interests of more than 250 credit unions and their approximately 10 million members.

The Leagues welcome the opportunity to provide comments to the National Credit Union Administration (NCUA) on their proposed rulemaking for voluntary mergers of federally insured credit unions (FICUs).

The proposed rule would: (1) revise and clarify the contents and format of the member notice; (2) add a definition of "covered person"; (3) expand the definition of "merger-related financial arrangements"; (4) increase the minimum member notice period; (4) provide procedures to allow member-to-member communications regarding the proposed merger; and (5) make conforming amendments regarding termination of insurance when the surviving credit union is not an FICU.

The Leagues fully support complete, accurate, and transparent disclosure to members regarding a proposed merger. However, we do not believe the NCUA needs to rewrite the merger rules to achieve this. The existing merger rules provide members with advance notice of their right to vote on the merger and a summary of the merger plan, including any merger-related financial arrangements. In addition, the NCUA Board already has the authority to approve a merger proposal *"subject to any other specific requirements as it may prescribe to fulfill the intended purposes of the proposed merger."*[1] The Leagues believe the current merger rules, combined with NCUA's authority to specify other requirements on a case-by-case basis, are sufficient. We recommend the NCUA revoke the proposed rule.

Should the NCUA Board feel the need to issue a final rule, we respectfully suggest that significant improvements are needed, and we offer the following recommendations.

Federally Insured State-Chartered Credit Unions

The proposed rule only applies to merging FCUs; however, the NCUA specifically asks whether it should apply to both merging FCUs and merging federally insured, state-chartered credit unions (FISCUs). The Leagues strongly oppose applying the

rule to FISCUs as that would be an overreach by an agency whose role is that of insurer. Under existing merger rules, FISCUs must receive NCUA approval before merging with another credit union. This authority addresses safety and soundness. Members' rights at FISCUs are protected by their state laws and their state regulators. The NCUA should not interfere with the role of state supervisory authorities.

Covered Person

The Board is proposing to remove the definition of ''senior management official'' and add a definition for "covered person." The term "covered person" would include the credit union's chief executive officer (CEO) or manager (or a person acting in a similar capacity); the four most highly compensated employees other than the CEO or manager; and any member of the board of directors or supervisory committee.

The proposed definition of "covered person" is impractical. Credit unions vary greatly in both size and management structure. Every credit union is different, and setting an arbitrary number on who has decision making authority or who is in a position of influence does not make sense. Consider that as of March 31, 2017 Call Report data, 37 percent of the nation's credit unions operate with five or fewer full-time equivalent employees. In these small credit unions, the CEO/Manager plus the top four most highly paid employees likely encompasses tellers and member service representatives who have no strategic decision making responsibilities.

The Leagues strongly recommend the Board maintain the current standard for whom merger-related financial arrangements must be disclosed. That is, disclosure should be limited to senior executives and volunteers of the credit union who have decision making authority. The standard should remain as senior management officials and the board.

Merger-Related Financial Arrangement

The existing merger rules address potential conflicts of interest for senior management officials and directors involved in voluntary mergers by requiring disclosure to members of any merger-related financial arrangements. The definition of merger-related financial arrangements in the current rules includes any material increase in compensation (including indirect compensation, for example, bonuses, deferred compensation, or other financial rewards) or benefits. "Material increase" is defined as an increase that exceeds the greater of 15 percent or $10,000.

Under the proposed rule, the monetary thresholds 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."*

It would also 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 proposed rule would also 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.*

The Leagues agree with NCUA’s goal of addressing improper influence and potential conflicts of interest. However, we have serious concerns regarding the proposed definition of merger-related financial arrangements and the manner in which all compensation is being painted. Not all compensation to executive officers as the result of merger is a bad thing. If mergers are to be successful and happen for the right reasons, merging employees who may otherwise be losing their jobs should be made whole again. When making an employee whole, they can make the right decision for their members and not worry about losing their job and income.

Maintain de Minimis Threshold

The Board should retain the de minimis threshold of material increase. Under the proposed rule, any increase would trigger disclosure. Disclosing a nominal annual increase provides no value. Consider that a continuing credit union may offer higher salaries for experienced executives than the merging credit union. This should not need to be disclosed unless the salary increase is material. In addition, health care, retirement, and other benefits offered on a nondiscriminatory basis to all employees of the credit union should not be considered merger-related financial arrangements.

Disclose Percentages; Not Dollars

The proposed revisions also require that the disclosure of merger-related financial arrangements include the amount of the compensation or benefits expressed in dollars, where possible. The Board stated that expressing the increases as a percentage fails to provide adequate context. The Leagues strongly disagree and contend that disclosing a dollar amount lacks context unless it is accompanied by the executive’s current compensation amount in dollars. Disclosing an increase as a percentage is sufficient, and maintains the executives’ privacy.

Look Back / Look Forward

The proposed rule 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. It also includes a “look forward” clarification indicating that the NCUA can look at all future compensation or benefits that would not be received but for the merger taking place, regardless of the amount.

The Leagues are concerned with the administrative burden placed on both the credit unions in compiling and presenting 24 months of board minutes and on the NCUA in reviewing 48 months of board minutes. Board minutes are already reviewed regularly by NCUA examiners during regular exams. As such, the Leagues suggest that 12 months would be a sufficient look-back period, especially if a final rule incorporates a de minimis exemption.

The Leagues are also very concerned that the forward-looking review (a) has no

stated time restriction governing review of future compensation and (b) provides no remedy or action a credit union should take if the NCUA determines that compensation should be disclosed. There may be many reasons for an increase in compensation after a merger. For example, if a credit union creates a new position two years post-merger due to a business need, and they promote a merged employee who has the requisite skills, when and how is that increase in compensation to be disclosed? Can the credit union be found to be in violation of the rules because they did not predict the future?

We recommend the Board reconsider reviewing "all future compensation or benefits," and instead review employment contracts of employees from the merging credit union. 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.

Member-to-Member Communication

The proposed rule would establish procedures to allow for member-to-member communication in advance of a proposed merger. The member notice would have to provide contact information at the merging FCU for communications and the merging FCU would need to ensure that members receive all appropriate communications from other members no later than 15 days before the member vote on the proposed merger.

The merging FCU may include a statement with the member-to-member communication notifying members that the communication represents the opinion of a member and does not reflect the views of management or directors. However, the merging FCU may not add anything other than this statement without prior approval by the Regional Director.

If the FCU believes some or all of the member's communication is "improper" they must submit the communication to the Regional Director (or ONES director) for review. The Regional Director will review the communication, communicate with the requesting member, and respond to the FCU within 7 calendar days. The FCU must then immediately mail or email the material to the members if so directed by the Regional Director.

The Leagues have several concerns with this proposed member-to-member provision. First, we do not believe the proposed member-to-member communication is necessary. The existing and proposed disclosure requirements provide members with complete information needed to make an informed vote. Members also already have a forum for comments; they may appear at the merger vote meeting and make comment. Those members who want to hear comments and opinions can attend the meeting.

The NCUA states member-to-member communication allows for "healthy member debate" of a proposed merger prior to the vote. We disagree. In an in-person debate at the meeting, those present hear both sides. As proposed, the members don't get to

hear both sides; the FCU is not permitted to add their rebuttal to the member-to-member communication.

Second, we are very concerned with the inability to refute members' comments that may be wildly inaccurate or the opinion of one person who doesn't have the right or full set of facts. Obtaining the Regional Director's approval of the credit union's response is not practical within the stated timelines. FCUs should be permitted to include a rebuttal.

Third, the proposed rule, at 708b.106(e)(4), contains a list of situations that would constitute an "improper" member communication. FCUs should be permitted to utilize this list and make their own determination that a member communication is improper and not mail or email the materials to the members. For situations not addressed in the rule, the FCU could seek approval from the Regional Director. The merger rules for Federal Savings Associations[2] allow financial institutions, not the regulator, to determine whether a customer communication should be distributed. FCUs should be permitted to do the same.

Fourth, the Leagues strongly recommend NCUA reconsider the timing requirements. The proposal recognizes that timing could be problematic and offers the 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, the FCU would have a strong incentive to wait until the 30-calendar day requirement has expired or risk sending multiple communications.

Fifth, the proposed rule does not address whether a FCU may aggregate the communications from all members into one notice and not have to send separate notices for each individual communication submitted. The Leagues recommend one notice aggregating all member comments be permitted. Again, the NCUA should consider the timing requirements, as an FCU will likely wait until the 30-calendar day requirement has expired to send one aggregated notice.

Timing of Notice

The current voluntary merger rule allows the merger vote to be held at either a special meeting or at the annual meeting if the FCU's regularly scheduled annual meeting will occur within 60 days after NCUA's approval of the proposed merger. Members must receive notice of the meeting as required by the FCU Bylaws.

The FCU Bylaws require that FCUs mail notices of annual meetings at least 30 days, but not more than 75 days, before the annual meeting. In contrast, the FCU Bylaws only require FCUs to mail notices for special meetings at least 7 days before the meeting. Thus, if the merger proposal is to be considered at a special meeting, members may have only a few days advance notice of a meeting under the current voluntary merger rule and the FCU Bylaws.

The Leagues agree that a 7-day notice for a special meeting for a merger vote is insufficient and members should be given adequate time to review the merger proposal, whether at a special meeting or the annual meeting.

The proposed rule would remove reference to the FCU Bylaws and instead require merger notices to be mailed at least 45 days, but no more than 90 days, before the meeting to vote on the merger. The Leagues do not agree with implementing a timeline that is not in sync with the FCU Bylaw timelines for the annual meeting.

The proposed rule that notices be mailed at least 45 days before the meeting to vote further delays an already lengthy and extensive merger process; annual meeting notices must be mailed at least 30 days in advance.

Conversely, if the merger vote is to be held at the annual meeting, would credit unions follow the annual meeting timeline of no more than 75 days notice, or the merger vote timeline of no more than 90 days notice? Following the annual meeting notice timeline essentially cuts the merger notice timeline to not more than 75 days. This, coupled with the 15-day advance member-to-member communication requirement, creates a timeline that is impractical and unworkable.

The Leagues strongly encourage the Board to synchronize the annual meeting notice and the merger vote notice timelines to create an efficient merger process. If member-to-member communication is part of the final rule, then the timing for member communication must also be considered in setting one coordinated timeline

Conclusion

The Leagues believe the current merger rules, combined with NCUA's authority to specify other requirements on a case-by-case basis, are sufficient, and we urge the Board to revoke the proposed rule. If it is not revoked, we encourage the Board to consider our comments and make significant improvements to the rule.

We thank you for the opportunity to comment on the proposed rule and for considering our views. If you have any questions regarding our comments, please contact me.

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[1]12 CFR §708b.105(b)

[2] 12 CFR 144.8

Sincerely,

Sharon Lindeman
VP, Regulatory Advocacy
California and Nevada Credit Union Leagues

cc: CCUL