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March 25, 2020

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

Re: Combination Transactions with Non-Credit Unions; RIN 3133–AF10

Dear Mr. Poliquin:

On behalf of America's credit unions, I am writing in support of the National Credit Union Administration's (NCUA) proposed rulemaking on combination transactions with non-credit unions. The Credit Union National Association (CUNA) represents America's credit unions and their 115 million members.

Proposed Combination Transactions Rulemaking

The NCUA Board issued a proposal to adopt new Subpart D of Part 708a intended to clarify and make transparent the procedures and requirements related to combination transactions. Combination transactions include those where a federally insured credit union proposes to assume liabilities from a non-credit union, including a bank; they also include a credit union's merger or consolidation with a non-credit union entity.

The proposal essentially codifies current requirements and practices related to combination transactions with non-credit unions. While the proposal does not introduce much that is new, we believe codifying and centralizing the existing requirements will aid credit unions pursuing such transactions.

Many of the elements of the proposal come from existing requirements, such as statutory factors the NCUA must weigh when considering an application for a combination transaction. While we support the majority of the proposed rule, as discussed below, there are a few aspects that are not statutorily required (or required elsewhere in the NCUA's regulations), several of which may be problematic.

Approval Required for Combination Transactions (708a.402)

This section requires the NCUA's advance approval of combination transactions, and it requires a federal credit union proposing a combination transaction to submit its request to the Regional Director. Federally insured state-chartered credit unions must obtain the advance approval of their state regulator in addition to the NCUA's approval.

In addition, this section recites the statutory factors the NCUA must weigh in its consideration of a combination transaction application. While four of the six statutory factors relate to safety and soundness, two factors require the NCUA to consider the proposed transaction's effect on credit union members and potential credit union members, and whether the proposed transaction is consistent with the credit union's mission. Accordingly, the NCUA has the right to object to a transaction even absent safety and soundness concerns.

This proposed section appears reasonable, as these factors are statutory. It is important that a credit union consider the impact a potential combination transaction will have on the existing and new membership. We ask that the NCUA fully understand the potential impact on new and existing credit union members before making its decision regarding these assessment factors. In certain instances, this may require direct communication between the agency and the applying credit union to accurately understand what the potential transaction may mean to new and existing members.

In addition, the proposed rule does not impose a limit on the length of time the NCUA may take to consider a combination transaction. According to the agency, an established timeframe may create impediments to the NCUA's ability to fully understand the transaction's potential consequences.

We strongly disagree with the proposed approach to exclude a limit on the length of time the NCUA may take to consider a combination transaction. We urge the agency to adopt a specified timeframe, which is critical for planning purposes. Timing is of utmost importance in any manner of merger or other combination transaction, including those with non-credit union entities. We recommend the NCUA apply an approach consistent with that of the Federal Deposit Insurance Corporation (FDIC), which maintains an established timeframe of generally 60 days to respond to combination transaction applications. It is important to maintain parity in this instance since non-credit union entities often consider transacting with non-credit unions (in addition to credit unions). We urge the NCUA to limit the length of time for which it can consider a combination transaction; we suggest a limit of 60 days to maintain consistency with the FDIC.

Submission to the NCUA (708a.403)

This section highlights critical elements of the application package. Among other elements, the applying credit union must provide basic information about the transaction that enables NCUA staff to evaluate it. This information includes:

- The balance sheet and income statements for both institutions;

- A combined financial statement showing the transaction’s potential impact on the credit union’s net worth;
- Information about the credit union’s due diligence assessment of the proposed transaction;
- A delinquent loan summary;
- Analysis of the adequacy of the credit union’s allowance for loan and lease losses; and
- A list of the other institution’s assets that would be impermissible for the credit union to hold under the Federal Credit Union Act or state law, with the plan for excluding these assets.

We are generally supportive of this section. We agree it is important for the agency to have sufficient information to make an informed decision regarding a combination transaction. Further, we believe most of the items listed above are appropriate to require of an applying credit union. This information will enable the NCUA to understand the financial condition of the credit union and non-credit union entity.

However, we have concern with the last item listed above: the proposed requirement for the applying credit union to list the bank’s assets that would be impermissible for the credit union to hold and a plan for excluding such assets. Based on our outreach, it is our understanding that in practice, rather than requiring such items be excluded from the outset, Regional Directors often permit the credit union to hold such impermissible assets for a period of time (sometimes up to twelve months) in order to either make them permissible or dispose of them.

We believe such an approach is favorable to the approach proposed. Ideally, rather than require the applying credit union to specify how it will exclude such assets at the outset, it would be preferable to allow the credit union to (1) specify how it will exclude such assets, or (2) hold the assets for a specified period of time in order to either make them permissible or dispose of them. If the NCUA considers such an approach, we suggest providing the applying credit union with twelve months—consistent with current practice—to remedy or dispose of the assets.

Federal Credit Union Membership (708a.405)

This section addresses the two-step process for joining a credit union: (1) determining that a potential member falls within the FCU’s field of membership, and (2) how the potential member becomes an actual member.

The NCUA has generally required that to become a member of a credit union, the other entity’s customer must affirmatively act through an authoritative vote or individual consent before the closing of a combination transaction. In the case of a vote, the other entity’s regulator, charter, and bylaws must permit such a process, whereby the vote of a certain percentage of customers will demonstrate affirmative approval for all affected customers and thereby meet the requirement to subscribe to credit union membership.

We do not support the proposed requirement for bank customers to, prior to closing of the transaction, affirmatively consent to becoming members of the credit union. This is problematic for several reasons.

As discussed above, the strict timing at play in these transactions can make closing the individual transaction difficult and is sometimes the reason such transactions fail. The proposed requirement for prior affirmative consent or a vote will be extremely challenging and likely prevent numerous transactions that would otherwise succeed.

In addition, since it is our understanding that state regulators often give state-chartered credit unions flexibility (e.g., six months after closing) to obtain consent of the bank customers, including such a strict requirement in the rule would severely disadvantage federal credit unions.¹ While even one additional month (post-closing) may not seem like much, the fact that the transaction is not contingent on customer consent is critical.

The proposed requirement to obtain an affirmative act—whether an authoritative vote or individual consent—will be an extremely onerous task, creating a huge burden for applying credit unions. To address this issue, we suggest the NCUA instead allow an opt-out. This would allow the applying credit union to inform all bank customers that they will become members of the credit union unless they take action to opt out. Such an opt-out provision would still achieve the NCUA’s objective of ensuring the customers choose to become members of the credit union. Further, an opt-out would greatly reduce the compliance burden associated with an affirmative act, as included in the proposal. Lastly, an opt-out would eliminate any uneven playing field between state and federal charters where the state regulator provides additional time for the applying credit union to obtain the consent or vote of the bank’s customers.

While an opt-out provision would make this section of the proposal more manageable, we ask the agency to consider whether consent—in the form of an affirmative act or an opt-out—is necessary or appropriate for combination transactions with non-credit unions. In requiring an affirmative act on behalf of bank customers, we understand the NCUA seeks to ensure appropriate parties are informed of and agree to a combination transaction. When a credit union merges with another credit union, such a requirement is reasonable since the members of the merged credit union are also its owners. However, there is a different dynamic when a non-credit union entity is involved since the customers (which would be required to consent or vote under the proposal) are not necessarily the owners of the entity. It is unclear whether the agency’s rationale for this proposed requirement would be achieved when the voting customers are not in all instances the same individuals that own the bank or other non-credit union entity. Therefore, we ask the NCUA to consider whether such affirmative act (or even an opt-out) would achieve its objective in the context of a non-credit union transaction, and, if not, whether to eliminate this requirement entirely.

¹ We recognize this is not an issue for federal credit unions designated as a low-income credit union (LICU) since LICUs are permitted to hold non-member funds.

Conclusion

On behalf of America's credit unions and their 115 million members, thank you for considering our comments in support of the agency's proposed rulemaking on combination transactions with non-credit unions. If you have questions about our comments, please do not hesitate to contact me at eeurgubian@cuna.coop.

Sincerely,

Elizabeth A. Eurgubian
Deputy Chief Advocacy Officer & Senior Counsel
Regulatory & Executive Branch Relations