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National Association of Federally-Insured Credit Unions

March 27, 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; Credit Union Asset Acquisitions (RIN: 3313-AF10)

Dear Mr. Poliquin:

On behalf of the National Association of Federally-Insured Credit Unions (NAFCU), I am writing in response to the National Credit Union Administration's (NCUA) proposed rule to add a new subpart D in Part 708(a) of its regulations regarding combination transactions. NAFCU advocates for all federally-insured not-for-profit credit unions that, in turn, serve nearly 120 million consumers with personal and small business financial service products. Combination transactions are voluntary, market-based transactions that must receive approval from both the NCUA and the Federal Deposit Insurance Corporation (FDIC) and as such, should not be subject to overly prescriptive regulatory requirements that could put these transactions as well as affected consumers at risk.

NAFCU urges the NCUA not to opine on the methods that credit unions, along with their bank transaction partners, should utilize to determine how consumers consent to become members. Additionally, NAFCU supports transparency in the NCUA's approval procedures for such transactions and encourages an expeditious timeline for approval. The NCUA also should carefully review its existing requirements for merger transactions to streamline its processes and better facilitate credit unions' mission of serving their communities with unparalleled, quality products and services.

General Comments

Bankers' baseless attacks on the credit union industry regarding the sale of banks to credit unions have raised false alarms—these are voluntary, market-based transactions, wherein the banks' board of directors are voting to sell to credit unions as the best option available for consumers. Credit unions continue to experience barriers to these transactions, specifically in the form of strict statutory prohibitions under the *Federal Credit Union Act* (FCU Act). For example, a credit union that merges with a bank continues to retain its unique field of membership (FOM) and is still subject to other statutory limitations like business lending caps and capital standards.

NAFCU agrees with NCUA Chairman Hood's recent testimony before the Senate Committee on Banking, Housing, and Urban Affairs in which he reiterated that credit union-bank mergers are not occurring "arbitrarily or capriciously."¹ Rather, the small uptick in banks selling to credit unions is likely a direct result of regulatory compliance burdens and costs that have led to consolidation across the entire financial services industry. These transactions overwhelmingly benefit local communities that may lose community-focused financial services as well as jobs and access to branches if, instead, a national bank purchases the local community bank. Importantly, credit unions help to prevent these communities from becoming banking deserts due to the failure of their community banks.

NAFCU recognizes that the proposed rulemaking aims to provide transparency to the NCUA's existing procedures for combination transactions and appreciates the agency's proactive approach to providing the industry with more clarity on this issue. Nonetheless, NAFCU's members fear that this proposed rule may lead to more confusion with respect to the level of detail the NCUA expects in applications for combination transactions. More specifically, the proposed rule does not provide enough clarity on the current approval process for a purchase of assets and assumption of liabilities as outlined in the NCUA's regulations Part 741.8.

NAFCU appreciates that the proposed new paragraph (d) in Part 741.8 places a strong emphasis on the safety and soundness of the credit union and whether the transaction in question would help the credit union to serve its members; however, many of the factors listed (which are the same as those in Part 708a.402) as part of the NCUA's assessment of an application for a combination transaction are subjective in nature. Although these are statutory, four out of the six factors are not empirical and are difficult to quantify into measurable data. For instance, the evaluation of the history of the credit union, its management policies, and the character and fitness of its management are all subjective factors that may be evaluated differently across regions. The NCUA should consider providing guidelines to Regional Directors regarding the assessment factors in Part 741.8 to clearly identify the type of information credit unions should include in application packets and the steps of the approval process.

Moreover, NAFCU's member credit unions are concerned that, if finalized as proposed, Regional Directors may implement this rule overall in different ways and on different timelines given that it is simply intended to clarify, in writing, already existing requirements. There is no provision that indicates whether the processes and requirements outlined in the proposed rule will have a retroactive effect on transactions that are pending before the rule is finalized. In order to foster business transactions that are in the best interest of the affected communities, the NCUA should not retroactively implement any requirements in the rule upon pending combination transactions. The NCUA should take the necessary steps to continue monitoring regional activity of combination transactions to ensure uniformity and clear expectations for credit unions while balancing the need for attention to the elements of each individual transaction.

Additionally, the NCUA should consider clarifying in its final rule whether the defined terms it uses to address combination transactions and the parties involved in these transactions applies to

¹ See Committee on Banking, Housing, and Urban Affairs, "Oversight of Financial Regulators" (Dec. 5, 2019).

credit union service organizations (CUSOs). For example, NCUA's regulations Part 712 permits federal credit unions (FCUs) to invest in or loan to a CUSO. The terms used in this proposed rule do not clearly indicate the impact, if any, on credit union transactions with CUSOs. NAFCU requests the NCUA clarify that this rule does not affect investments or lending activities related to CUSOs. The NCUA should not use this rule as a vehicle to impose limitations on other credit union-related entities.

Recognizing the significance of these combination transactions to preserving access to financial services in communities across the nation, NAFCU urges the NCUA to provide broad flexibility in its regulatory requirements so that credit unions are able to best serve their communities, especially those individuals of low- and moderate-income, that are at risk of being underbanked or unbanked. Overly detailed, laborious processes for these transactions that do not directly stem from the contours of the FCU Act should not be included in regulation.

Field of Membership Requirements

NAFCU objects to any rigid FOM approval requirements that may impose significant and unnecessary burdens on the process of a bank selling to a credit union. Narrow FOM requirements for such transactions would hamper the ability of credit unions to provide products and services to underserved communities. In addition to confirming that each bank customer is within the FCU's FOM, the proposed rule explains that the NCUA's long-standing position has generally required credit unions to ensure that the bank's consumers have consented to become members of the FCU.

Becoming a member of the FCU requires the banks' customers to affirmatively act through a vote or individual consent before the combination transaction is complete. In the context of a vote, the bank's regulator, charter, and bylaws must permit a process where the vote of a certain percentage of customers will show affirmative approval for all affected customers to become members of the FCU. Although the NCUA notes that this approach is equivalent to the voting required in mergers between two federally-insured credit unions, where a majority vote of the whole allows the transaction to proceed without an affirmative act by each individual, this should not be carried over as a requirement for combination transactions under new subpart D in Part 708(a) of its regulations.

The NCUA should specifically delegate to credit unions the authority to determine the appropriate process for enrolling existing bank customers as member-owners of the credit union. This process is also subject to approval from the banks' board of directors, who are well-informed to make decisions based on the bank's regulatory requirements the provisions of its charter and bylaws. This level of autonomy is appropriate for the two entities whose members and consumers will be affected by the transaction. The member-owned, not-for-profit nature of credit unions naturally provides an incentive for an FCU to act in the best interest of its membership; therefore, a decision regarding potential new members should be left to the discretion of the FCU and the bank. As for the selling bank, its owners likely prefer to sell to a credit union because of its community focus. The similarities in culture, unlike that of a large national bank, would likewise provide incentive for the bank to determine the best and least disruptive method for adding new members to the FCU.

Additionally, different states have different approaches for how credit unions in these transactions may approach how consumers become members of the credit union, including an option to “opt-out” of membership versus an affirmative “opt-in.” The NCUA should permit credit unions to adopt the approach that best suits the needs of their members and communities. Some credit unions may decide to include language regarding consent in a written disclosure or their share agreements, which, in the context of acquiring a bank, would be sent to potential members. Credit unions should have control over how and when this information is disclosed, whether before, during, or after completion of the transaction.

Instead of dictating that an authoritative vote or individual consent take place, the NCUA should permit credit unions to decide based on state rules, their policies and procedures, or those of the bank, how to proceed with membership. To best ease the transition and, most importantly, preserve access to financial services for the affected communities, especially low- and moderate-income individuals, NAFCU urges the NCUA to maintain sovereignty on membership decisions with the credit union and its leadership. The NCUA closely scrutinizes these transactions, but this level of involvement and interference in the process is unnecessary to guarantee the legitimacy of the process and ensure the safety and soundness of the credit union after the transaction is complete. In fact, such oversight would only serve to potentially frustrate the transaction, putting the entire deal at risk of not being completed in an efficient manner. The NCUA should keep its review of the transaction limited to the initial approval conducted alongside the FDIC.

Review Timeline and Regulatory Clarity for Merger Applications

Under the current application process, the NCUA does not impose on itself a specific timeline during which it must review and approve or deny a merger application. NAFCU’s members have reported that currently, it could take more than eight months for approval of a combination transaction. Without a regulatory deadline, there is no guarantee that the approval of a credit union application to acquire a bank might not take longer, even extending beyond a year. To avoid any unnecessary delay or misguided denial of applications, the NCUA should provide a reasonable timeline for approval that also recognizes the need for some flexibility for credit unions to gather all necessary information to complete the transaction.

The NCUA should consider two timelines for its application process. First, the NCUA should consider adopting a 30-calendar day notification timeline to acknowledge receipt of a credit union’s application. This initial confirmation would provide credit unions and the bank transaction partner with certainty that the NCUA’s review of the application is ongoing. Confirmation of the completed application package would facilitate swift responses from the credit union and its bank transaction partner and enable a more streamlined approval process.

Next, the NCUA should also adopt a six-month timeline for review and approval of combination transaction applications, with the potential for several one-month extensions to allow sufficient time for credit unions to collect important financial documents and other information required for the transaction to close. A timeline for the NCUA to complete its review of the application and either approve or deny the transaction would keep all parties accountable. However, NAFCU

recognizes that combination transactions are not homogeneous, and each transaction may face different obstacles and require different timelines.

Consequently, incorporating regulatory flexibility for voluntary time extensions to collect further information would better help credit unions serve their existing and future members and avoid the business risk of over-extended approval processes. It is critical that the NCUA keep in mind that all transactions are different, and some may require a higher level of review than others. As such, bright-line requirements are not appropriate; however, clear guidelines and expectations for the process are essential.

NAFCU also recommends the NCUA avoid establishing prolonged procedures to complete the application and approval process. In addition to providing clear timeline expectations, the NCUA should establish guidelines for credit unions that are submitting applications for combination transactions, including written clarification of any application materials that are required at the onset and any supplemental materials that may be needed throughout the approval process. The NCUA should conspicuously reference the templates or other materials required to submit information to the NCUA for approval as well as the steps of the approval process. These steps would serve as a roadmap for credit unions but be provided with the understanding that each transaction may be assessed differently based on the value and/or risk of the transaction.

The NCUA should also consider other impacts related to these transactions, including the impact on certain assets acquired from a bank that may fall within the scope of the NCUA's regulations, Part 701.36, regarding FCU occupancy and disposal of acquired and abandoned premises. This regulatory requirement may result in additional administrative actions for the FCU to address, including occupying or partially occupying the selling bank's branches and whether to dispose of abandoned premises. Clarity on the scope of the proposed rule and its interaction with Part 701.36 would be useful to ensure that credit unions are able to fully comply with the NCUA's expectations for occupying or disposing of property acquired through a combination transaction.

Additional Merger Considerations

Although not specific to combination transactions as described in this proposed rule, many of NAFCU's member credit unions have expressed frustration with the merger process for credit union-credit union transactions. More specifically, instances where a credit union with a multi-SEG charter is a potential merger partner for a credit union with a community charter. The NCUA's Chartering and Field of Membership Manual prohibits a community credit union from merging into a multi-SEG credit union, except in an emergency merger; so in instances where such a transaction is contemplated, the community credit union must convert its charter to a SEG in order to merge.

This process can be quite extensive and time-consuming, sometimes delaying the merger unnecessarily. For example, one of NAFCU's member credit union reported a 45-day delay in the merger process due to the conversion of the merging credit union from a community charter to a multi-SEG charter. The NCUA also does not allow for conditional approval of the merger pending the charter change and a positive outcome of the required membership vote. This means that if the

membership did not vote in favor of the merger, or the merger partner no longer wished to pursue the merger, then the merging credit union would have to potentially again undergo a charter conversion, only further delaying the process and putting the merging credit union at risk. NAFCU asks the NCUA to reevaluate the sequence of its regulatory requirements for credit union-credit union mergers to ease the burden associated with NCUA application and approval of such transactions.

Conclusion

Considering the current public health and economic crisis caused by the novel coronavirus (COVID-19), the NCUA should prioritize rulemakings that add flexibility to the credit union industry, instead of those that create additional hurdles. This proposed rule would establish various requirements on credit unions seeking to help communities that may be facing a banking desert during this current time of economic contraction and uncertainty. NAFCU urges the NCUA to delay its finalization of this rule until the COVID-19 pandemic has subsided and the economy begins to revive.

NAFCU appreciates the NCUA's efforts to provide transparency for transactions where a credit union merges, consolidates, or assumes the liabilities of a bank. NAFCU urges the NCUA to streamline and offer a clear timeline for the approval of such transactions as well as provide greater flexibility for FOM requirements both under this proposed rule and more broadly in its regulations. Such flexibility would afford credit unions opportunities to better serve underserved communities by keeping branches open and offering access to safe, affordable financial products and services. If you have any questions, please do not hesitate to contact me at akossachev@nafcu.org or (703) 842-2212.

Sincerely,



Ann C. Kossachev
Director of Regulatory Affairs