NASCUS

The National Voice of the State Credit Union System

June 15, 2020

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

Re: NASCUS Comments on Combinations Transactions (RIN 3313-AF10)

Dear Mr. Poliquin:

The National Association of State Credit Union Supervisors (NASCUS)[1] submits the following comments in response to the RIN 3313-AF10, the National Credit Union Administration's (NCUA's) proposed Combinations Transactions rule.[2] NCUA's proposal would create a new Subpart D to § 708a comprised of five provisions that would govern Combination Transactions of a federally insured credit union (FICU). The proposed new provisions would, among other things, define terms related to these transactions, designate the criteria NCUA will consider when granting or withholding approval of a transaction, establish a formal application process, mandate that an applicant credit union's board certify certain governance and due diligence standards, and require certain affirmative actions of the customers of a non-credit union entity participating in one of these transactions. The proposed rule would also make changes to existing § 741.8 of NCUA's Rules and Regulations governing FICU assumption or purchase of loans, deposits, or liabilities from a non-FICU.

Combination Transactions, while still relatively infrequent, warrant the establishment of a formal and transparent process that NCUA will follow to evaluate requests for approval of a Combinations Transaction. NCUA, as administrator of the National Credit Union Share Insurance Fund (NCUSIF), clearly has a role to play in ensuring that any acquiring FICU will remain safe and sound and the Federal Credit Union Act (FCUA) authorizes NCUA to approve or deny such transactions.[3] In addition, NCUA as the chartering authority for federal credit unions (FCUs) may impose any conditions or restrictions it deems appropriate for FCUs.

NCUA's proposal is well intentioned but needs significant changes. As discussed in detail below, the proposed rule fails to adequately distinguish between state and federal charters, ignores the practical business need for expeditious supervisory and regulatory approvals, has the potential to weaken board governance, and is in parts overly vague. Most troubling is the extent to which the proposed rule would usurp state authority by reaching far beyond a reasonable safety and soundness nexus. Although NCUA asserts its authority to supplant

[1] NASCUS is the professional association of the nation's 45 state credit union regulatory agencies that charter and supervise over 2,000 credit unions.
[2] "Combination Transaction with Non-Credit Unions; Credit Union Asset Acquisition" 85 Fed. Reg. 5336 (January 30, 2020).
[3] 12 U.S.C. 1785.

state governance rules with respect to Combination Transactions we emphatically disagree that so doing is the proper course of action or within the spirit of the FCUA.

State Regulators Should Retain Primary Approval Authority for Federally Insured State Credit Union Combination Transactions

State regulators are the primary prudential regulator for federally insured state credit unions (FISCUs) as well as for most of the non-credit union entities involved in Combination Transactions. As such, state regulatory rules and determinations as to the permissibility of the transaction for FISCUs and the validity of the memberization of the non-credit union customers should control. Principles of federalism necessitate NCUA adopt a measured approach with rulemaking that so clearly would infringe on well recognized state authority. NCUA should resist the facile path of preempting state governance and credit union and state bank organizational rules and compelling states to adopt federal principles of credit union membership.

For transactions involving FISCUs, NCUA should limit its role to evaluating the safety, soundness and insurability of the continuing FISCU. By exercising regulatory restraint and confining the proposal's application to FISCUs to share insurance considerations, NCUA can materially strengthen the dual chartering system while providing a transparent process for Combination Transactions and honoring the agency's statutory obligations.[4]

An overwhelming majority of Combination Transactions involve acquiring credit unions that are FISCUs. Between the year 2012 and the year 2018, eighteen of the twenty credit unions that acquired bank assets and liabilities were FISCUs.[5] Presuming the trend continues in comparable fashion, NCUA's rule would have a disproportionate impact on FISCUs and the state system. For this reason, NCUA should be particularly sensitive to the need to precisely tailor rulemaking to address risk and to preserve the dual chartering system. Specifically, the disparate impact on FISCUs implicates Executive Order 13132 and presents significant federalism implications.[6]

FISCUs are state corporations governed by state law. In the absence of NCUA's proposal, FISCU Combination Transactions would be procedurally governed primarily by state rulemaking and state policy. However, with the advent of this rulemaking, NCUA takes distressingly large strides down a path that appropriates for itself powers and authorities that properly reside with the states. The proposed rule inserts NCUA into issues related to how persons become members of FISCUs and into determinations as to the best interest of the members of a FISCU. The

[4] The Federal Credit Union Act provides for insuring the accounts of "credit unions organized and operated according to the laws of any State..." 12 U.S.C. 1781(a).
[5] Federal Reserve Bank of St. Louis, "Why are More Credit Unions Buying Community Banks?" Andrew P. Meyer, April 11, 2019. Available at https://www.stlouisfed.org/publications/regional-economist/first-quarter-2019/credit-unions-buying-community-banks.
[6] Exec. Order No. 13132, Federalism, 64 Fed. Reg. 43255 (January 4, 1999).

proposal also intervenes in the fiduciary duty and governance obligations of a FISCU board.[7]

Given that who and how someone becomes a member of a credit union and to whom the credit union board owes a duty (members, the credit union itself, non-members as contemplated by NCUA's rule) are such foundational elements of state law, it is difficult to reconcile NCUA's Executive Order 13132 attestation in the proposal that "[t]he proposed rule does not have substantial direct effects on the states, on the relationship between the national government and the states, or on the distribution of power and responsibilities among the various levels of government."[8] The proposed rule has substantial federalism implications and NCUA should consult with state regulators pursuant to Section 6 of Executive Order 13132.[9]

Deferring to state regulations on the above noted governance issues would be much more consistent with the FCUA than the path laid out in this proposed rule. Throughout Title II of the FCUA, Congress acknowledges the complimentary supervisory authorities of NCUA and the state regulatory agencies.[10] In Section 205 of the FCUA, Congress provided for NCUA reliance on state regulator determinations as to the validity of required member votes.[11] By revising the proposal to provide for state determination of governance and other non-direct safety and soundness issues, NCUA would conform to Executive Order 13132, help preserve the dual chartering system, and reduce regulatory burden for FISCUs.

The careful balance of state and federal authority is not the only salient interest at stake in this rulemaking. As NASCUS has noted in response to previous comment calls, the United States financial system is predicated on a system of dual chartering, where separate but co-equal state and federal bank and credit union charters exist in a cooperative, but competitive, regulatory environment. That regulatory distinction between charters, and the vigilance against homogenization, is what drives innovation within the system. As the United States Treasury Department has recognized:

> "Diversity increases the chances that innovative approaches to policy problems will emerge… A sole regulator, not subject to challenge from other agencies, might tend to become entrenched, conservative, and shortsighted."[12]

---

[7] Proposed Part 708a.403(d)(1) requires a FISCU's directors to submit signed statements that the transaction is in the best interest of the FISCU's members and potential members. While this requirement currently exists in NCUA merger and conversion rules, we have consistently noted that it is an unsupportable overreach of NCUA authority. We renew our objections herein.

[8] 85 Fed. Reg. 5340.

[9] 64 Fed. Reg. 43257.

[10] For example: NCUA shall consult and cooperate with state regulators implementing member business loan rules. 12 U.S.C. 1757a(e). NCUA may accept any report on the condition of a credit union from state regulators. 12 U.S.C. 1782(a)(4). NCUA may accept exam reports from state regulators. 12 U.S.C. 1784(d).

[11] 12 U.S.C. 1785(2)(G)(ii).

[12] U.S. Department of the Treasury, Modernizing the Financial System, February 1991, page XIX.

As the NCUA has noted, the credit union dual chartering system is essential for fostering regulatory and supervisory innovation and has "proven its merit."[13] In order to preserve a meaningful dual chartering system and proper differentiation of roles, NCUA should narrowly tailor this proposal with respect to FISCUs to matters of the safety, soundness, and insurability of the continuing credit union.

We also note that FISCUs are not the only state-chartered entities over which NCUA's proposal asserts jurisdictions. Most of the acquired non-credit union institutions in Combination Transactions are state-chartered banks with capable state regulators and their own federal banking regulator exercising supervisory authority. The myriad of additional state and federal regulators with supervisory authority over aspects of these transactions is yet another reason for NCUA to exercise restraint with respect to FISCUs in this rulemaking.

Proposed § 708a.402 Approval Required for Combination Transactions Should Focus on Safety and Soundness and Timeframes should be Included

Proposed § 708a.402 requires NCUA and state regulator prior approval for a Combination Transaction. The proposal does not specify the order in which those approvals must be obtained nor does it provide a timeframe within which NCUA must approve or deny the transaction. Both omissions are problematic. However, the more troubling aspect of the proposed provision is the discussion of the factors to be considered by NCUA in approving or denying applications.

The provision incorporates the FCUA's six factors the NCUA must weigh when considering a request for approval for a Combination Transaction. The first four factors are related to safety and soundness:

- ✓ the history, financial condition, and management policies of the credit union

[13] See remarks of NCUA Chairman Rodney Hood, August 14, 2019, available in full at https://www.ncua.gov/newsroom/speech/2019/ncua-chairman-rodney-e-hood-remarks-nascus-state-system-summit. Speaking to the NASCUS State System Summit, the Chairman said:

> *"Another thing that has not changed is the importance of the dual chartering system and my belief in its value. The founders of our great country set up a federalist system, with the national and state governments having defined roles. That system has proven itself to be effective.*
>
> *Likewise, a system of regulation and supervision where federal and state authorities work in their defined roles while cooperating with one another, always with the common goal of a safer, sounder, more efficient and innovative credit union industry, has clearly demonstrated its merits.*
>
> *Another thing that has not changed is the importance of the dual chartering system and my belief in its value. The founders of our great country set up a federalist system, with the national and state governments having defined roles. That system has proven itself to be effective.*
>
> *Likewise, a system of regulation and supervision where federal and state authorities work in their defined roles while cooperating with one another, always with the common goal of a safer, sounder, more efficient and innovative credit union industry, has clearly demonstrated its merits."*

- ✓ the adequacy of the credit union's reserves
- ✓ the economic advisability of the transaction
- ✓ the general character and fitness of the credit union's management

As NCUA concedes, the remaining two factors are not safety and soundness related:[14]

- ✓ the convenience and needs of the members to be served by the credit union
- ✓ whether the credit union is a cooperative association organized for the purpose of promoting thrift among its members and creating a source of credit for provident or productive purposes

NASCUS agrees that the first four factors are safety and soundness related and should be reviewed by the NCUA to protect the NCUSIF. In many cases, state regulators not only review the acquiring credit union's financial condition and management, but also conduct in-person examinations or review a recent report of examination of the non-credit union entity involved in the transaction.[15] With respect to the final two factors, NCUA should defer to state regulators for transactions involving FISCUs.

As discussed at length above, state regulators remain the primary prudential regulator of FISCUs. NCUA would be within its statutory mandate to rely on the determinations of state regulators for the final two factors. Reliance on state determinations is particularly appropriate given the amorphous nature of the fifth factor and the non-discretionary nature of the sixth factor.

Whether the "needs and conveniences" of the members to be served warrant approval of the transaction is so subjective that absent additional discussion of the standard from NCUA the proposal fails to provide any meaningful transparency or objectivity as intended by the rulemaking. Even the Supplemental Material accompanying the proposed rule (Supplemental Material) is devoid of any explanation as to how this factor would be evaluated. By deferring to state regulators in this regard, NCUA would allow the regulators in closest proximity to the transaction, as the primary regulator of the credit union and in many cases the regulator of the non-credit union entity, to make decisions based on community standards in their particular jurisdictions. On the banking side, a convenience and needs analysis is also performed by the federal deposit insurer, but that analysis is focused on meeting the needs and convenience of the community as a whole, on issues related to Community Reinvestment Act compliance, and on whether benefits to the community outweigh anti-competitive effects.[16] NCUA has no such statutory considerations, and is often unfamiliar with banking operations or the communities in question. Deferring to more experienced state regulators is sound public policy and good sense.

[14] 85 Fed. Reg. 5338.
[15] That the proposal pays little attention to the financial condition of the non-credit union entity is puzzling.
[16] Federal Deposit Insurance Corporation, Application Procedures Manual, Chapter 4 (2019) p. 4-21. Available at https://www.fdic.gov/regulations/applications/resources/apps-proc-manual/section-04-mergers.pdf.

Factor six, that the FISCU is in fact a credit union organized for the thrift of its members seems to be a formulaic standard. The FCUA defines a credit union as a federal or state-chartered credit union. NCUA could fulfill this statutory provision by seeking a declarative statement as part of the application process based on state law and state determinations that the FISCU is a state credit union in good standing. Leaving factor six open to other undefined interpretations runs counter to the intention of providing transparency and clarity to the Combination Transaction process.

It is Essential the Proposed Rule Establish a Timeframe for Approval

NCUA notes in the Supplemental Material that the agency declined to include a timeline in the proposal so that it may gain experience reviewing applications and transactions. We appreciate that each transaction is unique and may present fact specific challenges that make determinations more complex. NASCUS further appreciates that sometimes supervisory delays result from the incomplete submission of applications. However, Combination Transactions can be time sensitive business transactions. In some cases, the non-credit union entity may be a stock traded company and subject to the ebbs and flows of the stock market. In some cases, investors may draw negative conclusions from supervisory delays in final approval. In other cases, an uncertain approval timeframe may make it difficult to properly synchronize winding down ancillary contracts and other business affairs.

Drawing parallels to FDIC rules and procedures, we strongly recommend NCUA establish timeframes for supervisory approval. NCUA should amend the proposed rule to establish the following in regulation:

- ✓ A commitment that NCUA respond in writing to an applicant within a specified timeframe that the application has been received and initially reviewed for completeness. This initial communication should inform applicant of whether the application qualifies for expediated determination or whether an extended timeframe will be needed by NCUA.
- ✓ An expedited approval process in which qualifying transactions receive a determination in 45-60 days. For FISCUs, an expedited approval might be warranted for a transaction where both institutions are regulated by the same state regulatory agency.
- ✓ A timeframe for all other transactions not to exceed six months.

Proposed § 708a.401 Definitions Need More Clarity within the Rule Text

NCUA should clarify what transactions are covered by the proposed rule. The proposed definition of Combination Transaction in the rule text does little to provide clarity as to which transactions are covered by the rule and which transactions are eligible obligations subject to § 741.8. NCUA appears to recognize the inherent confusion that might arise from distinguishing between eligible obligations and Combinations Transactions. In the Supplemental Material NCUA expands on the proposed definition of a Combination

Transaction with a 243-word footnote to provide clarification.[17] The problem is that examiners and stakeholders may be referencing the final rule in the future without the benefit of the Supplemental Material. The proposed definition of Combination Transaction should be enhanced to provide clarity in the text of the rule.

In addition, the proposed definitions of "credit union" and "non-credit union" should be clarified so as not to cause confusion in transactions involving privately insured credit unions. The proposal defines a "credit union" by reference to the definition of "insured credit union" in the FCUA. This definition by reference means only NCUSIF insured credit unions are "credit unions."[18] The proposal defines a "non-credit union" as any financial institution that is not an FCU or a "state credit union" as that term is defined in the FCUA. The FCUA definition of a "state credit union" includes privately insured credit unions.[19] Therefore, it seems the proposed rule has rendered privately insured credit unions, per the definition section, an amorphous "other" as neither "credit unions" nor "non-credit unions." The proposed rule should clarify the rules that apply to transactions involving a FICU and a privately insured credit union.

Proposed § 708a.403 Submission to NCUA Should be Streamlined and Limited in the Provision's Application to FISCUs

Proposed § 708a.403 addresses the application process for a FICU seeking to engage in a Combination Transaction. Some of the required submissions such as balance sheets and income statements, delinquent loan summary, list of shareholders, identification of impermissible assets, and analysis of the ALLL accounts make sense and are essential data for making an informed regulatory and supervisory determination of the appropriateness of the transaction.[20] Other required submission items and other provisions of proposed § 708a.403 are problematic.

---

[17] See Footnote 13: *New Subpart D does not address the requirements for FICU purchases of loan assets from institutions that are not FICUs when the proposed purchase is not part of a merger or consolidation. Section 205(b)(1) of the Act does not include authority to purchase assets, such as loans, other than as part of a merger or consolidation. A merger or consolidation generally means that at least one entity's charter is extinguished in the transaction. Accordingly, FICUs seeking to purchase loans from entities other than FICUs, where the other entity is not merging or consolidating with the FICU, must do so under other authorities. For FISCUs, state law or regulation may permit these purchases. For FCUs, this authority would be the NCUA's eligible obligations rule, 12 CFR 701.23. Generally, if an FCU is purchasing loans from an entity other than a FICU, the eligible obligations rule requires the borrower to be a member of the purchasing credit union before the purchase is made. Id. Just as in the deposit context, the NCUA has historically interpreted this provision to mean that the borrower must have taken some affirmative action to join the FCU before the transaction closes. Purchases of student loans or mortgages to complete a pool of loans for sale on the secondary market are exempt from the membership requirement. The eligible obligations rule also allows FCUs to purchase eligible obligations from FICUs ''without regard to whether they are obligations of its members.'' Id. 701.23(a)(2)(i).*

[18] "The term "insured credit union" means any credit union the member accounts of which are insured in accordance with the provisions of subchapter II of this chapter…" 12 U.S.C. 1752(7).

[19] "The terms "State credit union" and "State chartered credit union" mean a credit union organized and operated according to the laws of any State, the District of Columbia, the several territories and possessions of the United States, the Panama Canal Zone, or the Commonwealth of Puerto Rico, which laws provide for the organization of credit unions similar in principle and objectives to Federal credit unions." 12 U.S.C 1752(6).

[20] 85 Fed. Reg. 5341.

- Proposed § 708.403(a) – Submission to the NCUA Regional Director

The proposal directs FICUs to submit applications to the NCUA Regional Director. As previously noted in our comments related to § 708a.402, the proposed rule lacks specific direction as to the order in which a FISCU submits its application to its primary state regulator and to NCUA. To provide clarity for FISCUs and equity between FISCUs and FICUs, the proposal should explicitly allow for concurrent submissions to NCUA and the state regulator. While FCUs benefit from a single submission and streamlined consideration of NCUA, FISCUs must obtain approvals of both state and federal regulators.[21] Unless submissions can be evaluated concurrently by NCUA and the state, FISCUs face potentially expensive delays in closing Combination Transactions. Concerns regarding possible delays are heightened by the proposal's lack of definitive timeframes for NCUA to render a decision.

- Proposed § 708.403(b) – Eligibility for, and Consent to, Membership

The proposal requires FICUs "explain the credit union's plan for obtaining membership" for the non-credit union entity customers. NASCUS appreciates that NCUSIF limits on FISCU non-member shares make it important for NCUA to ensure a Combination Transaction does not result in an immediate supervisory violation.[22] However the process by which the non-credit union customers become credit union members may vary significantly between FISCUs and FCUs. We urge NCUA to divide this provision into distinct sub-parts for state and federal charters.

This recommendation is predicated on the fact that state regulators are in the best position to determine whether a non-credit union entity's customers are eligible for membership in the FISCU. For example, the customers may all be considered within the credit union's existing Field of Membership (FOM) and as a result there is no "plan" to make the customers members.[23] Furthermore, as FOM is a matter of state law, NCUA would not be in a position to make any judgements on the validity of the membership plan, rendering the submission of a membership plan superfluous for FISCUs.

In contrast, the truly relevant issue for FISCUs is captured in proposed 708a.404(a) which requires the FISCU to "demonstrate" that accounts will be insured upon close of the transaction. Maintaining both this provision and the provision relating to membership with respect to FISCUs is redundant and thus unnecessarily burdensome.

<u>Proposed § 708a.403(c)(1)(vi) Disposition of Assets Prior to Transaction Close is Not Practical</u>

[21] Of course, both FISCUs and FCUS must also obtain approval for a Combinations Transaction from the prudential regulator of the non-credit union entity. NASCUS' comments are focused on the "credit union regulator" side of the transaction.
[22] See 12 C.F.R 741.204 and 701.32 (incorporated by reference for FISCUs).
[23] Of course, the credit union will likely have a plan to retain the accounts, but that is not what appears to be contemplated by the proposed rule.

Proposed § 708a.403 requires FICUs to submit a plan of how the credit union intends to dispose of impermissible assets before the Combination Transaction closes. NASCUS questions the practicality and wisdom of this provision. Prior to the close of the transaction, the entities remain separate autonomous corporations. Given that the transaction may fail to close, it seems unlikely that the non-credit union institution will be willing to divest itself of assets without being paid a premium or otherwise guaranteed compensation if the transaction fails to close. This seems to us an unnecessary risk and complication to impose upon credit unions. We would be supportive of a provision requiring the submission of an explanation for divesting of the assets within six months of the closing of the transaction. Our understanding is that six months post-closing has been a timeframe for divestment previously used in some Combination Transactions. A post-closing requirement is the more prudent requirement for managing impermissible investments. Federal banking regulators have allowed significantly more than six months post-closing for divestiture - more than two years, in at least one case.[24]

Proposed § 708a.403 Director Certification Should Not Apply to FISCUs

Pursuant to proposed § 709a.403, a FICU's application must also include a certification signed by each of the credit union's directors that voted in favor of the combination transaction. The certification must include attestations as to the best interest of the members, the information provided directors by management, and the absence of insider profit.

NASCUS is particularly concerned by the "best interest of the member standard" NCUA is proposing. We are unaware of any statutory authority for NCUA to promulgate such a fiduciary duty standard for FISCU boards. As noted above, there is FCUA language that speaks to the "needs and conveniences" of the members and prospective members, but no statutory directive that speaks to "best interests." We also note that no other federal depository institution regulator requires a certification of best interests of a distinct group of individuals. NCUA fails to make a case, compelling or otherwise, as to why credit union boards must be regulatorily compelled in such a fashion. Furthermore, with respect to FISCUs, NCUA's requirement seems to be substituting a fiduciary duty standard of NCUA's own making over that of accepted common law or state regulation. In NCUA's view, an FCU board might have specific fiduciary duties to the members akin to shareholders. However, state law determines the FISCU board's duty, not NCUA. In some cases, state courts have defined that duty to the credit union rather than to the members as individual owners.[25]

[24] OCC Conditional Approval #1200 (July 6, 2018; https://www.occ.treas.gov/topics/charters-and-licensing/interpretations-and-actions/2018/ca1200.pdf) (with regard to bank-impermissible assets of bank holding company that will merge with an into bank under this 2018 approval order, "OCC agrees that it would be a reasonable period of time … for [bank] to divest or conform [… in no event later than July 21, 2022.").

[25] For one example, see Save Columbia CU Committee v. Columbia Community Credit Union, 139 P. 3d 386, 393, 394 (Wash. Ct. App. 2006). State laws and regulations dictate fiduciary duties for state credit unions just as they do the purpose of a state credit union or its field of membership. NCUA's insurance authority simple conveys no such preemptive power in these matters.

We also remain troubled by the fact that the proposal would divide a FICU's board. Dividing the FICU board by who supported an action and who did not contravenes basic board good governance principles. FICU boards do not act as individuals, and all board members bear the responsibility of board actions. Dividing board members according to who voted for or against a Combination Transaction is to invite public dissent outside of the board room. This rule would set credit union governance on a slippery slope and we urge NCUA in the strongest terms to reconsider whether this is the desired governance model of the future.

Proposed § 708a.405 Federal Credit Union Membership Should not be Applied to FISCUs

Proposed § 708a.405 would establish the rules by which the customers of the non-credit union would become members of the FCU involved in the transaction. NCUA asserts the provision would not apply to FISCUs.[26] As a matter of practice, NASCUS generally does not comment on proposed rules or provisions applicable only to FCUs. However, given the way the final Voluntary Merger rule was applied to FISCUs, we will comment in this case.[27]

We agree proposed §708a.405 should apply only to FCUs. The FCUA only addresses the field of membership of FCUs.[28] The field of membership, and the means by which non-credit union customers become members of a FISCU is exclusively a matter of state law and should not be subject to NCUA promulgated procedures.

NASCUS also believes § 708a.405(b) as proposed would be problematic because the proposal requires an FCU to confirm that the customers of the non-credit union entity have consented to become credit union members. The proposed rule text is vague as to how this provision might be satisfied. In the Supplemental Material, NCUA implies that the non-credit union entity could conduct a vote of its customers.[29] A non-credit union customer vote raises several challenges. First, the idea of having a majority vote of customers, as suggested in the Supplemental Material, seems to conflate the concept of individual consent to be a credit union member with the authority of the non-credit union entity to allow itself to be acquired. The latter is, in most cases, the province of the shareholders of the entity, not the customers. Second, it is unclear why, if a majority vote of the customers can serve as "affirmative approval" for customers who actually voted "no" and those that did not vote, why consent may not be inferred from the fact that the customers have maintained their account thru the acquisition. In transactions involving banks, Federal Deposit Insurance Corporation (FDIC) regulations require multiple public notices be made of the intent for the bank to cease

[26] 85 Fed. Reg. 5341.
[27] In 2017 NCUA proposed a rule to "revise the procedures a federal credit union must follow to merge…" although it noted the possibility of applying the rule to FISCUs. When it decided to expand the scope of the rule to apply to FISCUs, it finalized the rule without providing an opportunity for comment on the application of the rule to FISCUs. Compare 82 Fed. Reg. 26605 (June 8, 2017) with 83 Fed. Reg. 30301 (June 28, 2018). As a result of the way the proposal was presented, many FISCU stakeholders focused on comments of addressing whether the rule, written to apply to FCUs, should be applied to FISCUs and less time commenting on problematic aspects of the proposal's other provisions as applied to FISCUs.
[2828] 12 U.S.C. § 1753.
[29] 85 Fed. Reg. 5339.

operations as an independent entity.[30] The same rationale that supports inferring consent from a vote supports inferring consent from the customers' account status after the multiple public notices.

Proposed Changes to § 741.8 Is Confusing for FISCUs and Adds Unnecessary Delay to Transactions

In addition to creating a new Subpart D for combination transactions, the proposal makes changes to existing § 741.8. The proposed changes would add "purchase of assets" other than loans to the list of authorized transactions for which FICUs must receive NCUA pre-approval and include cross references to other applicable rules located elsewhere in NCUA's rules and Regulations. The proposed changes to § 741.8 would also include applying the six factors enumerated in proposed § 708a.402 to every request for § 741.8 approval.

NCUA's proposed inclusion of cross-referenced regulations raises concerns. As discussed above, NCUA should consolidate rules that apply to FISCUs in a single provision or consecutive provisions. Requiring FISCUs to cross reference scattered provisions throughout NCUA's rule is inefficient and is an unwarranted regulatory burden. Furthermore, the inclusion of references to § 701.23, § 703, and § 721 without further refining the reference for FISCUs is confusing. Only certain sub-provisions of those regulations apply, and in the case of § 703 the only application is as a reserve requirement. However, a plain reading of the proposed changes would be that NCUA now intends to apply those provisions in their entirety. We do not believe that was the intent, and therefore the proposed change promises to complicate compliance, not simplify it.[31] If it was NCUA's intention to abandon long-standing state autonomy in these areas, then it should say so explicitly in the Supplemental Material. A proposal that preempts state law should provide clear notice to the state system on the intention, and is worthy of independent Notice and Comment.

NASCUS also opposes the extension of the six factors to § 741.8 transactions. As NCUA acknowledges, there is no statutory obligation to consider the six factors for § 741.8 transactions.[32] NCUA justifies its discretionary proposal by citing the need for safety and soundness and whether it helps the credit unions serve its members.[33] We take no issue with the emphasis on safety and soundness. Of course, as administrator of the NCUSIF, NCUA should focus on the safety and soundness of FISCUs in its regulatory approach. However, we remain unconvinced that NCUA needs to extend the six factors in rule to help the agency make a safety and soundness decision. The logical conclusion of NCUA's view is to see the inclusion of the six factors in every FCU and FISCU rule where a FICU must obtain NCUA approval of an action of some sort. That seems extreme.

[30] 12 C.F.R. 303.65 and 12 C.F.R. 303.87.
[31] If it is NCUA's intent to expand those provisions to FISCUs beyond the current application then it is incumbent on NCUA to say so unequivocally so state system stakeholder may provide comments on that aspect of the proposal.
[32] 85 Fed. Reg. 5339.
[33] Ibid.

Without a statutory mandate, we see little justification for NCUA to extend the six factors to help it determine if the permission sought by a FISCU helps it serve its members. Unless a FISCU's application portends an unsafe and unsound condition, the effectiveness of member service is a question for state regulators, not NCUA.

NCUA Should Consolidate Share Insurance Rules for State-Chartered Credit Unions

NCUA's proposed Combination Transaction rule would apply to FISCUs by reference in § 741.208. NCUA's organization of its share insurance rules for FISCUs, using incorporation by reference, is unwieldly, burdensome, and unnecessarily complicates FISCU compliance. It is incumbent on regulators to make regulations accessible and understandable for licensees. NCUA's FISCU rules are neither. Rules applicable to FISCUs should be incorporated in their entirety in a single, or consecutive, provisions for ease of reference. That the Combination Transactions rule will almost certainly disproportionately impact FISCUs only strengthens the case for incorporating the rule in the FISCU provisions of NCUA's Rules and Regulations.

NCUA Should Look to Existing Federal Banking Agency Rules for Guidance

Most of NASCUS' state regulator members supervise both banks and credit unions. Many also supervise other non-depository financial service providers. NASCUS' credit union and stake holder members represent the breadth and width of the credit union system, from the largest credit unions to modest sized credit unions and in-between. NASCUS fully understands and appreciates the credit union difference. However, the credit union difference does not always require the invention on entirely unique rules and regulations.

We encourage NCUA to look to similar rules as promulgated by its Federal Financial Institution Examination Council peers regarding mergers and combinations.

Congress instructed NCUA to promulgate rules consistent with its peers with respect to credit union conversions.[34] While not directly on point, the premise is instructive. Particularly at this extraordinary time in history, over-complicating rules for a Combination Transaction is not the most prudent course.

Conclusion

NASCUS appreciates the opportunity to submit comments on the NCUA's proposed Combinations Transactions rule. NASCUS and state regulators are committed to working with NCUA to develop effective and balanced regulations to govern these transactions that will allow NCUA to meet its fiduciary and statutory responsibilities while simultaneously respecting state authority. In particular, we are intent on creating a regulatory regime that provides transparency and assures the credit union remains safe and sound while at the same time avoiding overly burdensome or impractical rules that unnecessarily encumber the market place and diminish the dual chartering system. With respect to Combination

[34] 12 U.S.C. 1785(2)(G).

Transactions, NCUA should more precisely craft a rule that provides greater autonomy for state regulators and state supervision.

NASCUS is happy to discuss our recommendations further at your convenience.

Sincerely,

- signature redacted for electronic publication -

Brian Knight
Executive Vice President & General Counsel