ICBA
INDEPENDENT COMMUNITY BANKERS of AMERICA®

July 11, 2022

Honorable Todd Harper
Chairman of the Board
National Credit Union Administration
1775 Duke Street
Alexandria, Virginia 22314

RE: ICBA Comments on NCUA Proposed Rule, "Combination Transactions with Non-Credit Unions; Credit Union Asset Acquisitions"

Dear Chairman Harper:

On behalf of the Independent Community Bankers of America ("ICBA"),[1] I am writing to encourage the National Credit Union Administration ("NCUA" or "Agency") to vote on the finalization of its proposed rule on credit union acquisitions of banks ("Proposed Rule").[2] Now more than two years since the Agency first proposed the rule, the need for regulatory clarity and enhanced transparency governing these deals is even more pressing. Apart from the accelerated growth of credit union acquisitions of community banks, these past two years have also seen courts and state agencies struggle with the interpretation of laws and regulations governing this grey area. Further, Presidential actions and federal banking agencies' review of merger guidance both weigh in favor of the Agency finalizing this rule.

[1] *The Independent Community Bankers of America® creates and promotes an environment where community banks flourish. ICBA is dedicated exclusively to representing the interests of the community banking industry and its membership through effective advocacy, best-in-class education, and high-quality products and services.*

With nearly 50,000 locations nationwide, community banks constitute roughly 99 percent of all banks, employ nearly 700,000 Americans and are the only physical banking presence in one in three U.S. counties. Holding nearly $5.9 trillion in assets, over $4.9 trillion in deposits, and more than $3.5 trillion in loans to consumers, small businesses and the agricultural community, community banks channel local deposits into the Main Streets and neighborhoods they serve, spurring job creation, fostering innovation and fueling their customers' dreams in communities throughout America. For more information, visit ICBA's website at www.icba.org.

[2] Combination Transactions with Non-Credit Unions; Credit Union Asset Acquisitions, 85 Fed. Reg. 5336 (Jan. 30, 2020).

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Background

The Agency first proposed the rule two and half years ago, in January 2020, in response to public recognition that credit unions were going on "bank buying sprees."[3] At the time, then Chairman Rodney Hood indicated that the Agency would issue a rule that "would make sure that they [credit unions] are acquiring a bank that comports with their existing field of membership and the lines of business in which they are operating."[4]

Soon after, NCUA issued the Proposed Rule, which created explicit procedures for federally-insured credit unions ("FICU") to follow when acquiring banks. Among other provisions, before acquiring a bank, the Proposed Rule would require a FICU to:

(1) conduct a vote of its Board of Directors before seeking approval to acquire a bank;
(2) seek and obtain approval from NCUA (and state regulators, if a state-chartered FICU) by demonstrating compliance with a series of six statutory factors;[5]
(3) explain how the credit union intends to obtain credit union membership for the customers of the acquired bank;
(4) have each director of the credit union's board attest that he or she does not have a pecuniary or personal interest in the transaction; and
(5) certify that credit union management explained how the transaction would benefit the current members of the FICU as well as the prospective members.

While a good first step, Proposed Rule should provide further transparency

ICBA generally supported the Proposed Rule, as we believed it would increase the transparency of these transactions – both for the bank customers as well as for the members of the acquiring credit union.[6]

Absent from much of the conversation about these acquisitions, is that credit union members perhaps get the worst end of these deals. Acquisitions of banks drain credit union capital,

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[3] *See* Eisen, Ben, "How Credit Unions Outgrew their Down-Home Reputation," The Wall Street Journal, Dec. 2, 2019; Clozel, Lalita, "Credit Unions Go on Bank Buying Spree: Not-for-profit financial firms have acquired a record number of banks since last year," The Wall Street Journal, Sept. 3, 2019.
[4] *See* Clozel, *Id*.
[5] These factors are: (1)The history, financial condition, and management policies of the credit union; (2)The adequacy of the credit union's reserves; (3)The economic advisability of the transaction; (4)The general character and fitness of the credit union's management; (5)The convenience and needs of the members to be served by the credit union; and (6)How the transaction fits into the credit union's purpose as a cooperative association organized for the purpose of promoting thrift among its members and creating a source of credit for provident or productive purposes.
[6] ICBA Comments on NCUA Proposed Rule, "Combination Transactions with Non-Credit Unions; Credit Union Asset Acquisitions" [RIN 3313-AF10]," *available at* https://www.icba.org/docs/default-source/icba/advocacy-documents/letters-to-regulators/icba-comment-on-cu-acquisitions_june_15.pdf?sfvrsn=8edb2717_0.

capital that rightfully belongs to credit union members. Yet those members have no say in these transactions. Acquisitions of banks also dilute the ownership stake that the acquiring credit union members hold. In cases where the transaction is an out-of-market deal or worse yet, an out-of-state deal, members of a credit union also risk fracturing their common bond relationship with the new "members" of the credit union (i.e., former bank customers).

Questions to Increase Transparency

To protect the interests of the existing credit union members, ICBA recommended that NCUA increase the transparency of these deals by suggesting that FICUs increase communication to their members and disclose the following:

- How much of the FICU's retained earnings is being used to fund the transaction?
- Whether senior management of the acquiring credit union has a pecuniary gain as a result of the transaction?
    - For example, does senior management have a compensation scheme based on the growth of the credit union that would be achieved via the acquisition?
- The purchase price of the bank and what each member would have received if that money were instead paid out to them in the form of a dividend?
- How many customers of the acquiring bank are expected to become members?
- How significantly would the addition of thousands of members (former bank customers) dilute the existing member ownership percentage, and what effect would that have on dividend checks?

Collaboration with Federal and State Banking Agencies

ICBA also recommended that the NCUA collaborate with the Federal Deposit Insurance Corporation ("FDIC") to establish public notice requirements of the proposed merger. The public notices should include whether the credit union has field of membership ("FOM") limitations that might inhibit continued service to the community that was otherwise provided by the acquired bank. For example, individuals that are not "customers," per se, may still have come to rely upon bank services, such as check cashing, remittances, or money orders, which might no longer be available to non-members of the credit union.

Finally, in noting NCUA's long held position generally requiring bank customers to become members of the acquiring federal credit union ("FCU"),[7] ICBA recommended that NCUA collaborate with the Comptroller of the Currency ("OCC") and state-chartering entities to

[7] Bank customers must affirmatively act through an authoritative vote or individual consent.

develop consistent and explicit voting procedures, which should mirror the requirements set out in existing NCUA regulations that govern non-credit union acquisitions of credit unions.[8]

Two and a half years and dozens of bank deals later – even greater need for NCUA to do more

Increased Confusion and Uncertainty Among States

Now, more than 30 months since the rule was proposed, the buying spree has continued unaddressed with a negligible level of transparency. As ICBA noted in its June 2020 comment letter,[9] more explicit and codified regulation is wholly appropriate given the confusion and uncertainty surrounding several deals. That uncertainty has not abated but has only seemed to increase.

For example, while ICBA noted Colorado's objection to the structure of these deals, the number of states that have contested these transactions has increased. Mississippi enacted a law[10] requiring acquired bank assets to remain under the control of an FDIC-insured institution. The Nebraska banking department separately ruled[11] that only chartered financial institutions organized to do business in the state may participate in a cross-industry acquisition or merger — rejecting an attempted bank acquisition by an out-of-state credit union. The Iowa Division of Banking Superintendent concluded that an Iowa state bank may not sell substantially all its assets and liabilities to a credit union.[12]

President Biden's Executive Order on Competition

On July 9, 2021, President Biden issued an Executive Order on Promoting Competition in the American Economy. As a result, the federal banking agencies have adhered to President Biden's Executive Order to closely scrutinize the combination, merger, or acquisition of financial institutions and "adopt a plan … for the revitalization of merger oversight." Part of that Order recognizes that, "Congress frequently has created overlapping agency jurisdiction in…the oversight of mergers," and further, encourages agencies to coordinate their efforts when there is overlapping jurisdiction.[13]

Following the spirit of that Order – reviewing oversight of mergers and coordinating among agencies – the FDIC Board, on which the Comptroller of the Currency and the Director of the

[8] 12 CFR 708a, Subparts A and C.
[9] *Supra* note 6.
[10] Mississippi House Bill 1360, amending Section 81-5-85 of Mississippi.
[11] "Nebraska Banking Department Rejects GreenState's Bid to Buy Premier Bank," CUToday.info (Jan. 1, 2022), *available at* https://www.cutoday.info/site/Fresh-Today/Nebraska-Banking-Department-Rejects-GreenState-s-Bid-To-Buy-Premier-Bank
[12] Strozniak, Peter, "Iowa Regulator Settles Dispute Over Bank's Sale of Branches to Credit Union," Credit Union Times (Mar. 7, 2020) *available at* https://www.cutimes.com/2020/03/07/iowa-regulator-settles-dispute-over-banks-sale-of-branches-to-credit-union/
[13] Exec. Order No. 14036, Section 3, 86 Fed. Reg. 36987 (Jul. 2021).

Consumer Financial Protection Bureau ("CFPB") sit, voted to issue a Request for Information ("RFI") to explore and examine the issue.

ICBA submitted comments in response to that RFI. Portions of that comment reiterate concerns we raised in our June 2020 response to the Agency's NPRM. Relevant to your jurisdiction and the outstanding NPRM, ICBA comments to the NPRM are reproduced here:[14]

> "Under the Bank Merger Act, the FDIC is required to review, among other factors, a convenience and needs factor when evaluating merger applications. The convenience and needs factor requires the FDIC to consider "the extent to which the proposed merger transaction is likely to benefit the general public through higher lending limits, new or expanded services, reduced prices, increased convenience in utilizing the services and facilities of the resulting institution, or other means.[15]
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> "[…] We believe that credit union acquisitions of community banks demand robust scrutiny under the convenience and needs guidelines since credit unions are exempt from CRA, are subject to fewer fair lending exams, and may have field of membership restrictions that may prevent customers of an acquired bank from becoming members of the resulting credit union.[16]
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> "[…] [W]hen a credit union acquires a community bank, it is not possible to evaluate the credit union's record of lending to low and moderate income ("LMI") individuals nor to evaluate its lending to small businesses. This data would be available if credit unions were subject to CRA, but because of their exemption, regulators and the general public have less transparency into their lending practices.[17]
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> "[…] In addition to our concerns with the credit union industry's exemption from CRA, the NCUA conducts far fewer fair lending exams than the FDIC, so the FDIC should place additional scrutiny on an acquiring credit union's fair lending record.[18]

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[14] ICBA Comment Letter in Response to FDIC Request for Information and Comment on Rules, Regulations, Guidance, and Statements of Policy Regarding Bank Merger Transactions, May 31, 2022, *available at https://www.fdic.gov/resources/regulations/federal-register-publications/2022/2022-rfi-rules-regulations-statements-of-policy-regarding-bank-merger-transactions-3064-za31-c-030.pdf.*

[15] *Id.* at 5.

[16] *Id.* at 6.

[17] *Id.*

[18] *Id*.

Ultimately, we would like to raise the same point that we raised with the FDIC when scrutinizing these acquisitions. We have little understanding of what populations are served by credit unions. A 2006 Government Accountability Office ("GAO") report[19] found that the NCUA does not have adequate data to determine the extent of credit union service to underserved populations and should develop such data. Notably, the GAO study also found that credit unions serve a lower proportion of low- and moderate-income households than banks. Eighteen years later, the NCUA has yet to address this GAO recommendation.

Given President Biden's interest in analyzing these deals more closely, ICBA believes that it would be prudent for NCUA to comply with the spirit of the Executive Order and finalize its Proposed Rule. NCUA should fulfill its role in reviewing these acquisitions by assessing the number of LMI consumers – not the number of LMI geographic locations - that would actually be served by these deals. The focus should be on the individuals served by the credit union.

Growth of 'shadow credit unions' casts a larger regulatory blind spot

In addition to the concern noted above regarding the lack of parity on fair lending exams, ICBA is gravely concerned about the lack of federal oversight of nonbanks. Whereas the banking agencies have the authority under the Bank Service Company Act ("BSCA") to supervise and examine banks' third parties, NCUA does not enjoy that same authority. As a result, credit union third parties, such as credit union service organizations ("CUSO") are nonbanks that do not have any federal supervision.

ICBA was pleased to see your shared concern in the unsupervised nature of these CUSOs when you dissented against a recent rulemaking that greatly expanded their powers. In your dissent, you explained that the CUSO rule "will allow CUSOs to engage in payday lending that exceeds rate caps and without other consumer protection guardrails. That action will set back the agency's long-term efforts to create access to credit for provident and productive purposes and runs counter to the spirit of the Federal Credit Union Act." You also added, "there is much to dislike in this rulemaking. It will give CUSOs the ability to become indirect auto lenders and payday lenders without applying consumer protection and prudential guardrails. It will also increase a regulatory blind spot and foster regulatory arbitrage."[20]

[19] GAO, "Greater Transparency Needed on Who Credit Unions Serve and on Senior Executive Compensation Arrangements," GAO-07-29 (Nov. 2006), *available at* https://www.gao.gov/assets/gao-07-29.pdf.
[20] Chairman Harper's dissent to credit union service organization final rule, (delivered Oct. 21, 2021), *available at* https://www.ncua.gov/newsroom/speech/2021/ncua-chairman-todd-m-harper-statement-credit-union-service-organizations-final-rule.

Multi-billion-dollar credit unions target small, locally-based credit unions, too

Credit unions have a tax subsidy in the form of exemption from corporate income tax. While the justification for this tax exemption is contested by some, there should be no question as to whether Congress intended to subsidize the consolidation of locally-based financial institutions, such as community banks. This heightened scrutiny should apply beyond the acquisition of locally-based community banks by multi-billion dollar, out-of-state credit unions, but should also extend to the acquisition of locally-based credit unions by multi-billion dollar, out-of-state credit unions.

If NCUA elects to not finalize its Proposed Rulemaking, ICBA believes that changes in the market and regulatory environment are sufficient to warrant NCUA to act in a manner similar to its fellow agencies, and to issue an RFI seeking more stakeholder input. This RFI should not merely examine multi-billion dollar credit unions buying banks, but also multi-billion dollar credit unions poaching locally-based credit unions. Larger, out-of-market institutions – be they banks or credit unions – displace locally based community financial institutions. A market dominated by large institutions is less competitive, creates systemic risk, and will result in fewer choices for consumers and small businesses, and ultimately less favorable rates and pricing.

Overall, as stated in our initial comment to the Proposed Rule, ICBA appreciates NCUA's willingness to address the growing concern and lack of regulatory clarity governing credit union acquisitions of banks. This proposed regulation is a good first step toward addressing uncertainties and disparities that are currently present, but more should be done to stem further mission erosion and deficient consumer protection of credit union members. If you have any questions or would like additional information, please do not hesitate to contact me at (202) 659- 8111 or michael.emancipator@icba.org.

Sincerely,

/s/

Michael Emancipator
Vice President and Regulatory Counsel