

June 22, 2007

Mary F. Rupp  
Secretary of the Board  
National Credit Union Administration  
1775 Duke Street  
Alexandria, VA 22314-3428

RE: Comments on Proposed Part 708b; Disclosure of Merger-Related  
Compensation

Dear Ms. Rupp:

I am writing on behalf of the National Association of Federal Credit Unions (NAFCU), the only trade association that exclusively represents the interests of our nation's federal credit unions (FCUs), in response to the National Credit Union Administration's (NCUA) request for comment on its proposed rule regarding disclosure of merger-related compensation. The proposed rule would amend Part 708b to require certain disclosures if a proposed merger plan contains a material increase in compensation for board members and/or senior management officials.

NAFCU firmly believes that federal credit unions should have the ability to fully exercise their business judgment to merge should it be in their members' best interest. NAFCU also believes that the integrity of the merger process is imperative. The decision to merge must be made free from undue influences; indeed, transparency is crucial to ensuring that interests of the members are paramount to a merger decision. While we recognize that the proposed rule is designed to ensure that executive self-dealing will not be a motivating factor in merger deliberations, NAFCU is extremely concerned that the proposal may have a chilling effect on the right of federal credit unions to make reasonable business decisions to benefit their members without achieving this goal.

Further, we do not believe that the agency has provided sufficient justification for why this regulation is necessary. The agency has expressed concerns "that prospective merger partners *may* seek to improperly influence" merger deliberations; however, NCUA does not cite any specific examples or cases of abuses by credit union executives. Accordingly, NAFCU strongly urges the agency to reconsider the proposal. However, should NCUA decide to move forward with the proposed rule, NAFCU provides the following specific comments.



*Scope of Proposed Rule*

Should the proposal be implemented, NAFCU believes that the rule should apply only to directors and senior management officials. NCUA has expressed concern that compensation packages could affect the decision-making process regarding merger proposals; the directors and senior management officials are the only individuals with authority over merger decisions and compensation.

NAFCU believes that retention agreements and bonuses for managerial and technical employees should not be subject to this rule; and, further, these agreements may be necessary to maintain continuity throughout the merger and account for differences in compensation plans between the credit unions.

**NCUA's Proposed Threshold Level**

The proposed rule defines a material increase as an increase of 15% or \$10,000, whichever is greater. If the merger-related compensation package meets or exceeds this threshold, the merger plan filed with NCUA must include a description of the compensation arrangement. Further, the merging federal credit union must provide notice of this material increase to its members prior to voting.

*Proposed Threshold Level*

NAFCU is concerned that a threshold level set too low could have an unanticipated impact of negating the benefit to the members. A low threshold would be triggered on a high majority of mergers thereby diminishing the meaning and importance of the disclosure as it could be seen as a customary part of the merger procedure rather than notice of an extraordinary material increase.

NAFCU recognizes the importance of providing transparency to credit union members throughout the merger process as well as the ability of directors and senior management officials to use their business judgment in determining the best interests of their members. NAFCU believes the proposed threshold would cover the large majority of potential mergers rather than, as the proposed rule aims, focusing on the few "material" increases where self-dealing is perceived to be a threat.

Given the current state of the merger field, the proposed rule's potential to capture a larger number of prospective mergers leads NAFCU to recommend that, should the proposal be finalized, the threshold level be raised in order to require notification of a material increase only on merger proposals where there is the true threat that self-dealing could impact the directors' or senior management officials' decision.

Alternatively, NAFCU recommends that the threshold level include only a percentage increase threshold trigger, especially given the proposed rule's language of "whichever is



greater”<sup>1</sup> to determine which trigger is used. NAFCU believes inclusion of the dollar amount limit has a potential for confusion without adding benefit to the members.

#### *Reliance on OTS Regulation to Set the Threshold Level*

NCUA relied on the Office of Thrift Supervision’s (OTS) regulation regarding Compensation to Officers in order to set the proposed threshold level. 12 C.F.R. § 563.22(d)(1)(vi)(C). Although NAFCU recognizes the similarities between the OTS regulation and the proposed rule, NAFCU is hesitant to accept reliance on the OTS threshold level without sufficient justification explaining why this threshold is appropriate for credit union mergers given the *current* market for senior management officials.

First, the OTS threshold level was introduced in 1994 and has not been adjusted despite a changing market environment. See 59 Fed. Reg. 44624, 44625 (August 30, 1994). The current labor market for senior management officials is very different than the market in 1994, and the proposed rule should recognize these differences. NAFCU does not believe reliance on a threshold level established 13 years prior to this proposed rule sufficiently incorporates factors present in the current business environment.

Second, when OTS promulgated its regulation it did not provide any rationale for the threshold levels it adopted and NCUA, in its proposed rule, has not provided any indication why this level is appropriate. The only explanation for inclusion of the “Compensation to Officers” section in the OTS regulation is provided in the section itself. See 12 C.F.R. § 563.22(d)(1)(vi)(C) and Preamble to Final Rule at 59 Fed. Reg. 44620. However, neither the preamble to the rule nor the specific section explains why the threshold level of 15% or \$10,000 is to be preferred over another threshold level.

NAFCU believes that the proposed threshold is arbitrary. If a final rule is implemented, NCUA should use current data and statistical information to determine an appropriate threshold which would be triggered only by mergers with significant compensation increases outside the current market conditions. Further, NAFCU recommends that this threshold be periodically examined.

#### *Sufficiency of Justification*

NAFCU would support the ability of the merging credit unions to justify and support a material increase in compensation. NAFCU prefers this approach to the OTS regulation which creates a presumption of unreasonableness for a 15% or \$10,000 increase. Given the unique circumstances of each merger situation, NAFCU is strongly opposed to the establishment of a presumptive standard of unreasonableness.

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<sup>1</sup> As proposed, the dollar amount trigger would only be applicable when the board member or senior management official earned *less than* \$66,667 in total compensation and received a \$10,000 or greater increase. In all other situations the percentage threshold would apply; thus, the dollar amount will not be the primary threshold limit and could tend to distract and confuse members and the disclosing credit union.



## **Requests for Clarifications or Modifications**

### *Definition of Compensation*

NAFCU requests clarification on what would constitute indirect compensation. The proposed rule could be construed as covering certain expenses (i.e., moving expenses for relocating to a different branch or office) that would not be considered compensation in the ordinary course of business. If the proposal is adopted, NAFCU recommends that an exception be provided for reimbursement of ordinary expenses incurred to benefit the credit union and not the individual senior management official or director.

### *Location of Inspection of the Disclosure Files*

The proposed rule requires inspection of the compensation disclosure to be at “an office” of the credit union during business hours. NCUA has indicated that credit unions and their members are expected to be able to work out reasonable arrangements for allowing viewing to occur at local branches of the credit union in addition to the main office. NAFCU believes that any inspection of the compensation arrangement should take place at the head office of the credit union.

### *Member Inspection of the Compensation Disclosure*

The proposed rule allows inspection of the disclosure relating to merger-related financial arrangements but does not allow copying and/or removing of the records. NAFCU strongly agrees with the prohibition on copying and removing credit union records from the inspection area. The right to inspect information regarding the compensation arrangement is to ensure transparency for members, not the public. Once sensitive proprietary information leaves the control of the credit union, it is at perpetual risk of mass distribution and/or misuse by unauthorized third parties. As such, only inspection should be permitted.

## **Additional Comments**

NAFCU urges the agency to consider the overall issue of executive compensation carefully and deliberatively. Recently, transparency of executive compensation of non-profit and tax-exempt executives has been a major concern on Capitol Hill. NCUA’s Outreach Task Force is currently considering this issue. NAFCU believes it is prudent that NCUA refrain from addressing this larger issue on a piecemeal basis via separate rulemakings. If based on the recommendation of the Outreach Task Force and other considerations the NCUA Board determines that greater transparency is needed, the method and process for collecting and disclosing executive compensation should be dealt with in one comprehensive rulemaking. Furthermore, we urge NCUA to provide ample advance opportunity for public comment before promulgating any proposed rule on executive compensation.



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NAFCU appreciates the opportunity to share its views on this proposed rulemaking. Should you have any questions or require additional information please call me or Pamela Yu, NAFCU's Associate Director of Regulatory Affairs, at (703) 522-4770 or (800) 336-4644 ext. 218.

Sincerely,



B. Dan Berger  
Senior Vice President of Government Affairs

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