

**LETTER OPINION
2020-L-10**

December 31, 2020

Ms. Lise Kruse
Department of Financial Institutions
2000 Schafer St Suite G
Bismarck, ND 58501-1204

Dear Ms. Kruse:

Thank you for requesting my opinion regarding the State Credit Union Board's (Board) authority over certain state credit union transactions. Specifically, you inquired: 1) whether the Board may authorize a credit union to purchase a bank; 2) whether the purchasing credit union may provide services to acquired former bank customers who reside outside the purchasing credit union's field of membership; 3) whether the Board may expand the purchasing credit union's field of membership to include an additional 75 miles around the purchased bank's former home office; 4) whether the Board may approve a merger of a credit union into more than one other credit union, effectively splitting the former credit union's operations and field of membership between the surviving credit unions, when a state credit union is conserved by the Department of Financial Institutions, or voluntarily when the membership of a going concern credit union so elects. ; and 5) whether the Board may authorize the sale of a credit union to a bank.

In my opinion: 1) the Board may authorize a state credit union's acquisition of certain bank assets and liabilities, provided such acquisition is permissible under the credit union's charter and applicable state and federal law; 2) a purchasing credit union may not provide services to acquired former bank customers who reside outside the purchasing credit union's field of membership; 3) the Board may expand the purchasing credit union's field of membership to include an additional 75 miles around the purchased bank's former home office; 4) the Board may approve a credit union merger into more than one continuing credit union; and 5) the Board may authorize the sale of a credit union to a bank.

ANALYSIS

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North Dakota Century Code Title 6 provides the powers afforded to the State Credit Union Board and to state credit unions. The Board's powers generally involve "mak[ing] and enforc[ing] such orders as are necessary or proper to protect the public and the depositors or creditors" of credit unions.¹ One of the enumerated state credit union powers, "[s]ubject to authorization by the state credit union board, acting by order or rule, [is that] a state credit union has the same powers as a federal credit union and may engage in any activity in which a credit union could engage if the credit union were federally chartered."²

Generally, investments available to state and federal credit unions are more limited than those available to banks and are prescribed by relevant state and federal law.³ Title 12 of the United States Code provides a federal credit union's powers, which include "to invest its funds... (D) in shares or accounts of savings and loan associations or mutual savings banks, the accounts of which are insured by the Federal Deposit Insurance Corporation; (E) in obligations issued by banks for cooperatives, Federal land banks, Federal intermediate credit banks, Federal home loan banks..." and others.⁴ Additionally, the National Credit Union Administration (NCUA) regulates federally chartered credit unions and addresses a federal credit union's acquisition of a bank's assets and liabilities in 12 C.F.R. § 741.8, which provides:

Any credit union insured by the National Credit Union Share Insurance Fund (NCUSIF) must receive approval from the NCUA before purchasing loans or assuming an assignment of deposits, shares, or liabilities from: ...
(2) Any other financial-type institution (including depository institutions, mortgage banks, consumer finance companies, insurance companies, loan brokers, and other loan sellers or liability traders ...⁵

Stated otherwise, subject to the requirements of 12 U.S. C. § 1757 and NCUA approval, a federal credit union may acquire certain assets and liabilities of certain banks. Consequently, subject to the provisions of its charter and State Credit Union Board

¹ N.D.C.C. § 6-01-04.

² N.D.C.C. § 6-06-06(11).

³ *See generally* N.D.A.C. §§ 13-03-22-02 through 13-03-22-05.

⁴ 12 U.S.C. § 1757(7) (2011).

⁵ Nat'l Credit Union Admin. Regulation 12 C.F.R. § 741.8 (2019).

approval, a state credit union, which by state law has the same powers as a federal credit union, may acquire certain assets and liabilities of certain banks.⁶

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Your second question was whether a purchasing credit union may provide services to acquired bank customers outside the credit union's field of membership. A state credit union's membership is "limited to groups having a common bond of occupation or association or to groups residing within a geographic area that does not extend beyond a seventy-five-mile [120.70-kilometer] radius of the home office of the credit union."⁷ The physical locations of members and branch offices of credit unions with common bonds of occupation or association, also known as "closed charter" credit unions, are not constrained by geographic boundaries.⁸ Conversely, members and branch offices of "open charter" credit unions must be located within the geographic boundaries authorized by the charter, and, in any event, within a 75 mile radius of the credit union's home office.⁹ Therefore, similar to acquired former "merging credit union"¹⁰ members, acquired former bank customers of a purchasing credit union must meet the membership requirements of the purchasing credit union's charter in order to receive services from the purchasing credit union.¹¹ If the purchasing credit union is a closed charter credit union, then the acquired bank customers must share the common bond of occupation or association provided in the charter.¹² If an open charter credit union, the acquired bank customers must reside within the geographic area of the purchasing credit union's charter.¹³

⁶ The NCUA proposed a rule on January 30, 2020 that "will clarify and make transparent the procedures and requirements currently in place related to combination transactions. Combination transactions include those where a federally insured credit union (FICU) proposes to assume liabilities from a non-credit union, including a bank. They also include a FICU's merger or consolidation with a non-credit union entity. Further, the proposed rule clarifies the scope of section 741.8 of the NCUA's regulations, which currently requires the NCUA to grant approval before a FICU may purchase loans or assume an assignment of deposits, shares, or liabilities from any institution that is not insured by the National Credit Union Share Insurance Fund (NCUSIF)." 85 Fed. Reg. 5,336 (Jan. 30, 2020) (to be codified at 12 C.F.R. 708). The comment period closed on March 30, 2020, and the rule is pending. If ultimately promulgated, the new rule's framework will illuminate this area of law, at least at the federal level.

⁷ N.D.C.C. § 6-06-07(2).

⁸ See generally N.D.A.C. ch. 13-03-15.

⁹ *Id.*

¹⁰ "Merging credit union" means the credit union whose charter ceases to exist upon merging with the continuing credit union. N.D.A.C. § 13-03-05-00.1(2).

¹¹ N.D.C.C. § 6-06-07(2).

¹² *Id.*

¹³ *Id.*

The next question concerns expansion of boundaries. When an open charter credit union establishes a branch office within its field of membership, to better serve its membership, that establishment does not expand the credit union's geographic boundaries.¹⁴ Should an open charter credit union merge with another existing credit union, however, the "continuing credit union"¹⁵ may, subject to approval of the state credit union board, expand its boundaries by applying to assume the field of membership of the "merging credit union,"¹⁶ pursuant to the requirements of N.D.A.C. ch. 13-03-14.¹⁷ In short, branching cannot expand boundaries but merging may. State law is silent on the boundary consequences of a state credit union's acquisition of a bank's assets and liabilities. The question is whether acquiring a bank is more like establishing a branch office or merging a credit union. The latter seems more likely, because acquiring a bank and merging a credit union both involve joining existing offices. Conversely, branching involves establishing a new office. Thus, if accomplished in accordance with the requirements of N.D.A.C. ch. 13-03-14, it is my opinion that a purchasing credit union may apply to expand its field of membership around an acquired bank's home office.

I now consider approval of a credit union merger into more than one continuing credit union. The State Credit Union Board is authorized to do all things necessary to continue service to a community affected by a failing credit union, including any mergers or acquisitions under the relevant chapters.¹⁸ Additionally, the board has the authority to waive any application requirements or considerations for approval otherwise mandated under the merger rules.¹⁹ If there is more than one potential merger partner for the failing institution, the board may give consideration to the credit union with a more similar field of membership or in closer proximity to the failing institution.²⁰ Moreover, the Board, exercising its discretion, may waive the provisions of the field of membership rules when such waiver is in the best interests of a failing institution.²¹ In light of the broad powers afforded to the board when conserving a failing credit union, it is my

¹⁴ N.D.A.C. § 13-03-15-03(2).

¹⁵ "Continuing credit union" means the credit union whose charter continues upon merging with the merging credit union. N.D.A.C. § 13-03-05-00.1(1).

¹⁶ "Merging credit union" means the credit union whose charter ceases to exist upon merging with the continuing credit union. N.D.A.C. § 13-03-05-00.1(2).

¹⁷ N.D.A.C. § 13-03-05-01(6).

¹⁸ N.D.C.C. § 6-06-08.2.

¹⁹ N.D.A.C. § 13-03-05-04.

²⁰ *Id.*

²¹ N.D.A.C. § 13-03-14-04.

opinion the board may split operations into more than one surviving credit union. Regarding approval of a credit union's voluntary merger into more than one other credit union, it is difficult to opine unequivocally because state law is silent on multiple credit union mergers. Nonetheless, provided the merger is consistent with the participating credit unions' charter provisions and conducted in accordance with the N.D.A.C. ch. 13-03-05 merger requirements, it is my opinion state law does not prohibit a credit union's merger into more than one other credit union.²²

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Finally, you ask about the sale of a credit union to a bank, whether voluntary or as an option when conserving a credit union. State and federal law are silent on the sale of a credit union to a bank. State law provides processes for merger of a credit union into another credit union, voluntary liquidation of a credit union, merger of a bank into another bank, and dissolution of a bank.²³ Each of the aforementioned processes provide criteria for state credit union board or state banking board consideration. Provided a bank's purchase of a credit union is consistent with the purchasing bank's and merging credit union's respective charter provisions, and the relevant state boards consider the criteria provided in the bank merger provisions²⁴ and credit union merger provisions,²⁵ it is my opinion state law does not prohibit a bank's purchase of a credit union, regardless of whether the purchase is voluntary or a remedy for conserving a credit union.

Sincerely,

Wayne Stenehjem
Attorney General

This opinion is issued pursuant to N.D.C.C. § 54-12-01. It governs the actions of public officials until such time as the question presented is decided by the courts.²⁶

²² N.D.A.C. ch. 13-03-05.

²³ See N.D.C.C. ch. 6-06.1, N.D.C.C. ch. 6-07, N.D.A.C. ch. 13-02-13, N.D.A.C. ch. 13-03-05.

²⁴ N.D.A.C. § 13-02-13-04.

²⁵ N.D.A.C. § 13-03-05-04.

²⁶ See *State ex rel. Johnson v. Baker*, 21 N.W.2d 355 (N.D. 1946).