

1 **7535-01-U**

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3 **NATIONAL CREDIT UNION ADMINISTRATION**

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5 **12 CFR Part 712**

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7 **RIN 3133-AE95**

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9 **Credit Union Service Organizations (CUSOs)**

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11 **AGENCY:** National Credit Union Administration (NCUA).

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13 **ACTION:** Final rule.

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15 **SUMMARY:** The NCUA Board (Board) is issuing a final rule that amends the NCUA's credit  
16 union service organization (CUSO) regulation. The final rule accomplishes two objectives:  
17 expanding the list of permissible activities and services for CUSOs to include the origination of  
18 any type of loan that a Federal credit union (FCU) may originate; and granting the Board  
19 additional flexibility to approve permissible activities and services.

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21 **DATES:** The final rule is effective [**INSERT DATE 30 DAYS AFTER DATE OF**  
22 **PUBLICATION IN THE FEDERAL REGISTER**].

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26 **FOR FURTHER INFORMATION CONTACT:** *Policy and Analysis:* Office of Examination  
27 and Insurance, (703) 518-6360; *Legal:* Office of General Counsel, (703) 518-6540; or by mail at  
28 National Credit Union Administration, 1775 Duke Street, Alexandria, VA 22314.

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30 **SUPPLEMENTARY INFORMATION:**

31

32 **I. Introduction**

33 **Legal Authority and Background**

34 The Board is issuing this rule pursuant to its authority under the Federal Credit Union Act  
35 (FCU Act).<sup>1</sup> Under the FCU Act, the NCUA is the chartering and supervisory authority for FCUs  
36 and the federal supervisory authority for federally insured credit unions (FICUs). The FCU Act  
37 grants the NCUA a broad mandate to issue regulations governing both FCUs and FICUs.

38 Section 120 of the FCU Act is a general grant of regulatory authority and authorizes the Board to  
39 prescribe regulations for the administration of the FCU Act.<sup>2</sup> Section 209 of the FCU Act is a  
40 plenary grant of regulatory authority to the NCUA to issue regulations necessary or appropriate  
41 to carry out its role as share insurer for all FICUs.<sup>3</sup> Accordingly, the FCU Act grants the Board  
42 broad rulemaking authority to ensure that the credit union industry and the National Credit Union  
43 Share Insurance Fund (NCUSIF) remain safe and sound.

44 Under the FCU Act, FCUs have the authority to lend up to one percent of their paid-in  
45 and unimpaired capital and surplus, and to invest an equivalent amount, in CUSOs.<sup>4</sup> The NCUA

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<sup>1</sup> 12 U.S.C. 1751 *et seq.*

<sup>2</sup> 12 U.S.C. 1766(a).

<sup>3</sup> 12 U.S.C. 1789.

<sup>4</sup> 12 U.S.C. 1757.

46 regulates FCUs' lending to, and investment in, CUSOs in part 712 of its regulations (CUSO  
47 rule).<sup>5</sup> In general, a CUSO is an organization: (1) in which a FICU has an ownership interest or  
48 to which a FICU has extended a loan; (2) is engaged primarily in providing products and services  
49 to credit unions, their membership, or the membership of credit unions contracting with the  
50 CUSO; and (3) whose business relates to the routine daily operations of the credit unions it  
51 serves.<sup>6</sup> The CUSO rule provides a list of preapproved activities and services related to the  
52 routine daily operations of credit unions.<sup>7</sup>

53 The list of preapproved activities and services in the CUSO rule has not been  
54 substantively revised since 2008.<sup>8</sup> The 2008 final rule added two new categories of permissible  
55 CUSO activities: (1) credit card loan origination and (2) payroll processing services. The 2008  
56 final rule also added new examples of permissible CUSO activities and clarified that FCUs may  
57 invest in, and loan to, CUSOs that buy and sell participations in loans they are authorized to  
58 originate. In the 2008 final rule, commenters requested that FCUs be permitted to lend to or  
59 invest in CUSOs involved in broader types of lending; specifically, car loans, including direct  
60 lending and the purchase of retail installment sales contracts from vehicle dealerships, and  
61 payday lending. The NCUA, however, declined to provide such authority at that time.<sup>9</sup>

## 62 II. Proposed Rule

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<sup>5</sup> 12 CFR part 712. All sections of part 712 apply to FCUs. Sections 712.2(d)(2)(ii), 712.3(d), 712.4, and 712.11(b) and (c) apply to federally insured, state-chartered credit unions (FISCUs), as provided in § 741.222 of the chapter. FISCUs must follow the law in the state in which they are chartered with respect to the sections in part 712 that only apply to FCUs. Corporate credit union CUSOs are subject to part 704. Any amendments to part 704 would occur through a separate rulemaking and are not included in this final rule.

<sup>6</sup> See 12 CFR 712.1(d), 712.3(b), and 712.5.

<sup>7</sup> 12 CFR 712.5.

<sup>8</sup> 73 FR 79307 (Dec. 29, 2008).

<sup>9</sup> The NCUA's rationale for not extending CUSO lending authority more broadly is discussed in detail in Section III, Final Rule.

63 At its January 14, 2021 meeting, the Board issued the proposed rule to amend the  
64 NCUA’s CUSO regulation.<sup>10</sup> The proposed rule would accomplish two objectives: Expanding  
65 the list of permissible activities and services for CUSOs that FCUs may lend to or invest in to  
66 include origination of any type of loan that an FCU may originate; and granting the Board  
67 additional flexibility to approve permissible activities and services. The NCUA also sought  
68 comment on broadening general FCU investment authority in CUSOs based on the FCU Act’s  
69 provision that authorizes FCUs to invest in organizations providing services associated with the  
70 routine operations of credit unions, which is codified in a separate provision from the authority  
71 for FCUs to lend to “credit union organizations.” The proposed rule provided for a 30-day  
72 comment period that closed on March 29, 2021. To allow interested persons more time to  
73 consider and submit comments, the Board extended the comment period for an additional 30  
74 days. The extended comment period closed on April 30, 2021.<sup>11</sup>

75 The Board received over 1,000 comments on the proposed rule. Comments were received  
76 from credit unions, both state and federal, CUSOs, credit union leagues and trade associations,  
77 banking trade organizations, individuals, consumer organizations, and an association of state  
78 credit union supervisors. In general, consumer organizations, banking trade organizations, and  
79 individuals who participated in a form letter writing campaign were opposed to the proposed  
80 rule. Credit unions were not unanimous, with some credit unions supporting the rule and others  
81 opposing it. CUSOs, credit union leagues, and trade organizations were generally in favor of the  
82 proposed rule.

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<sup>10</sup> 86 FR 11645 (Feb. 26, 2001).

<sup>11</sup> 86 FR 16679 (Mar. 31, 2021).

84 **III. Final Rule**

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86 The final rule adopts the proposed rule without any substantive change. Under the final  
87 rule, therefore, CUSOs are permitted to originate any type of loan that an FCU may originate and  
88 grants the Board additional flexibility to approve permissible CUSO activities and services  
89 outside of notice and comment rulemaking.<sup>12</sup> The final rule and a discussion of the Board’s  
90 responses to the comments are discussed in detail subsequently. First, however, the Board  
91 explains the general principles and approach it has taken to examine and reconcile the competing  
92 viewpoints of commenters as well as past statements by the NCUA and individual Board  
93 Members on risks relating to CUSO activity.

94 As detailed in response to commenters’ different points, which are grouped by subject  
95 matter in the following sections, the Board has re-examined several key statutory and policy  
96 principles to engage in a thorough, balanced review of the comments. These points include the  
97 following:

- 98 1. The Board’s views regarding safety and soundness and risk to the NCUSIF. On this  
99 critical issue, the Board has considered key reference points, including the statutory  
100 definition of a “material loss” to the NCUSIF and requirements for NCUA insurance of  
101 member accounts. These authorities do not define all losses as material or involving  
102 undue risk to the NCUSIF. This preamble elaborates on these reference points in  
103 considering the degree of risk the rule may pose.

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<sup>12</sup> Originate means to fund or make loans. This is separate from the already permissible activity for FCUs to lend to or invest in CUSOs that engage in loan support services that include loan processing and servicing under § 712.5(j).

104 2. The need to balance predicted risks against predicted benefits. Many commenters  
105 opposing the proposed rule made, for the most part, generalized predictions of harm to  
106 the NCUSIF, to consumers, or to the reputation of credit unions. While the Board  
107 recognizes the need to consider these concerns, it also finds that they do not account for  
108 the potential benefits that the regulatory changes may bring to FCUs by enhancing  
109 efficiency and supporting innovation, and to consumers by expanding lending options  
110 and access through credit union-affiliated lenders. The Board also finds this expansion in  
111 FCU authority appropriate for parity purposes because the Board currently does not  
112 restrict the activity of CUSOs in which only FISCUs lend or invest.

113 3. Some of the policy concerns invoked by commenters, as well as the Board at times in the  
114 past, have been both qualified and conditional. Most notably, some commenters and the  
115 Board in past CUSO rulemakings have considered the potential for FCUs lending to or  
116 investing in CUSOs with expanded authorities to dilute the FCU common bond and  
117 introduce more competition to small credit unions. The Board continues to recognize that  
118 these issues raise concerns for some parties, but has found that neither rests on clear  
119 statutory authority in the FCU Act. That is to say, nothing in the FCU Act binds CUSOs  
120 to FCU field of membership common bond provisions, and the Board itself has invoked  
121 this concern only conditionally in past rulemakings, allowing it to yield to the needs of  
122 credit unions to avail themselves of expanded CUSO lending activity. Further, the FCU  
123 Act does not require a CUSO to serve credit unions and members exclusively, but rather  
124 primarily, which balances a focus on credit union members while expressly authorizing  
125 CUSOs to serve others. Similarly, the Board does not believe it is prudent to allow  
126 concerns over legitimate competition in the marketplace to restrain regulatory changes  
127 that may benefit many credit unions and the system as a whole. Accordingly, to the

128 extent these factors are appropriate regulatory considerations, the Board believes they  
129 must yield to the benefits of expanded FCU authority about CUSO activity and other  
130 factors.

131 4. Application of the Board’s judgment to reconcile differing viewpoints. Commenters  
132 opposing the rule raised several concerns, and in a few cases, cited past examples or  
133 incidents. But the Board does not believe that commenters opposing the rule provided  
134 substantial evidence to support their predictions that adopting the proposed rule would  
135 result in various harm. Commenters supporting the rule provided reasons they believe the  
136 rule would be beneficial. In considering these competing viewpoints, the vast majority of  
137 which are general policy views, the Board has applied its own judgment to make the best  
138 conclusions it can about the potential benefits and risks of the proposed rule. Throughout  
139 this review, the Board has concluded that limiting expansion and innovation indefinitely  
140 based only on generalized concerns would result in regulatory stagnation, which may  
141 harm the credit union system in the long term.

142 After considering the mixed viewpoints, the Board has determined that the overall weight  
143 of the factors in the record favor moving forward to enhance opportunities for FCUs CUSOs to  
144 engage in all types of lending permitted for FCUs.

145  
146 **Expansion of Permissible FCU Lending and Investment in CUSOs Engaged in Lending**  
147 **Activity**

148 The Board has reconsidered its 2008 position on permitting FCUs to invest in or lend to  
149 CUSOs that engage in all types of lending. The Board now believes that permitting FCUs to

150 invest in or lend to CUSOs that originate any type of loan that an FCU may originate may better  
151 enable FCUs to compete effectively in today's marketplace and better serve their members.

152 As discussed in the preceding section, the FCU Act permits an FCU to lend to or invest in  
153 a CUSO that provides services associated with the routine and daily operations of credit unions.  
154 The NCUA has interpreted this statutory authority broadly to permit an FCU to lend to, and  
155 invest in, a CUSO that does most of the same activities and services permissible for an FCU.<sup>13</sup>  
156 To date, however, FCUs have not been permitted to invest in, or lend to, CUSOs that originate  
157 certain kinds of loans.<sup>14</sup>

158 As discussed in the proposed rule, the NCUA historically has been reluctant to grant  
159 FCUs authority to invest in or lend to CUSOs with broad lending authority. First, the NCUA has  
160 been hesitant because CUSOs may serve those who are not members of a member credit union .  
161 The NCUA has been concerned about FCUs benefiting from CUSO profits generated from non-  
162 members.<sup>15</sup> Second, the NCUA has also expressed concern that if member loans were being  
163 made by CUSOs, the NCUA would have a duty to examine such loans and that would  
164 necessitate greater NCUA examination authority over CUSOs.<sup>16</sup> Finally, the NCUA has also had  
165 concerns that permitting CUSOs to engage in a core credit union function could negatively affect  
166 affiliated credit union services.<sup>17</sup>

167 Due to these concerns, the NCUA has previously found compelling justification for  
168 permitting FCUs to invest in or lend to CUSOs engaged in only four types of loans: (1)

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<sup>13</sup> 12 CFR 712.5.

<sup>14</sup> *See*, 62 FR 11779 (Mar. 13, 1997).

<sup>15</sup> *Id.*

<sup>16</sup> *Id.*

<sup>17</sup> 68 FR 16450 (Apr. 4, 2003).



169 business; (2) consumer mortgage; (3) student; and (4) credit cards.<sup>18</sup> In permitting these types of  
170 lending, the NCUA has considered factors specific to each type of lending, such as whether these  
171 activities require specialized staff or economies of scale, and, as discussed subsequently, whether  
172 loan aggregation was prevalent in the marketplace for the particular type of lending.

173         Upon reexamination, the Board now believes it is appropriate to permit FCUs to invest  
174 in, or lend to, CUSOs that engage in all types of lending permitted for FCUs. As discussed  
175 previously, the Board received extensive comments on the proposed rule. The commenters,  
176 including credit union commenters, were split on whether permitting CUSOs to originate any  
177 loan that an FCU can originate would be ultimately beneficial to credit unions, particularly small  
178 credit unions, or detrimental to the long-run interests of credit unions. Comments are discussed  
179 in detail in the following paragraphs.

180

181 *Safety and Soundness*

182

183         Some commenters who supported the proposed rule generally stated that the rule would  
184 not cause safety and soundness concerns and that the current CUSO regulatory framework  
185 sufficiently protects FCUs and the NCUSIF. Commenters pointed to several existing authorities  
186 to manage the potential risk from CUSO lending. First, commenters noted that under the current  
187 regulation, the NCUA may at any time, based upon supervisory, legal, or safety and soundness  
188 reasons, limit any CUSO activities or services, or refuse to permit any CUSO activities or  
189 services. Commenters further stated that the NCUA can exert pressure on FCUs if CUSOs  
190 engaged in unsafe or unsound behavior. Second, an FCU may invest in, loan to, and/or contract

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<sup>18</sup> *Id.* See also, 73 FR 79307 (Dec. 29, 2008).

191 with only those CUSOs that are sufficiently bonded or insured for their specific operations and  
192 engaged in preapproved activities and services. Third, FCUs are bound by an aggregate limit of  
193 loans and investments in CUSOs to two percent of paid-in and unimpaired capital and surplus.  
194 Fourth, FCUs (as well as FISCUs) are required to include provisions in contracts with CUSOs in  
195 which they lend or invest to give the NCUA complete access to any books and records of the  
196 CUSO and the ability to review the CUSO's internal controls. Finally, other commenters noted  
197 that CUSOs are subject to state lending laws and federal consumer protection laws. In addition,  
198 some CUSOs may be subject to supervision at the state level by way of state licensing  
199 requirements or third-party oversight authority.

200 Some commenters discussed that CUSOs currently have extensive lending authority and  
201 there have not been any extraordinary losses.

202 A few commenters also discussed that the bigger safety and soundness risk may arise  
203 from not adopting the proposed rule as it permits FCUs to remain competitive and build capital.  
204 Commenters also discussed that FCUs could be subject to reputational harm if they cannot  
205 provide members the necessary services.

206 In response to a question in the proposed rule about potential safety and soundness  
207 conditions, one commenter urged caution on the potential to apply risk retention requirements to  
208 participation loans originated by wholly owned CUSOs. The commenter stated that, since the  
209 balance sheets of the CUSO and its parent are consolidated, the participation becomes effectively  
210 nonexistent, so a risk retention requirement becomes unnecessary.<sup>19</sup>

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<sup>19</sup> Note that a CUSO's balance sheet would be consolidated with a credit union's if required by applicable accounting principles. Generally, the NCUA requires credit unions to consolidate a CUSO's balance sheet with the credit union's when the credit union wholly owns or owns a controlling interest in the CUSO. See NCUA Call Report Form 5300 Instructions, Statement of Financial Condition, at 2, effective Sept. 2021, available at <https://www.ncua.gov/files/publications/regulations/call-report-instructions-september-2021.pdf>.

211 In contrast, some of the commenters who opposed the proposed rule believed that the  
212 proposal would have substantial unintended consequences and affect the safety and soundness of  
213 FCUs and the NCUSIF. Commenters primarily focused on the NCUA's lack of examination or  
214 oversight authority and the systemic risk that arises from a few CUSOs providing services to a  
215 large portion of credit unions.

216 Commenters generally discussed that the NCUA has no examination or oversight  
217 authority over CUSOs. One commenter noted that several federal agencies, including the  
218 Government Accountability Office and the Financial Stability Oversight Council, have  
219 recommended that the NCUA be given supervisory oversight of CUSOs and that the Chairs of  
220 every NCUA Board over the past decade, as well as the NCUA's Inspector General, have called  
221 for vendor authority. These commenters believed expanding CUSO lending authority at the same  
222 time the NCUA has acknowledged an existing risk related to CUSOs would exacerbate the  
223 current problems that arise from the inability to supervise CUSOs. One commenter questioned  
224 why the NCUA would propose providing CUSOs with all the powers of FCUs, but with none of  
225 the commensurate prudential supervision or consumer safeguards to mitigate the risk. One  
226 commenter recommended a hybrid approach that would enable the NCUA to review a CUSO's  
227 loan origination activities, but not permit a complete NCUA examination.

228 The Board does not believe that the limited expansion of FCUs' ability to lend to, or  
229 invest in, CUSOs engaged in lending permissible for an FCU contradicts its long-stated need for  
230 additional examination and enforcement authority of CUSOs and other third-party vendors.<sup>20</sup> It  
231 is the Board's continuing policy to seek third-party vendor authority for the agency from

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<sup>20</sup> The Board also notes that its request for third-party vendor authority is more expansive than examination and enforcement authority over CUSOs. The term third-party vendors include any third-party service provider regardless of credit union ownership, a larger category of institutions than just CUSOs. The NCUA currently has very limited oversight of non-CUSO third-party vendors.

232 Congress. The Board does not believe this rule undermines its request for such authority as the  
233 rule provides only a modest expansion of FCU authority to lend to, and invest in, CUSOs and  
234 results in only an incremental amount of additional risk to the NCUSIF.

235 The Board also believes there are several factors that may mitigate the risk to the  
236 NCUSIF, though the Board acknowledges that despite these mitigating factors CUSOs have  
237 caused more than \$500 million in losses to FICUs since 2008. First, as commenters in favor of  
238 the rule discussed, even though the NCUA does not have examination or enforcement authority  
239 over CUSOs, FCUs only have the authority to lend up to one percent of their paid-in and  
240 unimpaired capital and surplus, and to invest an equivalent amount, in total to CUSOs. These  
241 investment and lending limits mitigate risk to the NCUSIF. Additionally, § 712.3(d) requires all  
242 FICUs that obtain an ownership interest in a CUSO to ensure by contract that the NCUA has  
243 access to the CUSO's books and records and other information and reports. CUSOs are also  
244 subject to state lending laws and federal consumer protection laws. These and the other  
245 regulatory requirements discussed above mitigate the potential risk to the NCUSIF due to the  
246 modest expansion of FCU authority to lend to and invest in CUSOs engaged in all lending  
247 activities.

248 The Board also notes that it has broad investigative subpoena authority that agency staff  
249 can use to obtain records and testimony in certain extraordinary circumstances.<sup>21</sup> This broad  
250 authority is not limited to credit unions and may permit NCUA staff to obtain information from  
251 third parties in connection with the agency's examinations of credit unions.<sup>22</sup> The Board does  
252 not currently use this authority broadly to obtain information from CUSOs, but the Board could

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<sup>21</sup> 12 U.S.C 1784(a), 1786(p).

<sup>22</sup> 12 U.S.C. 1784(a); *see United States v. Inst. for Coll. Access & Success*, 27 F. Supp. 3d 106, 112 (D.D.C. 2014) (an agency Inspector General's administrative subpoena to third party in an investigation was enforceable even though third party was not an entity subject to agency's regulatory jurisdiction).

253 potentially instruct NCUA staff to employ these oversight tools to their full potential to guard  
254 against risks to the NCUSIF associated with CUSO activity in the absence of direct statutory  
255 examination and enforcement authority over CUSOs.

256 Further, regarding its enforcement authority, the Board also notes that it may have  
257 statutory enforcement authority in certain cases over CUSOs that commit misconduct.  
258 Specifically, an insured credit union's independent contractor may be subject to the Board's  
259 enforcement powers under the FCU Act if it knowingly or recklessly participates in certain  
260 violations that cause or are likely to cause more than a minimal financial loss to, or a significant  
261 adverse effect on, the insured credit union.<sup>23</sup> Thus, the Board may have greater power in certain  
262 circumstances than opposing commenters acknowledge.

263 The Board also believes that the risk to the NCUSIF is mitigated because in its  
264 experience most CUSO loans are sold to credit unions, which are subject to NCUA enforcement  
265 and examination authority. In addition, the Board also believes that the additional risk is  
266 mitigated because most CUSOs are wholly owned by the parent credit union (as of the end of  
267 2020, for instance, approximately 72 percent of natural person CUSOs were wholly owned by  
268 credit unions),<sup>24</sup> which provides the NCUA additional leverage if a CUSO is engaging in unsafe  
269 or unsound lending practices. In both situations, the NCUA would likely have additional insight  
270 into the risk of the CUSO's lending. The Board acknowledges, however, that there may be gaps  
271 in its jurisdiction for certain CUSOs that may retain its loans, sell them to third parties, or are not  
272 wholly owned by credit unions.<sup>25</sup> It is the Board's belief that this risk is limited and is  
273 outweighed by the potential benefits of the final rule.

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<sup>23</sup> 12 U.S.C. 1786(r).

<sup>24</sup> CUSOs at a Glance (2020), available at <https://www.ncua.gov/analysis/cuso-economic-data/cusos-glance>.

<sup>25</sup> The Board notes that such risk is already present in the credit union system as the NCUA insures FISCUs that may be subject to substantially less restrictive CUSO requirements. For example, many states do not restrict, or have higher limits for, FISCU investments in CUSOs.

274 As some commenters supporting the proposed rule observed, the expanding lending  
275 authority may be beneficial to FCUs by enhancing their competitiveness and ability to generate  
276 capital. Increased credit union capital would strengthen the NCUSIF by reducing the potential  
277 for losses due to credit union failures. The Board believes that the potential benefits of the  
278 expanded authority for FCUs to lend to or invest in CUSOs engaged in all lending activities may  
279 outweigh the potential costs of the rule including additional risk to the NCUSIF, decreased credit  
280 union lending due to increased competition, and increased consolidation, particularly among  
281 smaller credit unions. In any event, the Board considers the potential benefit to credit unions and  
282 the NCUSIF to be at least a partial mitigating factor against the potential incremental risks.

283 Other commenters expressed concerns about systemic risk. For example, one commenter  
284 quoted former NCUA Board Chair Mark McWatters to highlight how CUSOs contribute to  
285 systemic risk: “Since 2008, CUSOs have caused more than \$500 million in losses to federally  
286 insured credit unions, and they have contributed to the failure of 11 credit unions...more than  
287 half of the NCUA’s institutions hold less than \$33 million in assets and average approximately  
288 three to four full-time employees per institution. These institutions are heavily dependent on  
289 third-party outsourced services and do not possess the resources to independently perform full  
290 due diligence on all of their critical services providers.” Another commenter stated that a large  
291 CUSO operating as a loan originator and selling participations or whole loans could produce  
292 systemic risks within the industry as evidenced by prior events caused by single originators, a  
293 concentrated group of originators, or by overconcentration within a sector.

294 As discussed in its responses to other comments in the preceding section, the Board has  
295 considered the potential benefits and risks of FCUs lending to or investing in CUSOs engaged in  
296 broader types of lending. The Board recognizes that several present and prior Board Members,  
297 the Inspector General, and other government bodies have found that the NCUA needs statutory

298 enforcement authority over third-party vendors, including CUSOs, to manage the associated  
299 risks appropriately. The NCUA has also documented significant previous losses to the NCUSIF  
300 that were attributed to CUSOs, particularly between 2008 and 2015.

301 The Board, however, does not find it necessary to continue to limit FCUs' authority to  
302 invest in, or lend to, CUSOs engaged in lending activities permissible for FCUs until the FCU  
303 Act is amended to add enforcement authority over CUSOs. Such a response is disproportionate  
304 to the modest expansion permitted in this final rule.

305 The Board also finds that prior statements about losses to the NCUSIF do not support any  
306 firm prediction that similar losses will occur in the future because of this final rule (or even with  
307 a mere continuation of the current authorities).<sup>26</sup> For example, the Board considers what has  
308 occurred since 2015, as reflected in the Inspector General's regular reports. Under the FCU Act,  
309 the Inspector General must submit a written report to the Board, the Comptroller General of the  
310 United States, and other parties when the NCUSIF incurs a "material loss" an insured credit  
311 union, with material loss defined as one exceeding \$25 million and 10 percent of total assets of  
312 the credit union.<sup>27</sup> These reports must include a description of the reasons that the problems of  
313 the credit union resulted in a material loss to the NCUSIF and recommendations for preventing  
314 any such loss in the future.<sup>28</sup> For losses that are not material as defined in this section of the  
315 FCU Act, the Inspector General must identify losses occurring in each 6-month period and report  
316 semi-annually to the Board and Congress on whether any of those losses warrant an in-depth

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<sup>26</sup> The Board also notes that there have been significant changes to laws, regulations, and industry practices for loan underwriting and credit administration since the 2008 financial crisis. Therefore, the Board also believes that the historical losses attributed to CUSOs that were discussed in the comments are not reflective of the current standards and practices, so the referenced historical losses may not necessarily be predictive of future losses.

<sup>27</sup> 12 U.S.C. 1790d(j)(1), (2).

<sup>28</sup> 12 U.S.C. 1790d(j)(1).

317 review.<sup>29</sup> Since 2015, the NCUA’s Inspector General has not issued any Material Loss Review  
318 reports in which CUSO activity was cited as the reason, or part of the reason, for the losses. The  
319 NCUA also looked at the total losses due to CUSOs in failed FICUs from 2015 to June 30, 2021.  
320 The Board found that failed FICUs lost approximately \$4 million due to CUSOs during this  
321 period. And, the NCUSIF lost only an amount estimated to be under \$1 million due to CUSOs  
322 during this period as most of the failed FICUs with CUSO-related losses were merged into other  
323 institutions without substantial loss to the NCUSIF.

324 The Board finds the absence of material CUSO-related losses during this period  
325 noteworthy; however, the Board acknowledges it excluded losses that occurred during the 2008  
326 banking crisis and looked at data that occurred during a relatively robust economy. This absence  
327 does not guarantee that material losses will not occur in the future, but it illustrates the  
328 uncertainty associated with predictions by some commenters. A past pattern of material losses is  
329 not, in the Board’s opinion, sufficient evidence that the pattern will continue.

330 In reconciling these competing perspectives, the Board also has considered the general  
331 principles discussed in the introduction to this preamble. Neither the FCU Act nor the NCUA’s  
332 regulations or policies require the agency to ensure all potential losses to the NCUSIF are  
333 avoided. The FCU Act requires the Board to consider whether a credit union applying for  
334 insurance of member accounts poses “undue risk” to the NCUSIF and to deny the application if  
335 the financial conditions and policies are unsafe and unsound or if the applicant poses undue risk  
336 to the NCUSIF.<sup>30</sup> In its regulations in § 741.204(d), the Board has further defined “undue risk  
337 “to the NCUSIF as a condition that creates a probability of loss in excess of that normally found

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<sup>29</sup> 12 U.S.C. 1790d(j)(4). This discussion provides only a general description of these requirements and the Inspector General’s duties and activities. More information is available on the Inspector General website and in its Semi-Annual Reports to Congress.

<sup>30</sup> 12 U.S.C. 1781(c).



338 in a credit union and which indicates a reasonably foreseeable possibility of insolvency and a  
339 resulting claim against the NCUSIF. Similarly, in considering whether a credit union’s practices  
340 are unsafe and unsound for chartering and field of membership purposes, the Board considers  
341 whether the action or lack of action would result in an “abnormal risk of loss” to the credit union,  
342 its members, or the NCUSIF.<sup>31</sup>

343 The Board also notes that the ongoing trend of credit union consolidation is already  
344 increasing systemic risk. On an aggregate basis, the total number of credit unions has been cut in  
345 half over the prior two decades as smaller credit unions have merged or consolidated. There were  
346 over 5,000 fewer credit unions with less than \$1.0 billion in total assets in 2020 than there were  
347 in 2000. As the number of credit unions has declined, loan portfolios have become increasingly  
348 concentrated within the largest credit unions. Expanding FCUs’ authority to lend or invest in  
349 CUSOs engaged in all lending activities may allow smaller credit unions to combine their  
350 resources to remain more competitive within the changing lending landscape, which could result  
351 in a reduction of systemic risk.

352 Separately, the Board already insures FISCUs that may, depending on state law, lend or  
353 invest in CUSOs that engage in all lending activities. In its role as insurer, the Board finds it  
354 would be unreasonable to decline to expand FCU authority on a risk basis when it currently  
355 allows the activity for FISCUs.

356 Based on these standards and principles, the Board does not find that the expanded FCU  
357 authority to lend to or invest in CUSOs engaged in all lending activities provided by this rule are  
358 likely or more likely than not to result in material losses to the NCUSIF or unsafe and unsound  
359 practices posing an undue risk to the NCUSIF.

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<sup>31</sup> 12 CFR 701, App. B, Glossary.

360           Regarding the concern over concentration risk, the Board believes that existing  
361 limitations in §§ 701.22 and 701.23 on the amount of eligible obligations that FCUs may  
362 purchase and on the amount of loan participations that all federally insured credit unions may  
363 purchase from a single source will provide significant protection against this concern.

364 Additionally, the Board believes there is some potential benefit to small credit unions buying  
365 loans from CUSOs. In such a case, many credit unions may be purchasing loans from the same  
366 entity leading collectively to enhanced due diligence on the CUSO.

367           Commenters also discussed the risk for reputational harm. For example, the ownership  
368 structure of CUSOs may result in the public's linking any aggressive or improper CUSO lending  
369 activity with the lending activity of FCUs themselves.

370           The Board agrees that confusion over the status of CUSOs or mistaken belief that they  
371 are federally insured and subject to the NCUA's full oversight would be problematic. The Board  
372 notes that certain FCU practices related to the promotion of CUSO services or CUSOs with  
373 names related to their FCU parents may raise unfair, deceptive, or abusive acts or practices  
374 issues.<sup>32</sup> FCUs should pay particular attention to their marketing and ensure that members are  
375 informed and understand the legal significance between FCU-originated loans and CUSO-  
376 originated loans. For example, FCUs should ensure that members clearly understand that the  
377 NCUA may have a more limited ability to address member complaints related to CUSO-  
378 originated loans. The Board notes that standardized disclaimers in loan origination  
379 documentation may be insufficient to address this concern. The Board, however, finds that the  
380 current regulations, including the prohibition on unfair, deceptive, or abusive acts or practices,  
381 reasonably guard against the concern about member confusion. First, § 712.4(a) specifies that an

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<sup>32</sup> Dodd-Frank Wall Street Reform and Consumer Protection Act, Title X, Subtitle C, § 1036; Pub. L. 111-203 (July 21, 2010).

382 insured credit union must take several steps to ensure corporate separateness from a CUSO,  
383 including that each is held out to the public as separate enterprises. Adherence to this  
384 requirement, and proper enforcement of it by the NCUA, is likely to mitigate much or all of the  
385 concern regarding confusion. Second, and similarly, the NCUA's advertising regulation in §  
386 740.2 requires, among other matters, that an insured credit union using a trade name in  
387 advertising must use its official name in loan agreements and account statements. This  
388 requirement may further safeguard against the risk of confusing a credit union with an associated  
389 CUSO with a similar name because the official loan documentation would disclose which entity  
390 or entities are involved. Each of these provisions on their own, therefore, and when considered in  
391 concert, may work to address this concern.

392 Commenters also noted that CUSO lending activities are currently considered complex or  
393 high risk. The Board acknowledges that CUSO lending activity has the potential to create  
394 material financial risk. This is why lending CUSOs are currently subject to additional reporting  
395 requirements in § 712.3(d). As discussed above, however, the Board does not believe this rule  
396 represents an undue safety and soundness risk; rather, the Board believes it only represents an  
397 incremental risk to credit unions and the NCUSIF. This relatively modest, incremental risk is  
398 further mitigated, as discussed above, by the existing regulatory and supervisory controls and  
399 standards in place.

400 Finally, one commenter recommended that loans purchased from a CUSO be subject to  
401 the same limitations as loans purchased from other credit unions and recommended that the  
402 NCUA have a process to ensure the quality of CUSO loans.

403 The Board has considered this recommendation and declines to adopt it. First, regarding  
404 new limitations on loans, the Board underscores that currently, §§ 701.22 and 701.23 of the  
405 Board's regulations restrict loan and loan participation purchases by credit unions. Subject to

406 various exceptions, including those provided in the temporary COVID rule in effect through  
407 December 31, 2021,<sup>33</sup> FCUs may purchase only eligible obligations of its members for loans the  
408 FCU would itself be empowered to grant.<sup>34</sup> Section 701.22, most of which applies to FISCUs as  
409 well as to FCUs, restricts the types of loan participations that a credit union may purchase to  
410 those the credit union is empowered to grant and also requires the originating lender, including a  
411 CUSO, to retain at least five percent of the outstanding balance of the loan through the life of the  
412 loan (10 percent is required if the originating lender is an FCU).<sup>35</sup>

413 The Board believes that these existing restrictions are sufficient to ensure that the loans or  
414 loan interests purchased by credit unions from CUSOs will have reasonable terms. At the same  
415 time, the Board acknowledges that CUSOs may originate loans that parties other than credit  
416 unions purchase. In turn, this would make the restrictions discussed in the preceding paragraph  
417 inapplicable. This is, however, the current situation for loans originated by CUSOs. The  
418 commenter who recommended this new restriction did not present persuasive evidence that this  
419 new restriction is necessary and further provided no analysis or evidence regarding how the  
420 restrictions might hamper CUSO activities and thus decrease the value of credit union interests in  
421 CUSOs. Accordingly, the Board declines to adopt this recommendation.

422 Second, regarding the quality of loans, the Board believes that credit unions and other  
423 parties who purchase CUSO-originated loans can perform due diligence and ensure that loans are  
424 underwritten and documented appropriately. Further, as part of the examination process, NCUA  
425 examiners can continue to request documentation on credit unions' due diligence and other  
426 policies and procedures associated with their investment, lending, and other interaction with

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<sup>33</sup> 85 FR 22010 (Apr. 21, 2020); 85 FR 83405 (Dec. 22, 2020).

<sup>34</sup> 12 CFR 701.23(b).

<sup>35</sup> 12 CFR 701.22(b)(3).

427 CUSOs. As with the recommendation on the terms of loans, the Board finds no persuasive  
428 evidence or analysis of the benefits and risks of such new oversight and declines to adopt the  
429 recommendation.

430

431 *Consumer Protection*

432

433 Commenters who supported the rule did not extensively discuss consumer protection  
434 issues. Several commenters stated that CUSOs would likely only issue loans that comply with  
435 the NCUA's loan origination rules as generally CUSO-originated loans would be sold to the  
436 parent credit unions. Another commenter stated that the proposed rule would expand financial  
437 inclusion due to the potential for collaboration to develop new technologies. Finally, commenters  
438 noted that CUSOs are subject to state lending laws and federal consumer protection laws.

439 In contrast, commenters who were against the proposed rule generally expressed  
440 concerns that the proposed rule would create risk to consumers. Several commenters expressed  
441 concerns that CUSO-originated loans are not subject to the same restrictions as loans originated  
442 by FCUs. For instance, the FCU Act limits interest rate, maturity, and prepayment terms for  
443 FCU-originated loans. Commenters were concerned that this rule change would enable an FCU  
444 to circumvent statutory lending restrictions through a CUSO subsidiary. Commenters were  
445 especially concerned about abuses because the proposed rule would principally allow payday and  
446 auto lending, which may be more likely targeted towards members in low-to-moderate-income  
447 communities and underserved areas. Furthermore, several commenters stated that CUSOs have  
448 been responsible for abusive lending in the past. One commenter noted that CUSOs were  
449 marketing payday loan products to state-chartered credit unions with triple digit interest rates in  
450 Texas until restrictions were implemented on the state level. One noted a 2010 National

451 Consumer Law Center report, which documented that over 40 credit unions were involved with  
452 payday lending through CUSOs. This prompted the NCUA to issue a letter to credit unions.

453 Another commenter stated that the proposal will disproportionately harm communities of color  
454 and exacerbate financial exclusion, even as the Board elsewhere emphasizes racial equity and  
455 financial inclusion. Another commenter stated that investing in CUSOs that violate the FCU Act  
456 usury ceiling creates not only reputation risk, but compliance and legal risk as loans that exceed  
457 the usury cap in the FCU Act should not be considered part of the routine operations of credit  
458 unions.

459 Commenters raised several potential solutions to potential consumer harm. One  
460 commenter stated that any expansion of CUSO lending activity should be limited to loans FCUs  
461 are themselves empowered to make. Another commenter recommended changes to the Payday  
462 Alternative Loans (PALs) program if the goal is to encourage more small-dollar lending and  
463 included ideas on how to increase credit unions' adoption of PALs. Another commenter  
464 suggested requesting examination findings from the Consumer Financial Protection Bureau,  
465 which has requisite authority to examine CUSOs to determine whether consumer protection laws  
466 are being followed.

467 The Board has considered the comments on this point and finds that overall, they provide  
468 support for proceeding with adopting the regulatory change to CUSO lending authorities as  
469 proposed.

470 As commenters in support of the expansion of FCU authority with respect to loans to and  
471 investments in CUSOs engaged in all lending activities stated, more collaboration and use of  
472 financial services technology may positively affect financial inclusion. By authorizing more  
473 parties to offer an array of consumer loans, the Board may increase beneficial competition and  
474 expand consumer choice. The Board also believes that CUSOs would likely adhere to the

475 statutory and regulatory restrictions on loans that FCUs are empowered to grant in order to be  
476 able to sell these loans to FCUs (though the Board notes that the purchasing authority provisions  
477 may vary for FISCUs because the Board's eligible obligation purchase regulation in § 701.23  
478 applies to FCUs only) and that CUSOs may not be under the same liquidity pressure for auto and  
479 payday loans as other types of loans currently authorized by the CUSO rule. The Board also  
480 notes that it recently relaxed some of these protections in light of the COVID-19 pandemic.<sup>36</sup> As  
481 a whole, however, it is the Board's belief that the current authorities governing FCU purchases  
482 of loans would likely result in a substantial amount of CUSO loans being issued on terms  
483 equivalent to those in the FCU Act, or what is already permitted for FISCUs.

484         The Board is, of course, concerned about the risk of unfavorable terms for consumers.  
485 As one commenter noted, in 2009, the NCUA Chairman issued a letter to all FCUs on consumer  
486 lending, including consumer protection issues.<sup>37</sup> The Board has also established two payday  
487 alternative loans (PALs) programs for FCUs to promote short-term, small-dollar loans for FCUs  
488 and their members that can serve as an alternative to loans with less favorable terms. The  
489 Board's concerns are partially mitigated, however, by state usury laws and other consumer  
490 protection laws that may be enough to curtail the risk of predatory lending by CUSOs. The  
491 Board acknowledges, however, that the majority of states permit payday lending and therefore  
492 state laws only provide some mitigation relating to the concern of CUSOs offering loans at  
493 excessive interest rates.<sup>38</sup> The Board plans to monitor new practices closely and take aggressive  
494 action when it can to protect consumers from abusive terms that are contrary to law. When the  
495 Board lacks direct authority, it can partner with other federal agencies, such as the CFPB, or state

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<sup>36</sup> 85 FR 83405 (Dec. 22, 2020).

<sup>37</sup> Payday Lending, 09-FCU-05, July 2009, *available at* <https://www.ncua.gov/regulation-supervision/letters-credit-unions-other-guidance/payday-lending>.

<sup>38</sup> See the CFPB final rule, Payday, Vehicle Title, and Certain High-Cost Installment Loans, 85 FR 44382, 44383 (July 22, 2020).

496 authorities to address any such situations. Ultimately, the Board and other parties, in  
497 combination, have tools available to protect consumers and curb abusive practices.

498 At the same time, the Board disagrees with commenters who believe that the expanded  
499 FCU authority to lend to or invest in CUSOs engaged in all lending activities would open up a  
500 new area of lending above the FCU interest rate cap and that such activity is contrary to the FCU  
501 Act.

502 First, the Board finds greater competition in the consumer loan market from FCU-owned  
503 entities is likely to introduce better consumer options and greater choice. If the Board decides to  
504 limit innovation and expansion out of concern for potential consumer harm, it may actually  
505 perpetuate a lack of consumer choice and access. Regardless of what action the Board takes,  
506 other parties will continue to lend in the marketplace and may lack the same grounding in the  
507 credit union mission and industry that would tend to mitigate the risk of abusive lending  
508 practices. Confronted with this choice, the Board's judgment is that CUSOs will be more likely  
509 than other lenders to offer only reasonable terms to consumers and be held accountable by the  
510 NCUA, other federal agencies, or state authorities. Second, regarding one commenter's opinion  
511 about the "daily operations of credit unions" not including lending above the FCU interest rate  
512 ceiling, the Board finds that the FCU Act's broad wording should not be read so narrowly.  
513 Reading this limitation into the phrase would, if applied to other areas of CUSO activity, such as  
514 trustee and fiduciary activity that is not generally within the power of an FCU, limit CUSOs to  
515 only those activities that FCUs may perform within all limitations of the FCU Act. CUSOs have  
516 long been permitted to engage in activities that are not specifically bound by these limitations.  
517 In particular, since originally authorizing CUSOs to engage in limited lending activity, the Board  
518 has not imposed the interest rate ceiling or other restrictions applicable to FCU-made loans to



519 CUSO-made loans. The concern, therefore, that some commenters raise is not specific to this  
520 rulemaking and has long stood as the agency's position on CUSO activities, including lending.

521 Ultimately, when faced with the choice between limiting or proceeding with this  
522 expansion of FCU authority to lend to, or invest in, CUSOs engaged in all lending activities, the  
523 Board finds in its judgment that the regulatory changes carry the potential to benefit consumers  
524 and FCUs through greater choice. At the same time, the Board will closely monitor the expanded  
525 activity given the importance of consumer protection.

526 In addition, the Board notes that amending the PALs program is beyond the scope of the  
527 CUSO rulemaking but will take commenters' input on that program into account in any future  
528 action on that program.

529

### 530 *Innovation*

531

532 Some of the commenters who supported the proposed rule generally stated that CUSOs  
533 enable necessary innovation. Many commenters discussed how CUSOs can pool resources for  
534 various projects each credit union could not afford to embark on individually, especially smaller  
535 credit unions. With innovation and technology continuously evolving at a significant pace,  
536 giving FCUs the option to start or partner with a CUSO to advance their technology capabilities  
537 would help FCUs remain competitive as they often lack the resources to build and maintain the  
538 technology infrastructure. Commenters stated that CUSOs are currently helping credit unions  
539 survive in the rapidly changing financial industry and several credit unions credited CUSOs with  
540 assisting them in reaching members, including low-to-moderate income members. Many  
541 commenters mentioned fintechs and that CUSOs are enabling credit unions to compete with  
542 fintechs and large banking organizations that have the resources to develop new technologies.

543 Several commenters stated that credit unions must continue to innovate, reduce costs, and  
544 generate income, especially as traditional sources of income, like net interest margins, are no  
545 longer sufficient.

546 Some of the commenters who were opposed to the proposed rule stated that CUSOs are  
547 already able to facilitate FCUs' collective investment in technology without having their lending  
548 powers broadened. CUSOs' permissible activities include "loan support services, including loan  
549 processing, servicing, and sales," which means CUSOs can currently play a support role in FCU  
550 lending according to one commenter.

551 When discussing current CUSO authorities to do indirect lending, another commenter  
552 stated that small FCUs struggle to engage in indirect lending, which requires significant  
553 investment and oversight. The commenter further stated that managing relationships with dealers  
554 and monitoring the quality of loans an FCU receives is paramount to the success of an indirect  
555 lending program. As a result, the indirect lending channel is often closed to small FCUs.

556 The Board has considered the wide variety of viewpoints on this issue. As several  
557 commenters noted, broadening the permissible CUSO lending categories may foster innovation  
558 and partnerships. Conversely, some commenters contended that the rule change is not needed for  
559 this purpose because credit unions already partner effectively with CUSOs to develop technology  
560 to support FCU lending. The Board views this difference of opinion and predictions similarly to  
561 how it views other general predictions about the risks and benefits of the rule change. The Board  
562 recognizes that the expanded FCU authority to lend to or invest in CUSOs engaged in all lending  
563 activities may not result in enhanced partnerships and cooperation with CUSOs and other credit  
564 unions because it is not possible to predict the future of the marketplace with certainty.

565 Alternatively, the regulatory changes may enhance this collaboration for some credit unions in  
566 some type of lending but not in all.

567           However, the Board in its judgment also finds that expanded areas of activity and  
568 investment would naturally tend to increase collaboration and cooperation. Affording greater  
569 opportunities for FCUs to lend to and invest in CUSOs engaged in a broader range of lending  
570 may facilitate more partnerships that position FCUs better to work with new entities and  
571 technologies in financial services. For this reason, the Board continues to find this a good basis  
572 to proceed with the regulatory changes.<sup>39</sup>

573

574 *Credit Union Mission*

575

576           Some of the commenters in favor of the proposed rule broadly stated that CUSOs enable  
577 FCUs to fulfill their mission by enhancing their ability to serve members. Several commenters  
578 stated there is no evidence that the proposed rule would hurt the industry, members, or the  
579 NCUSIF.

580           In contrast, some of the commenters opposed to the proposed rule stated that the  
581 proposed rule undermines fundamental principles of the FCU Act. Principally, in their view, the  
582 proposed rule would dilute the common bond by permitting lending outside of FCUs' fields of  
583 membership. These commenters stated that allowing FCUs to directly profit from loans that are  
584 originated to non-members is contrary to the intent of the FCU Act. Many commenters generally  
585 stated that the profit FCUs would derive from non-members calls into question the rationale for  
586 the exclusion from federal income taxation.

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<sup>39</sup> The Board also notes that innovation and collaboration were not the sole basis for the proposed rule. As discussed in the preamble to the proposed rule, another basis for the rule was to enable FCUs to better serve their members. The Board views the various bases in the proposed rule as independently sufficient to support the rule. 86 FR 11645, 11646 (Feb. 26, 2001).

587           The Board finds that concerns about diluting the FCU common bond do not warrant  
588           modifying or declining to adopt the proposed rule.

589           First, the Board does not agree with commenters who believe the FCU Act requires  
590           consideration of this factor in evaluating proposed CUSO activities. The FCU Act’s field of  
591           membership and common bond provisions apply to FCUs, not to CUSOs.<sup>40</sup> The loan authority  
592           for CUSOs in the FCU Act specifically defines a “credit union organization” in part as an  
593           organization “established primarily to serve the needs of its member credit unions, and whose  
594           business relates to the daily operations of the credit unions they serve.”<sup>41</sup> Thus, the FCU Act  
595           does not require that CUSOs be established exclusively to serve credit union members or credit  
596           unions. Accordingly, any objection based on a claim that expanded FCU authority to lend to or  
597           invest in CUSOs engaged in all lending activities violates the FCU Act is unfounded.

598           Second, apart from the statutory provisions, in this rulemaking the Board has re-  
599           examined its prior policy-based concern regarding dilution of the common bond through CUSO  
600           lending authorities. As the proposed rule recounted, historically the Board has been hesitant in  
601           granting CUSOs authority to make consumer loans because it may be perceived as diluting the  
602           common bond. In a 1998 final rule in which it granted CUSOs authority to make student loans,  
603           but not other types of consumer loans, the Board elaborated that it limited the expansion because  
604           Congress and the public may perceive it as a dilution of the common bond.<sup>42</sup> In the same  
605           discussion, the Board explained that it would grant authority to CUSOs to make student loans  
606           because they required more specialized staff and experience, whereas general consumer loans  
607           did not.<sup>43</sup>

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<sup>40</sup> 12 U.S.C. 1759 and the NCUA’s Chartering and Field of Membership Manual, 12 CFR 701, App. B., set forth common bond definitions and requirements for FCUs.

<sup>41</sup> 12 U.S.C. 1757(5)(D).

<sup>42</sup> 63 FR 10743, 10752 (Mar. 5, 1998).

<sup>43</sup> *Id.*

608           The 1998 final rule is, therefore, best read as relying on two bases for limited expansion  
609 at that time: perception of dilution of the common bond and the need for credit unions to partner  
610 with CUSOs for certain types of loans. And in that rule, the determination that one type of new  
611 loan authority would be beneficial to credit unions overcame the generalized concern about  
612 perceived dilution. In fact, in the same final rule, the Board refuted in detail the contention by a  
613 commenter that CUSOs are subject to the statutory common bond requirement,<sup>44</sup> demonstrating  
614 further that the perceived dilution concern was not viewed as an absolute or particularly strong  
615 counterweight to other policy rationales. That is to say, incremental expansion of FCU authority  
616 about CUSO lending authorities based on the Board's judgment and experience have in the past  
617 outweighed this concern. Based on this re-examination, the Board concludes that the concern  
618 over perceived dilution of the common bond is relatively weak and has not historically been  
619 given great weight or decisiveness in evaluating the reasons for and against an expansion of FCU  
620 authority related to this activity.

621           Given this background and context for the perceived common bond dilution concern, the  
622 Board finds that it does not warrant refraining from adopting this final rule. The commenters  
623 who cited this concern provided only generalized predictions or policy arguments that lack  
624 specific evidence even to predict with any certainty that the regulatory changes would appear to  
625 dilute the common bond. Other commenters predicted that the expanded authority might instead  
626 bring credit union membership to more people. The Board believes this result is at least as likely  
627 as one in which the common bond is perceived by some subjectively as being diluted. For  
628 example, non-credit union members who are eligible for membership may decide to join a credit  
629 union after obtaining a loan from an affiliated CUSO. And in any event, a CUSO engaging in

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<sup>44</sup> *Id.* at 10745.

630 this type of lending would still be required to primarily serve credit unions, its membership, or  
631 the membership of credit unions contracting with the CUSO.<sup>45</sup>

632 Accordingly, based on this re-examination of the perceived dilution concern and the  
633 limited support offered by commenters opposing the rule on this basis, the Board concludes that  
634 this concern does not weigh against adopting the rule as proposed.

635 Another commenter stated that FCUs would profit from loans exceeding usury caps in  
636 the FCU Act, and this is against the spirit of the FCU Act.

637 The Board does not find this generalized concern persuasive. Currently, CUSOs are not  
638 subject to the interest rate ceiling in the FCU Act.<sup>46</sup> This provision applies to loans made by an  
639 FCU. By regulation, subject to some exceptions, an FCU may not buy a loan it is not empowered  
640 to grant.<sup>47</sup> However, the Board recognizes that an FCU investing in a CUSO may receive  
641 revenue derived from loans the CUSO makes but does not sell to an FCU. This is true under the  
642 current regulation, but the customer base requirement discussed in the preceding section tends to  
643 limit this effect by requiring that CUSOs primarily serve credit unions, CUSO members, and  
644 members of credit unions contracting with the CUSO. The same requirement will apply to  
645 CUSOs engaged in new types of consumer loans. For this reason, the Board finds this concern  
646 lacks sufficient support and weight to warrant not adopting the rule as proposed.

647

648 *Growth or Competition*

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<sup>45</sup> 12 CFR 712.3(b).

<sup>46</sup> 12 U.S.C. 1757(5)(A)(vi).

<sup>47</sup> 12 CFR 701.23(b).

650           Some of the commenters who supported the proposed rule generally stated that the  
651 CUSOs would not compete with credit unions because CUSOs do not have enough liquidity to  
652 originate and hold loans. These commenters stated that CUSOs will originate loans only as a  
653 mechanism to secure more loans for their lending partners and will then sell the loans to credit  
654 unions. Several commenters pointed to credit union loan growth in mortgages, student loans,  
655 credit cards, and business lending. One credit union trade organization acknowledged credit  
656 unions and CUSOs would likely compete for loans; however, it believed the greater threat comes  
657 from fintech and banks.

658           Several commenters also stated that the proposed rule would help FCUs because it would  
659 result in increased lending opportunities. One of the reasons for increased lending discussed was  
660 CUSOs' potential to lower costs through economies of scale. Several commenters stated that  
661 CUSOs enable FCUs to share costs, distribute risk, and provide scale. A few commenters  
662 specifically stated that the proposed rule would enable smaller FCUs to continue their lending  
663 activities but, instead of keeping their lending operations in-house, utilize the services of a  
664 CUSO to generate loans.

665           In contrast, several commenters who opposed the proposed rule believed that CUSOs  
666 would bring unnecessary competition, particularly for smaller credit unions. Some commenters  
667 stated that the proposed rule could benefit certain, larger FCUs, but it could hurt other, smaller  
668 credit unions as well-funded CUSOs could capture potentially significant market share. One  
669 commenter noted that past NCUA Boards have been concerned that CUSOs only benefit large  
670 credit unions and once noted that smaller credit unions have been unable to meet minimum  
671 eligibility requirements in order to partake of CUSO services. One commenter noted there is no  
672 evidence FCUs need help with non-complex consumer loans or auto loans. Other commenters

673 stated that the proposed rule would not result in increased lending and that CUSO-originated  
674 loans sold to credit unions do not drive credit union loan growth.

675 A few other commenters believed that the rule could be anti-competitive as it may result  
676 in additional industry consolidation because small credit unions could lose market share.

677 The Board has considered the differing viewpoints on this issue and determined that this  
678 concern does not warrant refraining from adopting the rule as proposed. As discussed in the  
679 introduction to this preamble, the Board has re-examined its historical stance on competition as it  
680 relates to CUSO activity and small credit unions.

681 First, it is not clear that the Board should, as a matter of principle, consider shielding  
682 credit unions from competition as an important consideration in its rulemaking.<sup>48</sup> Doing so may  
683 result in stagnation and could produce overall negative results for the credit union system and the  
684 NCUSIF over time.

685 Second, the NCUA currently does and will continue to provide significant support and  
686 flexibility to small credit unions through various regulatory and supervisory programs. These  
687 efforts recognize the challenges that these small credit unions face by reducing regulatory  
688 burdens. For example, the NCUA has a small credit union examination program that streamlines  
689 the examination process for small FCUs with a record of solid performance.<sup>49</sup>

690 The Board believes the final rule presents an opportunity for all credit unions to work  
691 collaboratively. It is the Board's belief that the final rule has the potential to benefit all credit  
692 unions, especially smaller credit unions, if they can effectively pool their resources to form new  
693 technology. The Board also believes the final rule would likely be a net benefit to the entire

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<sup>48</sup> See *Fed. Comm'ns Comm'n et al. v. Prometheus Radio Project et al.*, No. 19–1231 (Apr. 1, 2021), Thomas, J., concurring (discussing whether the FCC should have considered a non-statutory factor in its rulemaking).

<sup>49</sup> See, 12-FCU-03 (2012).



694 system. The Board acknowledges there would likely be additional competition for credit unions,  
695 particularly certain smaller credit unions, but this rule provides additional flexibilities to permit  
696 the credit union system to offer enhanced lending products. The Board believes that under the  
697 final rule, credit unions will have an enhanced ability to collaborate and create better lending  
698 products for their members.

699 For each of these reasons on their own, and in their totality, the Board finds that it is  
700 prudent to proceed with this final rule despite this objection.

701

#### 702 *Types of Loans*

703

704 Some of the commenters who favor the rule encouraged the NCUA to finalize expansive  
705 lending authorities for CUSOs as lending opportunities are always evolving. Several commenters  
706 stated that there are currently companies looking for FCU partners that originate solar,  
707 renovation, boat, and airplane loans. One commenter expressed concern that these types of loans  
708 might cause credit unions to focus on loans for luxury items to the detriment of low- and  
709 moderate-income members.

710 The Board has not limited the types of loans a CUSO can originate provided that the  
711 loans are the type of loan an FCU is able to originate. Contrary to the concern of one commenter,  
712 the Board does not believe that focused CUSO activity would detract from individual credit  
713 unions' focus on providing financial services to all their members, as required by fair lending  
714 laws.

715

#### 716 *Auto Loans and National Lending*

717

718 Several commenters who support the proposed rule stated that the proposal is necessary  
719 for FCUs to remain competitive as lending becomes more standardized and consumers move  
720 online for more of their financial services. Many commenters discussed a recent trend to point of  
721 sale financing. According to these commenters, consumers are acquiring credit at the point of  
722 sale, instead of acquiring credit through a credit union first. Commenters were particularly  
723 concerned about this trend for auto loans. These commenters expressed concerns that point of  
724 sale sellers are not interested in working with credit unions. The challenge, according to some  
725 commenters, is that a large, nationally focused seller is unlikely to secure relationships with  
726 thousands of individual credit unions. This presents an opportunity for CUSOs to help the credit  
727 union industry with their collaborative business model. Some commenters believed credit unions  
728 risk diminishing market share if CUSOs are not permitted to contract with national lenders. One  
729 CUSO commenter stated that CUSOs could easily use a common platform and participate out  
730 loans to credit unions within the geographic area in which members are located.

731 A few of the commenters who opposed the rule highlighted the established relationships  
732 some credit unions have with local dealers. These commenters were concerned that national  
733 lending CUSOs would threaten these existing relationships.

734 The Board finds that the comments on this issue generally support the regulatory  
735 changes. The Board agrees that expanding CUSO lending authority to cover auto loans may help  
736 credit unions compete at the point of sale. Existing data also supports the Board's belief that  
737 small credit unions are struggling to compete in auto lending and that the final rule may support  
738 small credit union auto lending efforts. The largest 150 credit unions have seen significant  
739 expansion of their auto lending market share over the prior two decades, while smaller credit

740 unions have lost market share almost every year.<sup>50</sup> The data indicates that smaller credit unions  
741 are becoming increasingly less competitive in the auto lending space.

742 The Board also recognizes that, despite the stated intent of the proposal, some credit  
743 union relationships with local dealers could be displaced by this rule, as they equally could be by  
744 other market forces. As discussed previously in response to concerns regarding additional  
745 competition for some small credit unions, the Board believes it would be inappropriate for the  
746 Board to attempt to restrain competition. The Board also believes that in the long-term, the  
747 benefits to the entire credit union system through this enhanced authority and competition will  
748 exceed costs associated with disruption to existing credit union-dealer relationships. Indeed,  
749 these costs are not certain or inevitable to occur.

750

#### 751 *Impact Analysis*

752

753 Several commenters who were opposed to the proposed rule requested that the NCUA  
754 conduct an independent economic analysis to weigh the advantages and disadvantages of the  
755 proposal. Other commenters recommended an impact analysis specifically to determine the  
756 impact on small credit unions.

757 The Board is aware of the challenges that face small credit unions. As discussed  
758 previously regarding growth and competition, the Board does not believe it is prudent or  
759 necessary to adopt rules that prevent market-based competition. In response to this specific  
760 recommendation for an impact study, the Board also notes that the Administrative Procedure Act

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<sup>50</sup> The Board notes, however, that during this period, the number of credit unions with less than \$1 billion in assets also decreased by over fifty percent.

761 does not require agencies to engage in studies before adopting regulatory changes.<sup>51</sup> The Board  
762 also believes an impact analysis is unnecessary. The Board believes the final rule will likely  
763 benefit credit unions. In the Board's experience, CUSOs generally benefit credit unions through  
764 additional capital and the sale of CUSO-originated loans to credit unions. For these reasons, the  
765 Board will proceed with the proposed changes without delaying them further to conduct a  
766 general impact study. As a separate reason to decline taking this step now, the Board observes  
767 that the commenters did not provide any specific studies of their own that would give the Board  
768 empirical evidence to support delaying these regulatory changes now.

769

#### 770 *Loan Pools, Aggregation, and Securitization*

771

772 A few commenters discussed the issue of securitization and whether the proposed rule  
773 would facilitate credit union securitizations. A few commenters asked for the NCUA to  
774 specifically permit CUSOs to aggregate credit union loans and issue securities on the secondary  
775 market as many credit unions do not have the available resources and volume necessary to  
776 originate the requisite amount of loans to securitize assets on their own. The Board will take this  
777 comment into consideration for future action.

778 Another commenter expressed concerns about CUSOs aggregating loans for sale to credit  
779 unions. The commenter stated that CUSO-generated loan pools may increase short-term  
780 operational efficiency; however, it also transfers the credit risk to smaller credit unions while the  
781 ancillary income is generated and retained by the CUSO. This commenter stated that the low

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<sup>51</sup> *Fed. Comm'ns Comm'n et al. v. Prometheus Radio Project et al.*, No. 19–1231 (Apr. 1, 2021), slip op. at 12 (holding that the Administrative Procedure Act imposes no general obligation on agencies to conduct or commission their own empirical or statistical studies).

782 margin and credit risk would be passed to the credit union with the higher margin income  
783 retained at the CUSO and ultimately benefit the largest credit union equity partners of the CUSO.  
784 This commenter added that historically, when there is market disintermediation, risk and credit  
785 losses are passed back to the passive participants with a disproportionate impact. The Board does  
786 not believe it is good policymaking to restrict credit union authorities on the potential for credit  
787 unions to enter unfavorable business deals. The Board does not believe that a few examples of  
788 unfavorable contracts with CUSOs sufficiently justify reducing the flexibilities afforded to the  
789 credit union system as a whole. Each credit union is responsible for its own due diligence prior to  
790 purchasing assets and entering into a contractual arrangement. Credit unions should exercise  
791 business judgment before making purchases and entering any contractual arrangement, even for  
792 counterparties that are part of the credit union industry. As part of good governance, credit  
793 unions with ownership in a CUSO are encouraged to monitor the length of time all loans remain  
794 on the books of the CUSO.

795 Accordingly, for the reasons discussed in the proposed rule and this final rule, the final  
796 rule is adopting the proposed rule without substantive change. Under the final rule, CUSOs are  
797 permitted to originate, purchase, sell, and hold any type of loan permissible for FCUs to  
798 originate, purchase, sell, and hold. CUSOs, therefore, could originate types of loans previously  
799 prohibited by the CUSO rule, including general consumer loans, direct auto loans, and unsecured  
800 loans and lines of credit. CUSOs could also purchase vehicle-secured retail installment sales  
801 contracts (RICs) from vehicle dealers.

802 Under the final rule, CUSO originated loans are not subject to the same restrictions as  
803 loans originated by FCUs. For example, part 701 of the NCUA's regulations imposes conditions

804 on FCU lending relating to loan terms such as interest rate, maturity, and prepayment.<sup>52</sup> These  
805 restrictions would not apply to CUSO-originated loans because CUSOs, even wholly owned  
806 CUSOs, are separate entities from FCUs and are not subject to direct NCUA supervision.  
807 However, an FCU may not purchase a loan from a CUSO unless the loan meets the requirements  
808 of the NCUA’s eligible obligations rule.<sup>53</sup> Similarly, an FCU may not purchase a loan  
809 participation from a CUSO unless it complies with the NCUA’s loan participations rule.<sup>54</sup>

### 810 *Loan Participations*

811 Besides specifically permitting CUSOs to engage in consumer mortgage, business, and  
812 student loan origination, the current CUSO rule also permits CUSOs to buy and sell participation  
813 interests in such loans. The inclusion of this authority to buy and sell participation interests in  
814 such loans stems from the FCU Act and the NCUA’s loan participation rule, which classifies a  
815 CUSO as a “credit union organization” authorized to engage in the purchase and sale of loan  
816 participations.<sup>55</sup> The NCUA’s loan participation rule, however, does not permit the sale to FCUs  
817 of participation interests in open-end, revolving credit.<sup>56</sup> Therefore, the current CUSO rule only  
818 permits CUSOs to originate credit card loans, but not the authority to buy and sell participation  
819 interests in credit card loans. To remain consistent with the NCUA’s loan participation rule, this  
820 final rule grants CUSOs the authority to only purchase and sell participation interests that are  
821 permissible for FCUs to purchase and sell. There were no comments specifically objecting to this  
822 provision, and the Board adopts it without change.

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<sup>52</sup> 12 CFR part 701.

<sup>53</sup> *See*, 12 CFR 701.23(b).

<sup>54</sup> 12 CFR 701.22.

<sup>55</sup> 12 U.S.C. 1757(5)(E); 12 CFR 701.22(a).

<sup>56</sup> 73 FR 79307 (Dec. 29, 2008).

823

824 ***CUSO Registry***

825 Under the current CUSO rule, a FICU must obtain a written agreement from a CUSO the  
826 FICU loans to or invests in that the CUSO will annually submit to the NCUA a report containing  
827 basic registration information for inclusion in the NCUA's CUSO registry (CUSO Registry).<sup>57</sup>  
828 CUSOs that are engaged in complex or high-risk activities have additional obligations with  
829 respect to the CUSO Registry.<sup>58</sup> Under the current CUSO rule, complex or high-risk activities  
830 are defined to include credit and lending, including business loan origination, consumer  
831 mortgage loan origination, loan support services, student loan origination, and credit card loan  
832 origination.<sup>59</sup> For consistency, the final rule removes the specific subcategories of lending and  
833 instead refers to all loan originations as complex or high risk. Lending activities are considered  
834 complex or high risk because they can present a high degree of operational or financial risk.<sup>60</sup>  
835 Specifically, FICUs making loans to and investments in CUSOs engaged in credit and lending  
836 activities may be exposed to significant levels of credit, strategic, and reputation risks.<sup>61</sup>

837 Commenters also noted that the CUSO Registry requires all CUSOs to provide data to the  
838 NCUA. Several commenters stated that the current reporting requirements are sufficient and the  
839 NCUA should not expand reporting requirements, as proposed. The Board is not expanding what

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<sup>57</sup> 12 CFR 712.3(d).

<sup>58</sup> *Id.* Complex or high-risk CUSOs must agree to include in their report: (1) a list of services provided to certain credit unions, and (2) the investment amount, loan amount, or level of activity of certain credit unions. Complex or high-risk CUSOs must also agree to provide the CUSO's most recent year-end audited financial statements to the NCUA. CUSOs engaged in credit and lending services are also required to report the total dollar amount of loans outstanding, the total number of loans outstanding, the total dollar amount of loans granted year-to-date, and the total number of loans granted year-to-date.

<sup>59</sup> 12 CFR 712.3(d)(5)(i).

<sup>60</sup> 78 FR 72537 (Dec. 3, 2013).

<sup>61</sup> *Id.*

840 must be reported by CUSOs engaging in complex or high-risk activities, but as proposed is  
841 incorporating all types of lending in the definition of complex or high-risk activities.

842 An association of state credit union supervisors expressed concern that state CUSOs with  
843 authority to engage in all forms of lending would be required to report additional information  
844 under the proposed rule. The organization requested that the NCUA consult with state regulators.  
845 The Board notes that when it adopted this provision in 2013, it broadly described credit and  
846 lending activities as complex or high-risk and applied this requirement to FICUs.<sup>62</sup> Further, some  
847 FISCO-owned CUSOs are reporting the number and dollar amount of their lending activities,  
848 even if those lending activities are not explicitly listed in § 712.3(d). The Board, therefore, does  
849 not believe the effect of this rule on CUSOs in which only FISCUs have an ownership interest  
850 represents a policy change from that final rule.

851  
852 **Expansion of Permissible CUSO Activities to Other Activities as Approved by the Board in**  
853 **Writing**

854 Currently, the list of permissible CUSO activities in § 712.5 includes many of the core  
855 services and activities associated with the daily and routine operations of credit unions. The list,  
856 however, does not provide the Board flexibility to consider additional activities and services  
857 without engaging in notice and comment rulemaking. In contrast, part 704 permits corporate  
858 CUSOs to engage in any category of activity as approved in writing by the NCUA and published  
859 on the NCUA's website.<sup>63</sup> Amending part 712 to be similar to part 704 has the potential to

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<sup>62</sup> 78 FR 72537, 72542 (Dec. 3, 2013).

<sup>63</sup> 12 CFR 704.11(d)(3)(ii). Approved activities are listed on the NCUA's website at:  
<https://www.ncua.gov/regulation-supervision/corporate-credit-unions/corporate-cuso-activities/approved-corporate-cuso-activities>.



860 reduce regulatory burden by allowing the rule to expand as technology shapes the routine and  
861 daily operations of credit unions.

862 Several commenters supported the proposed change to permit the NCUA to approve of  
863 new activities outside of notice-and-comment rulemaking. Commenters mentioned the current  
864 authority in part 704 for corporate CUSOs. Other commenters generally stated that the proposed  
865 process would be more efficient and that the advantages outweigh the public input received  
866 through notice-and-comment rulemaking. One commenter stated that the change would allow the  
867 Board to be more responsive to shifting market dynamics. Another commenter encouraged the  
868 NCUA to periodically review the list for updates and to post any additional activities on its  
869 website. A few commenters noted that a technical change is necessary in the regulatory text.

870 A few commenters who opposed the proposed rule generally discussed that enabling the  
871 Board to approve new activities without notice-and-comment rulemaking would eliminate  
872 regulatory transparency and opportunity for the public to review and comment on newly  
873 proposed CUSO activities. One banking trade organization stated that the authority to approve  
874 rules without notice and comment is exacerbated by requiring formal rulemaking to revoke or  
875 reform the approved activity, but not adding the same activity. The commenter stated that this  
876 policy places a regulatory obstacle to address potentially unsafe and unsound activities, or  
877 activities that may be harming consumers, members, and underserved areas and low-to-moderate  
878 income communities. One credit union trade organization that supported the rule overall  
879 nonetheless encouraged the NCUA to do notice-and-comment rulemaking to add approved  
880 activities and suggested limiting the comment period to thirty days as a balance between speed  
881 and transparency. Another consumer stated that emerging technologies often pose risks to  
882 members and other consumers that should be evaluated through the public notice and comment  
883 process.

884           The Board has considered the comments on this issue and is finalizing the changes to the  
885 approval process as proposed. As commenters supporting the change observed, a streamlined  
886 process may help CUSOs keep pace with innovation. The Board has considered the opposing  
887 comments and notes that its intent is to use this authority only for approving activities that are  
888 related to the existing authorities in § 712.5. If the Board believes a new authority is sufficiently  
889 novel, and that notice and comment is advisable or required under the Administrative Procedures  
890 Act, then the Board would use notice and comment rulemaking.

891           The Board also believes it is reasonable to add new approved activities without issuing  
892 the matters for public comment but to solicit public comment before removing activities. The  
893 Board has had this process in place in part 704 for corporate credit unions since 2011 without  
894 any indication that the process is unworkable or leads to inadequately considered policy choices.  
895 Using notice-and-comment procedures when removing an approved activity is sound policy to  
896 ensure that the Board considers parties' serious reliance interests when changing a policy.<sup>64</sup>  
897 While the removal of any given approved activity may not rise to the level requiring an in-depth  
898 analysis of reliance interests before removing it, the general policy of following this process will  
899 help the Board ensure it conducts this analysis in appropriate cases.

900           Second, the Board has considered, but disagrees with, the suggestion to use a 30-day  
901 comment period when adding new activities as a blanket policy. While a 30-day comment period  
902 would naturally tend to lead to a prompter conclusion than a 60-day comment period, it would  
903 still generally result in several months or more from the time the activity is proposed until it is  
904 approved by the Board when taking into account the need to review and respond to public

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<sup>64</sup> See *Dep't of Homeland Sec. v. Regents of the Univ. of Calif. et al.*, 591 U.S. \_\_\_\_ (2020), slip. op. at 23 (holding that, when an agency changes course, it must recognize that longstanding policies may have engendered serious reliance interests that must be taken into account).

905 comments and prepare a final Board action in response. The Board, therefore, finds this  
906 suggestion would not implement the proposal as it was intended. Regarding the commenter's  
907 transparency concern, the Board notes that it would have discretion to take action to add  
908 activities in a public forum, such as open Board meetings, or alternatively, undertake notice-and-  
909 comment proceedings if it deems them appropriate or desirable under the circumstances of any  
910 particular request to approve a new activity.

911 Accordingly, under the final rule, the list of permissible activities in § 712.5 includes a  
912 catchall category for other activities as approved in writing by the NCUA and published on the  
913 NCUA's website. The final rule also provides that once the NCUA has approved an activity and  
914 published that activity on its website, the NCUA would not remove that particular activity from  
915 the approved list, or make substantial changes to the content or description of that approved  
916 activity, except through formal rulemaking procedures.

917

#### 918 **IV. Investment Authority**

919

920 An FCU's authority to lend to and invest in a credit union organization is provided for in  
921 two separate provisions of the FCU Act. The NCUA has historically interpreted the lending and  
922 investment authority under the FCU Act as referring to the same types of organizations.<sup>65</sup> The  
923 Board solicited comment about adopting separate definitions for the types of organizations that  
924 an FCU may invest in or lend to, which potentially would expand the types of organizations  
925 eligible for FCU investment. Several commenters supported the Board's decision to reconsider  
926 its longstanding interpretation of FCU investment and lending authority. Commenters in support

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<sup>65</sup> 12 U.S.C. 1757(5)(D).

927 of the reinterpretation generally discussed the benefit of broadly permitting FCUs to invest in  
928 financial technology companies. Several commenters stated that FCUs can get left out of the  
929 development of new financial technology because of the requirement to primarily serve  
930 members. Some commenters stated that additional investment authority would ensure the  
931 industry has better leverage, control, and influence in the development of new technologies.  
932 Three commenters provided sample safety and soundness conditions that could be applied to  
933 these lending authorities.

934 One commenter recommended that certain de minimis investments be exempt from  
935 CUSO requirements. This commenter recommended that the NCUA permit FCUs to make a 25  
936 percent investment in CUSOs of FISCUs without those CUSOs being subject to part 712.  
937 Currently, the preapproved activities and most other requirements of part 712 do not apply to  
938 CUSOs with only FISCU investment. Accordingly, if the only credit unions that have an  
939 ownership in a CUSO are state-chartered, then the CUSO may be able to engage in activities  
940 beyond those that are preapproved in § 712.5. Thus, any investment in, or loan to, a CUSO  
941 (which § 712.1 generally describes as ownership interests) from an FCU subjects the CUSO to  
942 all of part 712's requirements. The commenter's suggestion is that some amount of such  
943 investment should be allowed without invoking those requirements. The Board appreciates this  
944 recommendation and will take it into consideration when evaluating future action on the  
945 investment issue. The Board observes, however, that any future expansion of FCU investment  
946 authority would need to be in organizations providing services associated with the routine  
947 operations of credit unions, which could vary from some types of entities in which state-  
948 chartered credit unions may invest.

949 Another commenter recommended that the proposed interpretation be adopted and  
950 extended to corporate credit unions.

951 In contrast, one banking trade organization stated that expanding FCU investment  
952 authority in CUSOs would be outside the routine operations of credit unions, which are  
953 statutorily confined to serving their fields of membership. The commenter stated that the  
954 NCUA's position would exceed the agency's legal authority under the FCU Act.

955 The Board will consider these comments in determining whether to propose any change  
956 to its existing interpretation and regulatory definition of a CUSO. The Board notes, however, that  
957 it does not find persuasive the contention that the possible reinterpretation is inconsistent with  
958 the FCU Act. As set forth in the preamble to the proposed rule, the investment provision of the  
959 FCU Act contains distinct wording from the loan provision. The preamble discussion in the  
960 proposed rule discussed the statutory wording and possible interpretation in careful detail. The  
961 Board, therefore, declines to withdraw this portion of the proposed rule, as recommended by the  
962 commenter, and will consider this issue for potential future action.

963

#### 964 **V. Other Comments**

965 The Board also received other comments outside the scope of the proposed rule, which  
966 are discussed briefly in this section.

967 One commenter recommended that where a CUSO is making a loan that involves tax  
968 credits the CUSO should be permitted to acquire and syndicate the tax credits, whether among  
969 taxable (non-credit union) members of the CUSO and/or third-party investors. The Board will  
970 consider this issue for potential future action for CUSO investment authorities but notes that  
971 these authorities have historically been narrow.<sup>66</sup> The NCUA has, however, previously found a

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<sup>66</sup> See 12 CFR 712.5(r), 712.6.

972 CUSO’s proposed acquisition and sale of tax credits in connection with approved lending  
973 activity to be permissible.<sup>67</sup>

974 One commenter asked that CUSOs be permitted to engage in both debt and equity aspects  
975 of financing sale-leaseback transactions for credit unions, whether those credit unions are  
976 members of the CUSO or not. The Board will consider this request in connection with future  
977 action on CUSO authorities.

978 One commenter suggested the NCUA offer periodic dialogue sessions akin to those  
979 recently launched by the Federal Deposit Insurance Corporation, and recommended a CUSO  
980 compliance guide. The Board will consider these suggestions as part of its ongoing supervisory  
981 program.

982

## 983 **VI. Regulatory Procedures**

984

### 985 *Regulatory Flexibility Act*

986

987 The Regulatory Flexibility Act (RFA) generally requires that, in connection with a final  
988 rulemaking, an agency prepare and make available for public comment a final regulatory  
989 flexibility analysis that describes the impact of a rule on small entities (defined for purposes of  
990 the RFA to include credit unions with assets less than \$100 million).<sup>68</sup> A regulatory flexibility  
991 analysis is not required, however, if the agency certifies that the rule will not have a significant

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<sup>67</sup> OGC Op. Ltr. 03–0647, FCU and CUSO Participation in New Markets Tax Credit Program (July 2003), *available at* <https://www.ncua.gov/regulation-supervision/legal-opinions/2003/federal-credit-union-and-credit-union-service-organization-participation-newmarkets-tax-credits>.

<sup>68</sup> *See* 80 FR 57512 (Sept. 24, 2015).

992 economic impact on a substantial number of small entities and publishes its certification and a  
993 short, explanatory statement in the *Federal Register* together with the rule.

994  
995 This rule does not have a significant economic impact on a substantial number of small  
996 entities. The rule imposes no requirement or costs on small entities and only expands the list of  
997 permissible activities for CUSOs. The rule expands the list of activities that are considered  
998 complex or high risk for purposes of the CUSO Registry, however, the Board does not expect the  
999 additional reporting requirements to entail substantial regulatory burden. Accordingly, the  
1000 NCUA certifies that the final rule does not have a significant economic impact on a substantial  
1001 number of small FICUs.

1002  
1003 *Paperwork Reduction Act*

1004  
1005 The Paperwork Reduction Act of 1995 (PRA) (44 U.S.C. 3501 et seq.) requires that the  
1006 Office of Management and Budget (OMB) approve all collections of information by a Federal  
1007 agency from the public before they can be implemented. Respondents are not required to respond  
1008 to any collection of information unless it displays a current, valid OMB control number.

1009 Consistent with the PRA, the information collection requirements included in this final  
1010 rule has been submitted to OMB for approval under control number 3133-0149.

1011  
1012 *Executive Order 13132*

1013  
1014 Executive Order 13132 encourages independent regulatory agencies to consider the  
1015 impact of their actions on state and local interests. Per fundamental federalism principles, the

1016 NCUA, an independent regulatory agency as defined in 44 U.S.C. 3502(5), voluntarily complies  
1017 with the principles of the Executive order. This rulemaking will not have a substantial direct  
1018 effect on the states, on the connection between the National Government and the states, or on the  
1019 distribution of power and responsibilities among the various levels of government. The NCUA  
1020 has determined that this rule does not constitute a policy that has federalism implications for  
1021 purposes of the Executive order.

1022

1023 *Assessment of Federal Regulations and Policies on Families*

1024

1025 The NCUA has determined that this rule will not affect family well-being within the  
1026 meaning of section 654 of the Treasury and General Government Appropriations Act, 1999, Pub.  
1027 L. 105-277, 112 Stat. 2681 (1998).<sup>69</sup>

1028

1029 *Small Business Regulatory Enforcement Fairness Act*

1030 The Small Business Regulatory Enforcement Fairness Act of 1996 (SBREFA) generally  
1031 provides for congressional review of agency rules.<sup>70</sup> A reporting requirement is triggered in  
1032 instances where the NCUA issues a final rule as defined in the Administrative Procedure Act.<sup>71</sup>  
1033 An agency rule, besides being subject to congressional oversight, may also be subject to a  
1034 delayed effective date if the rule is a “major rule.” [The NCUA does not believe this rule is a  
1035 “major rule” within the meaning of the relevant sections of SBREFA]. As required by SBREFA,  
1036 the NCUA will submit this final rule to OMB for it to determine if the final rule is a “major rule”

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<sup>69</sup> Pub. L. 105–277, 112 Stat. 2681 (1998).

<sup>70</sup> 5 U.S.C. 551.

<sup>71</sup> *Id.*



1037 for purposes of SBREFA. The NCUA also will file appropriate reports with Congress and the  
1038 Government Accountability Office so this rule may be reviewed.

1039

1040 **List of Subjects in 12 CFR Part 712**

1041 Administrative practices and procedure, Credit, Credit unions, Insurance, Investments, Reporting  
1042 and recordkeeping requirements.

1043

1044 By the National Credit Union Administration Board on October 21, 2021.

1045

1046

1047

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Melane Conyers-Ausbrooks,

1048

Secretary of the Board.

1049

1050 For the reasons stated in the preamble, the Board amends 12 CFR part 712 as follows:

1051

1052 **PART 712—CREDIT UNION SERVICE ORGANIZATIONS (CUSOs)**

1053

1054 1. Amend the authority for part 712 by revising the citation to read as follows:

1055 **Authority:** 12 U.S.C. 1756, 1757(5)(D) and (7)(I), 1766, 1782, 1784, 1785, 1786, and  
1056 1789(a)(11).

1057

1058 2. Amend §712.3 by revising paragraphs (d)(5)(i), (d)(5)(ii) introductory text, and (d)(5)(iii) to  
1059 read as follows:

1060

1061 **§ 712.3 What are the characteristics of and what requirements apply to CUSOs?**

1062 \* \* \* \* \*

1063 (d) \* \* \*

1064 (5) \* \* \*

1065 (i) Credit and lending:

1066 (A) Loan support services, including servicing; and

1067 (B) Loan origination, including originating, purchasing, selling, and holding any loan as  
1068 described in § 712.5(q).

1069 (ii) Information technology:

1070 \* \* \* \* \*

1071 (iii) Custody, safekeeping, and investment management services for credit unions.

1072 \* \* \* \* \*

1073 3. Amend §712.5 as follows:

1074 a. Revise paragraph (a) introductory text;

1075 b. In paragraph (a)(4), add a semicolon at the end of the paragraph;

1076 c. Revise paragraph (b) introductory text;

1077 d. In paragraph (b)(11), remove the period and add a semicolon in its place;

1078 e. Remove paragraphs (c), (d), (n), and (s);

1079 f. Redesignate paragraphs (e) through (t) as paragraphs (c) through (p);

1080 g. Revise newly redesignated paragraphs (c) introductory text, (d) introductory text, (e)  
1081 introductory text, (f) introductory text, (g) introductory text, and (h) introductory text;

1082 h. In newly redesignated paragraph (h)(3), remove the word “and”;

1083 i. Revise newly redesignated paragraphs (i) introductory text, (j), (k), (l), and (m)

1084 introductory text;

1085 j. In newly redesignated paragraph (m)(3), remove the period and add a semicolon in its  
1086 place;

1087 k. Revise newly redesignated paragraph (n);

1088 l. In newly redesignated paragraph (o), remove “*CUSO investments in non-CUSO service*  
1089 *providers.*” and remove the last period and add a semicolon in its place;

1090 m. In newly redesignated paragraph (p), remove the period and add a semicolon in its  
1091 place; and

1092 n. Add new paragraphs (q) and (r).

1093 The additions read as follows:

1094 **§712.5 What activities and services are preapproved for CUSOs?**

1095 \* \* \* \* \*

1096 (a) Checking and currency services:

1097 \* \* \* \* \*

1098 (b) Clerical, professional and management services:

1099 \* \* \* \* \*

1100 (c) Electronic transaction services:

1101 \* \* \* \* \*

1102 (d) Financial counseling services:

1103 \* \* \* \* \*

1104 (e) Fixed asset services:

1105 \* \* \* \* \*

1106 (f) Insurance brokerage or agency:

1107 \* \* \* \* \*

1108 (g) Leasing:

1109 \* \* \* \* \*

1110 (h) Loan support services:

1111 \* \* \* \* \*

1112 (i) Record retention, security and disaster recovery services:

1113 \* \* \* \* \*

1114 (j) Securities brokerage services;

1115 (k) Shared credit union branch (service center) operations;

1116 (l) Travel agency services;

1117 (m) Trust and trust-related services:

1118 \* \* \* \* \*

1119 (n) Real estate brokerage services;

1120 \* \* \* \* \*

1121 (q) Loan origination, including originating, purchasing, selling, and holding any type of  
1122 loan permissible for Federal credit unions to originate, purchase, sell, and hold, including the  
1123 authority to purchase and sell participation interests that are permissible for Federal credit unions  
1124 to purchase and sell; and

1125 (r) Other categories of activities as approved in writing by the NCUA and published on  
1126 the NCUA's website. Once the NCUA has approved an activity and published that activity on  
1127 its website, the NCUA will not remove that particular activity from the approved list or make  
1128 substantial changes to the content or description of that approved activity, except through formal  
1129 rulemaking procedures.