August 27, 2006

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

Re: Comment on Proposed Rule 12 C.F.R. Part 708a
Conversion of Insured Credit Unions to Mutual Savings Banks

Dear Ms. Rupp:

Thank you for the opportunity to provide comments to the National Credit Union Administration on Proposed Rule 12 C.F.R. Part 708a, Conversion of Insured Credit Unions to Mutual Savings Banks. Self-Help Credit Union is a 21-year old community development credit union serving approximately 14,000 member-owners, on whose behalf we manage in excess of $250 million of assets.

Summary

Self-Help strongly supports the proposed regulation, while recommending a number of minor modifications that we believe we strengthen the final regulation. The conversion of a cooperatively-owned, not-for-profit, tax-exempt institution into a for-profit, tax-paying corporation, coupled with the virtual certainty of a subsequent conversion to a stockholder corporation, requires the highest level of scrutiny afforded any cooperative and its voting procedures.

A credit union's leadership must exercise the authority to recommend a conversion with extraordinary deference toward providing adequate, relevant information to their member-owners, while providing member-owners with the fullest opportunity to deliberate and discuss such a conversion, including its risks and rewards to them as individuals and as a collective. The opportunity for directors, and managers, to receive extraordinary private benefits not available to the member-owners who they are elected, and appointed, to represent requires NCUA to be particularly cautious in monitoring a conversion vote.

The proposed changes increase clarity and transparency on the conversion process for directors as well as member-owners as voters. In particular, we are pleased to see that NCUA is granting

members the right to be aware of a potential conversion prior to a board vote and granting the members the right to communicate with each other. Both of these rights are quite similar to the rights afforded shareholders of for-profit corporations.

While we support the proposed regulation, we also recommend that NCUA make additional minor changes to the regulation to ensure a more open, fair election process and to ensure that the rights of member-owners in a credit union conversion are comparable to the rights of shareholders in for-profit institutions. Specifically, we propose the following changes:

- The advanced notice of the board's intent to vote on a conversion should be sent to all members.
- Incentives, such as raffles, that encourage member-owners to participate in the election, particularly incentives that encourage early voting, should be banned.
- Member-owners should be permitted to change their vote until such time as the balloting is closed at the special member meeting.
- The teller of elections should be prohibited from providing interim vote tallies to anyone.
- Credit unions should be prohibited from rebutting the boxed disclosure.
- The boxed disclosure should include an affirmative statement of the board's intentions related to a subsequent conversion to a stock bank.
- Credit unions should be required to include the boxed disclosure in all written communications regarding the conversion.
- The credit union should pay for the distribution of member-to-member communications.

Self-Help Supports the Proposed Regulation

As previously noted, Self-Help strongly supports NCUA's proposed revisions. In particular, we would like to emphasize our support for the following provisions:

708a.3 Determination of Fiduciary Duty and Advanced Notice

We support NCUA's proposal requiring the board to give members advanced notice of the board's intent to vote on a proposal to convert the credit union to a bank. We have been saddened by the disregard most converting credit unions have shown their members by failing to inform their member-owners of their conversion plan at the same time they inform regulators of their proposal to convert the credit union to a bank.

It is simply unimaginable that the board of a public corporation would attempt to hide such an event from shareholders. For example, Wachovia recently announced its proposal to merge with World Savings Bank to the public, well before it had received approval from regulators such as the Federal Reserve, the Securities and Exchange Commission and the Office of Thrift Supervision. The contrast between public company transparency and credit unions is truly sad. In only the most recent example, among many converting credit unions, Lafayette Federal Credit Union submitted its conversion proposals to NCUA, OTS and the Federal Deposit Insurance Corporation in June of 2006, and only announced its intentions to convert publicly on August 24, 2006, when it received approval of its disclosures and voting process from NCUA. Such attempts to hide critical corporate information from shareholders would lead to major upheaval on public company boards, and should lead to similarly legitimate complaints from credit union member-owners.

In addition, we believe that clearly stating that the board of directors must propose and support a conversion only if they have determined the conversion is in the best interest of the members clarifies the general responsibility of a credit union's board to act only in the interest of the member-owners. The board of directors, and management, of the credit union has the fiduciary responsibility to promote the members' interests, while ensuring that the credit union's assets, including its net worth – which belongs to the members, collectively – are utilized to serve those same members. We are concerned that many directors and managers, when presented with the inherent conflict of interest presented by a conversion, may not always defer to this fundamental duty to guard the members' interest. At the same time, we assume that no board of directors would object to such a provision clarifying that they recommend the proposed conversion only when it will benefit the members.

We also agree with NCUA's position that soliciting member feedback will help a board of directors make a more informed decision itself as to whether a charter conversion truly benefits the people they serve – their member-owners. As discussed further in our proposed list of enhancements, we do recommend that credit unions' ensure that all members receive the advanced notice via more robust communications methods than those proposed.

708a.4(a) Delivery of Ballots

We support the proposal limiting ballot mailings until 30 days prior to the special member meeting to consider conversion. Such a proposal removes the false impression that members should vote in haste and creates an environment where the member-owners can gather information about the future of their credit union prior to making this critical decision. As one member of Congress recently stated, sending ballots at the same time as initial disclosure is asking "member-owners to vote first and to discuss the matter openly after the decision has been made [is] the functional equivalent of passing out ballots [in August] for the upcoming November elections." In public elections, even communities that allow early voting only open such voting a few weeks prior to the election, so voters can gather information prior to making their decision.

708a.4(f) Member-to-Member Communications

One of the most important recommendations in this proposed regulation is the recommendation to allow member-to-member communications. This helps provide balanced perspectives regarding the options presented to voters – remaining a credit union or becoming a bank. At the same time, the proposal is consistent with the rights afforded shareholders of public companies during a proxy election and the rights of savings bank owners.

The current rules, coupled with the efforts of boards to stifle member-to-member communications under the false pretense of member privacy ensures that the board of directors and managers, as conversion advocates, dominate the debate. We find it particularly disturbing that credit union leaders themselves have rejected suggestions that they should distribute member-to-member communications, which is a method of promoting member discussion without jeopardizing member privacy.

As noted, we also propose that the credit unions' fund such member-to-member communications, consistent with the rights of shareholders of public companies, as further described below.

708a.4 Member Disclosure

The process of converting a credit union to a bank must be transparent for every member-owner, including those who are less familiar with the structure of the very institution they own. At the same time, NCUA must provide appropriate oversight of the election to ensure that these same member-owners can make well-informed decisions based on fair, objective and honest information. The proposed regulation improves the flow of such information, particularly in the recommended changes to the boxed disclosure. The simplification of the "Loss of Credit Union Membership" section provides member-owners, as voters, with a clear understanding of the outcome of their voting options. In addition, we strongly support the required disclosure on "Potential Profit by Officer and Directors". The history of credit union-to-bank conversions is conclusive evidence that converted credit unions are almost certain to engage in a subsequent conversion to a stockholder bank, which provides tremendous opportunity for insider gain, much of which NCUA has documented in the commentary of the proposed regulation. Member-owners need this information in order to make informed decisions.

At the same time, we do propose that NCUA elevate the required disclosure regarding a boards subsequent intent to engage in a second conversion to the required boxed disclosure, as further discussed below.

708.12 Access to Books and Records

The decision to convert a credit union to a for-profit, tax-paying financial institution is the most important decision a credit union's managers, board of directors and member-owners will ever make during the credit union's existence. As such, we believe that a greater level of transparency in the decision-making process governing this event is required than that which is typically afforded member-owners regarding other decisions made by managers and boards.

In order to make an informed choice as to whether they benefit by remaining member-owners of a credit union or becoming mutual-holders in a bank, we believe members must to be able to review the materials that management has prepared and a board of directors has reviewed in its due diligence on the same conversion proposal. Unlike other board decisions, which the members are not required by statute to ratify, Congress expressly distinguished the decision to convert a credit union by granting the authority to make this decision to the member-owners. As such, these member-owners must be as well informed in making the conversion vote as a board of directors in its decision-making process regarding this and other decisions. A member-owner would be derelict in his or her duty to make this decision without seeing all of the information that is provided to directors regarding such a conversion, including the minutes of the board's own deliberations on the subject.

Suggested Modifications to the Regulation

As noted in our summary, Self-Help would like to offer a number of small, but important modifications to the proposed regulation. Each of these changes is offered to enhance

deliberation and fairness in the election process and/or to provide comparability to the rights of shareholders of for-profit corporations.

Maximize Advance Member Notification

We believe the advanced member notice of a board's intent to vote to recommend conversion should be afforded the same priority as subsequent information distributed to member-owners. As such, this notice to member-owners should be provided via mail or e-mail to all member-owners, in addition to being posted on a credit union's website, in the branches and an area newspaper.

Ban Voting Incentives, Such as Raffles

We urge NCUA to ban incentives in the conversion voting process. We believe that such incentives are created with the intent to encourage members to vote quickly, prior to fully examining the proposed conversion, and in particular, discussing the issue with other member-owners. The size of some of the raffle offerings[1] ($100,000 at DFCU Financial and $20,000 at Community Credit Union) is not consistent with the type of small prizes that credit unions like ours offer to members to participate in annual meetings. Given that the board of directors and management are promoting the conversion of the credit union, we believe it is particularly distressing that the same group be allowed to offer voting incentives. Such an endeavor – whereby the party advocating a specific position offers prizes to all voters – would be roundly denounced in a public election.

We recognize that many credit unions typically offer small incentives, such as raffles, for members to participate in other voting activities, most notably annual meetings. Typically, these incentives are small – a free dinner, $25 deposited into the member's share account, etc. The heightened importance of a credit union converting its charter, and thereby diminishing its member-owners rights and altering their opportunities, requires a higher standard of fairness than other member decisions.

If NCUA declines to an outright ban on voting incentives in conversion elections, we do urge the agency to ban raffles that are not available to all voting members, such as a raffle that is only open to the first 500 voters.

Members Right to Change Votes

Self-Help believes that credit union member-owners should be allowed to change their vote up until the ballot box is closed at the special meeting. This is consistent with the shareholder rights of for-profit companies and Robert's Rules of Order. We find no legal precedent for the decision to prohibit a member from changing his or her vote prior to the announcing of the final results. To the contrary, we believe current NCUA regulation implicitly endorses the right of a member to change his or her vote prior to the closing of a ballot.

[1] For example, the most recent proposed conversion, DFCU Financial, offered the extraordinary total of $100,000 in cash prizes to voters in its recently withdrawn conversion, of which there were ten winners of $10,000 each, to be evenly divided between the individual voter and the school district of his or her choice. The coupling of personal gain for individual voters with emotional benefit (a contribution to their child's school district) is particularly noxious when the group offering the incentive – the board – is also the group promoting the conversion and the group afforded an extraordinary opportunity to gain in a two-step conversion.

For example, the current 708a.11(d) [relocated to 708a.13(c) in the proposed regulation] provides:

> "A credit union should conduct its meeting in accordance with applicable federal and State law, its bylaws, *Robert's Rules of Order* [emphasis added] or other appropriate parliamentary procedures."

Robert's Rules of Order, "Voting VIII," confirms the general corporate standard that a member may change his or her vote until the time the results are announced:

> "A member has the right to change his vote up to the time the vote is finally announced. After that, he can make the change only by permission of the assembly, which may be given by general consent; that is, by no member's objecting when the chair inquires if any one objects. If objection is made, a motion may be made to grant the permission, which motion is undebatable."

Such a right is also consistent with corporate law as practiced in virtually every state. The case law in various states as well as corporate law principles confirm that a member of a corporation or a co-operative group such as a credit union can change his or her vote until the time that the result is announced.[2] For example, in the case of *Salgo v. Matthews*[3] the shareholder votes in question were presented to the corporation while the ballots were still being counted, but before the results were announced. According to the Court of Appeals:

> "In the absence of any controlling bylaw, agreement or other binding provision concerning earlier closing of the polls, a stockholder has the right to change his vote so long as the result has not been finally announced. Zierath Combination Drill Co. v. Croake, 21 Cal. App. 222, 131 P. 335 (1913); Zachary v. Milin, 294 Mich. 622, 293 N.W. 770 (1940); State ex. rel. David v. Dailey , 23 Wash.2d 25,

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[2] CORPORATIONS:CASTING OF BALLOTS AFTER CLOSING OF POLLS, s 2, 41 A.L.R.3d. 234 (2004). See also cases cited in ALR article; Am. Jur.2d, Corporations s 839, CORRECTING BALLOT ORIGINALLY CAST (2004) (a shareholder has the right to make the desired correction in order to express the true intent); Am. Jur.2d, Corporations s 1197, VOTING OR CHANGING OF VOTE AFTER CLOSING OF POLLS (shareholder has the right to change his or her vote as long as the result has not been finally announced); 18 C.J.S., Corporations s 375, RIGHT TO VOTE GENERALLY (shareholders have the right to have all pertinent and material information whenever called upon to vote); In Practicing Law Institute, October 29, 1987, Balotti and Bodnar, CONDUCTING A CRITICAL STOCKHOLDERS' MEETING, the authors stated:

> "Other courts have held that stockholders may change their votes prior to the announcement of the final vote on a question. Zachary v. Miln, 293 N.W. 770 (Mich. 1940); Salgo v. Matthews, 497 S.W.2d 620 (Tex. Civ. App. 1973); Missouri ex rel Lawrence v. Mcgann 64 Mo. App. 225 (Mo. App. 1895); Zierath Combination Drill Co. v Croake, 131 P. 335 (Cal. App. 1913)."

See also FLETCHER CYCLOPEDIA OF THE LAW OF PRIVATE CORPORATIONS (2004 update), Chapter 13: Shareholder Meetings and Elections, V: Conduct of Meeting and Elections ("a shareholder or member may change a vote at any time before the result is finally announced [FN 29], and before that time it is proper to permit a correction to the ballot so that it will express the shareholder's rule intention [FN30].") See cases cited in Fletcher.

[3] Salgo v. Matthews, 497 S.W.2d 620 (Tex. Civ. App.-Dallas, 1973). writ refused n.r.e. (1974).

158 P.2d 330 (Wash. 1945); 5 Fletcher, Cyclopedia Corporations s 2017 at 104 (perm. ed. 1967)."[4]

Like the proposal to allow member-to-member communications, which converting credit unions have opposed under the false pretense of member privacy, we believe converting credit unions that oppose this proposal on procedural grounds are demonstrating their opposition to members' rights and showing their true interest – winning the vote at all costs. Such a procedure is well practiced, and therefore, will create on undue burden on a credit union. Inspectors of elections are long practiced at managing ballots to allow shareholders to change their votes while maintaining voter confidentiality.[5]

Prohibit Interim Vote Tallies

The inspector of elections should be prohibited from sharing interim tallies with anyone, including the board and management. Given that the board of directors, in voting to support conversion, has clearly expressed their support for a specific campaign position – that in favor of conversion – it is entirely inappropriate to afford them access to running vote tallies. Given all of the tools a board and management already have to promote their position, it seems bizarre that they be allowed to get updates on how the votes are running, so they can adjust their campaign efforts accordingly.

Fortunately, our proposal to allow vote changing effectively eliminates the opportunity for the inspector of election to count ballots prior to the closing of the ballot box, so our above proposal regarding vote changing, if adopted, would obviate the need to ban teller-to-official communication regarding interim vote tallies.

Prohibit Boxed Disclosure Rebuttal

We strongly endorse the proposed regulation clarification requiring that the "boxed" disclosure be on a separate sheet of paper with nothing on the backside. At the same time, we believe NCUA should remove any ambiguity and specifically prohibit a credit union from "rebutting" the required disclosures. The approval in recent conversion disclosures of rebuttals of these required disclosures dilute the effectiveness of these critical disclosures, effectively downgrading the very importance NCUA affords them by separating them from the other required disclosures.

Attempts to disguise or disclaim federally required disclosures have traditionally resulted in such disclosures being held to be defective and legally insufficient as a matter of law. *See e.g. Stevenson v. TRW Inc.* 987 F.2d 288, 296 (5th Cir. 1993) (holding reverse side disclosures to be defective under the Fair Credit Reporting Act), *See also Jenkins v. Landmark Mortgage Corp.* 696 F.Supp. 1089 (W.D.Va. 1988) (holding that accurate Truth-in-Lending disclosures were rendered defective when coupled with a misleading and seemingly contradictory cover letter.)

[4] Id. at 630-31.

[5] For example, each ballot is sealed inside two envelopes. The inner envelope is blank, and contains the completed ballot. The outer envelope contains a unique identifier of the shareholder. The envelopes remain sealed until voting is closed. If a shareholder changes their mind, and provides a new ballot, the old ballot, sealed within two envelopes, is shredded and the new ballot, identified by the unique identifier on the outer envelope is retained. When the ballot box is closed, all of the outer envelopes are discarded, and the inner envelopes, with their ballots, are pooled prior to their opening, thereby ensuring voter confidentiality.

As a supervised institution, we are concerned with NCUA's lack of consistency on this issue. For example, we cannot imagine NCUA allowing a credit union to rebut the APR disclosure on a loan contract or any other required disclosure.

Elevate Stock Conversion Plans to Boxed Disclosure

We recommend that NCUA relocate the required disclosure regarding a board's subsequent intent to engage in a second-step conversion to a stock bank to the boxed disclosure regarding, "Potential Profit by Officers and Directors." The board's intent regarding such a second step clearly informs the value of this disclosure to member-owners as voters.

It is our experience that members rarely read disclosures, particularly those that are small type, dense and in "legalese". As such, NCUA's existing requirement, that a board merely disclose its intent regarding a second-step conversion along with the other non-boxed disclosures effectively neutralizes the impact of this critical piece of information for the majority of voters. On the other hand, knowing whether or not a board seeks to undertake a second conversion is critical to understanding the potential profit motive addressed in this specific disclosure.

All Written Communications Must Include Boxed Disclosure

Limiting the boxed disclosure to the 90, 60 and 30-day notice affords credit unions too much leeway in providing other information to member-owners. It is our experience that credit union officers and directors will use any means available to discourage member-owners who support remaining a credit union, including rebuttal of required disclosures, refusal to announce conversion prior to regulatory approval of disclosures, and denying member's opportunity to communicate with each other or change their votes. As such, we are very concerned that some credit unions will use this exemption as justification to send out substantial information on a regular basis to members other than the required mailings that will dilute the impact of the boxed disclosures with information promoting the benefits of conversion

We recommend that NCUA require credit unions to provide the boxed disclosure with any written notice on the proposed conversion, be it in a member mailing or on a website. This would not prevent credit unions from answering member questions, speaking with the media and otherwise discussing the proposed conversions, assuming such non-written communications are held to the "accurate and not misleading" standard.

Credit Unions Should Fund Member-to-Member Communications

As noted previously, the proposal to expressly authorize procedures for member-owners to converse with each other regarding this fundamental debate about the very existence of the institution they own is a great improvement in the conversion process. However, just as public companies are required to distribute dissident positions in proxy elections, we believe NCUA should also explicitly require credit unions to fund communications from dissident member-owners to their fellow members.

The board of directors of a credit union has two specific, and conflicting functions in a conversion vote. First, the board oversees the election process itself. In this capacity, the board establishes the ground rules for the election. Second, by recommending (and to date, always initiating) the conversion, board along with management, is the best-funded, most influential

group of member-owners advocating for or against conversion. Even with the most benevolent leadership, these two roles are in conflict. The first role calls for impartiality. The second calls for campaigning for a specific position.

To date, every converting credit union has put substantial funds toward the second role of advocate and very little toward the first role of impartial arbiter. For example, DFCU Financial, the most recent credit union to propose conversion, disclosed its plans to spend $115,000 on a "member awareness campaign", in addition to its regular printing, mailing assembly and postage fees for sending out information that largely promotes conversion, not to mention consulting and legal fees. Not even the best-organized members are able to raise over $100,000 to fund a campaign promoting a vote to remain a credit union.

To combat this inherent conflict, whereby the board can provide itself limitless funds to promote conversion, we believe the credit union should make its resources available for the distribution of information opposing a conversion, as prepared by member-owners who self-identify as advocates for remaining a credit union. Without such funding, the democratic nature of a credit union becomes very undemocratic – whereby the pro-conversion campaign is paid for out of the members' money, while opponents must organize their own campaign out of individual funds. Congress recognized this fault in presidential campaigns over 30 years ago when it created public financing in the first place, and reinforced the importance of maintaining financial parity in elections when it included provisions in the recent McCain-Feingold bill explicitly authorizing additional fundraising opportunities for candidates whose opponents contribute substantial private funds to their own campaign war chests.

Procedurally, there is precedent for such expense being borne by a regulated institution and a mechanism for doing so. Under 17 CFR 240.14a, public companies are required to distribute shareholder proposals in proxy solicitations to all shareholders. If NCUA is concerned about the cost this could create for a credit union, it could clarify 708a.4 (f) to state that the member-requested communication should also be sent out as part of all written communications to members subsequent to the member request, e.g., the 90, 60 and/or 30-day mailing.

Conclusion

Given the finality of a credit union converting to a bank, and the billions of dollars of member-owned net worth at stake, we support NCUA's intent to craft a regulation that increases transparency and member communication, and clarifies the roles and responsibilities of directors, managers and member-owners. We hope NCUA will improve this strong proposal by adopting the procedural modifications we recommend.

Sincerely,

/s/

Randy Chambers
Vice-President & Chief Financial Officer