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August 28, 2006

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

RE: 12 CFR Part 708a, 71 Fed. Reg. 36946-36966 (June 28, 2006)
Conversion of Insured Credit Unions to Mutual Savings Banks

Dear Ms. Rupp:

The American Bankers Association ("ABA") appreciates the opportunity to comment on the National Credit Union Administration's (NCUA's") proposed rule that amends its regulations governing the conversion of insured credit unions to insured mutual savings banks. ABA, on behalf of the more than two million men and women who work in the nation's banks, brings together all categories of banking institutions to best represent the interests of this rapidly changing industry. Its membership – which includes community, regional and money center banks and holding companies, as well as savings associations, trust companies and savings banks – makes ABA the largest banking trade association in the country.

General Comments

For the third time in as many years, the NCUA proposes to amend its charter conversion regulations to add further burden and detail to the efforts of credit unions making the business decision to choose a different charter. The NCUA asserts that the proposal reflects greater learning on the part of NCUA. Moreover, for the first time NCUA endeavors to provide some basis for its rulemaking, including attempting to gather economic data, while emphasizing application of NCUA's limited statutory authority to "administer" the vote on the conversion proposal and to approve or disapprove the methods by which the vote is conducted. NCUA has even added a laudable standard for its judgment on the method of the vote – full and fair disclosure.

Yet, in the midst of its careful statement of jurisdiction and tracing of lines of authority reminiscent of filings made in court, the NCUA continues to employ every interpretative device to delay, discourage, and punish any credit union that has the temerity to file an application regarding the issue of change of charter. NCUA had the opportunity to learn from its past missteps and provide for a process that is predictable, user-friendly, and straightforward. That is not the path NCUA has proposed. Rather, the process offered by NCUA, as further amended by this proposal, is one of more harassment, greater cost, continued uncertainty, and perpetuation of a skewed approach that fails to provide credit union members with a clear and balanced presentation of the issues. And, although the NCUA carefully states that it "recognizes and fully supports the right of a credit union to change its charter to a bank charter," that is not the reality faced by applicants attempting to put those words into action. It is clear to the casual observer that the NCUA's proposed procedure rests solidly upon a prejudice that no rational person with all the facts could possible choose to convert from a credit union to a bank. Indeed, the NCUA's recent comments on the disclosure materials of Lafayette Federal Credit Union and Marcy Federal Credit Union illustrate NCUA's predisposition that there is no rationale, economic basis, nor compelling reason sufficient to overcome the NCUA's fundamental belief that the credit union charter is superior to all possible and potential charters. It appears that the attitude of the NCUA is that the mere application to leave the NCUA's jurisdiction is almost *prima facie* evidence of an unsafe or unsound practice or of management and board malfeasance.

To state the obvious, that the proposal (though superficially crafted with judicial care) far exceeds the NCUA's regulatory mandate, is to join a chorus of voices for which the NCUA has no ear. The only voice that has influenced the NCUA's actions to date appears to be that of the federal judiciary. The NCUA has learned from its losses in court, but not sufficiently. It still plays the "cheerleader" role rather than fulfill its statutory institutional duty to serve as an impartial implementer of congressional intent. It seems difficult to develop and preside over a fair process when the agency manifests such a clear preference for what that outcome should be. That is not the proper posture for a governmental agency tasked with an arbiter's responsibilities. The U.S. Patent and Trademark Office may not believe that any particular submission has the chance of commercial success, yet it weighs every submission by the impartial standards of patentability. The Securities and Exchange Commission is not interested in which entity wins a proxy fight but in the fair adherence to rules of proxy solicitation and administration. Even state regulators, who may be expected to be loath to see state-chartered financial institutions shift their charters to federal supervision (including the NCUA), do not erect the sort of barriers to exiting that are present in this proposal. Yet the NCUA, in every action, declares and promotes its bias, contrary to clear congressional mandate and best administrative practices.

This stacked deck approach to supervising the decision-making process, so that no disclosure from management to members, other than disclosures that proclaim and reiterate the NCUA's view of the superiority of the credit union charter, is contrary to the Administrative Procedures Act and undermines the foundation for the judicial doctrine of agency deference. There can be no grounds for deference when the agency takes a partial position on the outcome, when only the rare application is approvable, when each denial is focused on the agency's firm belief that there can be no rationale sufficient to support exiting the credit union system, and when any such rationale presented by management is suspected by the agency of being a deceptive communication.

It is also clear that NCUA does not recognize the ability of boards of directors to make an informed business decision. Rather, NCUA substitutes its judgment for the business judgment of the institution, thereby usurping the role of the board of directors in contravention of statute and common law. Every state has common law standards on the business judgment rule for its corporations and other forms of business. The U.S. Supreme Court has ruled that it is the state's business judgment doctrine that must be applied, not a federal standard that a regulator may attempt to bootstrap onto existing statute. Atherton v. Federal Deposit Insurance Corporation, 519 U.S. 213 (1997). NCUA has chosen to question and challenge every assertion of the benefits of an alternative business form to provide financial services to customers and communities. No credible regulator goes to such extremes,

Description of the Proposed Rule

As summarized by the NCUA, the proposed rule changes are basically in ten areas:

- Each credit union considering charter conversion must give its membership advance notice of the board's consideration, prior to the board's vote on whether or not to propose to convert. Included in this section are procedures for members to share their views on the issue before the board acts.
- A credit union's board of directors may only vote in favor of conversion if the board determines that conversion is in the best interests of the members and the board submits a certification to the NCUA board of its support for the conversion plan and proposal.
- The mandated "boxed" disclosure has been shortened; it must be on a separate piece of paper (not on the reverse side of any other material, thereby avoiding any future "fold" issues); it must be included with 90,60, and 30-day notices to credit union members; it must include disclosures on the impact to members of loss of credit union status, such as notification that rates may change for the worse; and it must

state that conversion to a mutual savings bank is just the first step in a two-step process that will lead to full stock ownership.

- The form of the ballot is specified, but the ballot may only be provided with the last notice (the 30 day notice) to members.
- The board must set a voting record date to occur at least 120 days after the board notifies the membership that it is considering conversion.
- After the board approves the plan to convert to a mutual savings bank it must disseminate materials to the full membership at the members cost.
- The credit union members are provided with access to books and records of the credit union, at the individual member's cost.
- The time period is limited for the NCUA Regional Director to approve or disapprove the vote once the certified vote is received from the converting credit union.
- The converting credit union is required to complete its conversion within one year of final approval of the disclosures.
- Includes the use of raffles in the voting guidelines.

Many of the above will be addressed in turn. In short, rather than correct legitimate problems, the NCUA seems driven to insert as many poison pills as possible into the conversion process.

"No less restrictive."

NCUA attempts to justify at length that its rules for administering the vote are "no less restrictive" than similar rules at either the state or federal level and cites a number of examples in furtherance of that claim. Unfortunately, many of the examples cited are incomplete, matching fruits to vegetables rather than like to like.

Indeed, much of the comparison to the Office of Thrift Supervison ("OTS") rules suffers from this incomplete comparison. A fuller comparison would surely show the NCUA to disadvantage. For instance, the OTS has a philosophy under its rules governing the conversion of a mutual to a stock form of charter (a form of conversion that is not within the competency of the NCUA nor part of NCUA's statutory mandate regarding the conversion from a credit union to a savings association) that the rules should promote the greatest distribution of stock possible. Nowhere does the NCUA recognize that the OTS has over thirty years of experience, has successfully allowed savings associations (whether savings and loans or savings banks) to determine what form of charter best serves their communities and depositors/borrowers, and that the statutory authority of the OTS far exceeds that of the NCUA's in the conversion of charter process. Only OTS, not the NCUA, has the federal authority to administer the reorganization into a mutual holding company charter ("MHC"). Only OTS, not the NCUA, has the authority on the federal level to supervise the conversion from a mutual to

stock form of charter. Yet, the OTS rules that govern a wider range of transactions are cited by the NCUA as being more restrictive than the NCUA's proposal. Again, NCUA makes the incomplete comparison between the express statutory grants of authority that OTS has and the limited grant given to the NCUA in the process by the Credit Union Membership Access Act (CUMAA). If the NCUA undertook an impartial, dispassionate effort to administer the limited authority granted to it by Congress, the rules and their justification would be simpler, predictable, and shorter. If anything, the length to which the NCUA attempts to "pre-brief" the issue suggests that NCUA understands the extreme to which it reaches.

Furthermore, the NCUA's argument that the OTS rules governing conversions are more restrictive begs the question, why, then, are there more successful conversions under OTS rules than there are under NCUA rules? The NCUA assertion turns out to be another revelation of its bias against conversions.

Member Notification

The proposal attempts to interject member/shareholder participation at a very early stage. This contravenes every other agency's approach, whether on the state or federal level, and most common law on corporate governance. The board's role, as the duly elected governing body of the credit union or corporation or nonprofit entity, is to consider and direct the operations of the entity. There are items that must be placed before the membership for a vote before they may be finalized. These include merger, dissolution, and purchase and assumption of the majority of the assets. This is true under the NCUA rules as well of those of the Office of the Comptroller of the Currency and the OTS, as well as various state corporate governance laws.

Nowhere is the job of the board reverse-delegated to the membership so that the membership, in essence, vocally votes BEFORE the board takes action. How will the membership exercise the fiduciary duty to think of the best interests of the entity? How will the membership be completely and fully informed when ideas are still in a preliminary, conceptual stage? Will the NCUA authorize distribution of the complete examination report to the membership as part of being fully informed? Will the membership be required to review suspicious activity reports and compliance efforts in order to understand fully the regulatory burdens and sophisticated system requirements that may necessitate increased investments that require more capital in order to comply with the requirements of the PATRIOT Act and other regulatory mandates? There are documents and information that board members are charged with investing the time and effort to understand, including confidential, competitive initiatives that underscore certain board decisions. These too must be disclosed to the membership if the membership is to understand fully and fairly the decisions of the board.

The logical analog to the member notification rule is the town hall meeting form of governance. And while that form works in many locales for municipal governance, it makes for a poor business governance model; even the NCUA recognizes that the safe and sound operation of the credit union requires the board to shoulder its responsibilities and make informed and deliberative decisions based upon sometimes confidential information. Neither the board nor the NCUA can effectively reverse-delegate that responsibility. Nor should they want that result. Yet, in this transaction alone, the NCUA seeks to achieve that result. It would almost seem that the NCUA does not want this to work.

Further, we cannot see how the credit union membership can be fairly expected to evaluate conversion issues without the benefit of first knowing the views of the credit union board on the very matters that boards are created to consider. No one would ask the members of the credit union where to place a branch. The members haven't time to analyze traffic patterns, fields of membership, and capital needs of the institution. It is not the job they agreed to when they joined the credit union – they delegated that to the board and to management. There are reasons boards act first – they have invested the time and are examined on their ability to oversee the management of the whole entity. Again, the NCUA proposal turns corporate governance upside down as yet another illogical barrier to credit unions seeking to make a different choice.

Board Member Certification

On the surface, the proposed requirement that the board certify that conversion to a different charter is in the best interests of the members of the credit union appears admirable. Yet, acting in the best interests of credit union members is the job of the board every day, not just in the situation of converting from the credit union format to another charter. Common law and express state law recognize the fiduciary duty of the board and temper that standard with the business judgment rule. Even corporate governance under the Sarbanes-Oxley Act does not require corporate boards explicitly to certify each action they take. A merger, whether voluntary or regulatorily "encouraged," does not require a certification of the board. The conversion from one form of credit union field of membership to another does not require board certification that it is in the best interests of the membership. Conversion away from the credit union charter alone, under the proposal, requires board certification.

NCUA's examples in support of this proposed requirement again are incomplete comparisons. The Hawaiian certification requirement, that the meeting and vote are valid, is a far cry from certifying that conversion is in the best interests of the credit union—it is a fact-based notification that the proper procedures were followed. Michigan's and Vermont's requirement that the

converting credit union file certified copies of all records of all conversion-related proceedings held by the governing body and the credit union's members is a completely different certification than NCUA's proposed rule—once again, a presentation to authorities of factual data. The cited OTS rule on the need to file a certified copy of each adopted conversion resolution, including the votes cast and the need for a legal opinion that that the meeting was conducted in compliance with all applicable laws, is completely different from requiring the board to certify that the conversion is in the best interest of the credit union.[1] The NCUA already has (and the proposal maintains) a requirement for the certification of the member vote – this new board certification is a step beyond NCUA's authority to administer the vote.

It takes no imagination to understand how this new requirement sets up board members for possible enforcement action or recall efforts. Why only the conversion vote merits this certification when other, equally fundamental changes do not, is again evidence of NCUA's clear message to the credit union industry – the NCUA considers only the credit union charter as the appropriate choice for the industry and any departure from that is presumptive malfeasance.

Boxed Disclosures

Again the bias of the NCUA against any other charter not contained in the credit union industry is clearly evident in NCUA's refusal to eliminate the much maligned, black lined "boxed" disclosures. NCUA has never accepted that the credit union shareholder and the mutual savings bank depositor have fundamentally the same rights,[2] insisting on creating an illusory difference because savings banks MAY grant more votes to depositors with more monies placed with the institution.[3] The fact that a savings association MAY offer one vote per depositor is conveniently ignored.

The NCUA also takes the opportunity to deride proxy voting, noting that proxy voting is not available under NCUA rules.[4] The fact that one regulator allows what another does not, does not make one regulator automatically superior to the other. It is a matter of competency and responsibility. We are unaware of any particular expertise or competency possessed by the NCUA that would make it a better judge of corporate regulation than the public corporation regulators. There is a variety of effective corporate regulatory models. Corporations have the ability to choose to incorporate under the laws of any state in the United States. The fact that many choose Delaware

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[1] 71 Fed. Reg. 36946, 36958 (June 28, 2006).
[2] Id. at 36952.

[3] Id. at 36956 ("Federal credit unions have the purest form of democratic government.").

[4] Id.

because of its experience and expertise in corporate law does not make the laws in other states less valid or those in Delaware less appropriate. The same is true among federal financial regulators. We do not see why the NCUA's views on this matter should be given any weight.

Further, NCUA attempts through its moment-in-time, nationwide, *averaged* economic data to support its belief that, without regard to regional factors or the fluctuating nature of the economic marketplace, all credit unions *always* pay better rates than do other financial institutions.[5] NCUA selects auto lending as an area where credit unions offer better rates despite the fact that most banks do not actively compete in this market. Further, NCUA cites two of twenty products examined, mortgage lending and passbook savings, where the rates were almost identical with the result that "there was no product of the twenty examined where bank rates were clearly better than credit union rates."[6]

We do not deny that many credit unions use their substantial regulatory benefits to expand market share. Indeed, some of the most aggressive credit unions exploit those regulatory benefits to expand activities far beyond the needs of their original fields of membership and the low and moderate income people that they were created to serve. What we do contest, though, is whether the NCUA even knows whose needs credit unions are actually serving. In recent congressional hearings, NCUA was unable to support its oft-pronounced and never-tested assertions that credit unions are serving people of modest means.

That is reason enough to question the competence of the NCUA to extend its role beyond administering the charter conversion vote in a fair and impartial manner. There is not much resident experience at the NCUA in gathering data on who and by what means credit unions actually serve. How is the NCUA able to judge whether the rates offered or charged by a converted institution after becoming fully tax paying and subject to the Community Reinvestment Act are "clearly better."[7] It is also remarkable that savings associations, even under the carefully selected economic data, are able to have nearly "identical" rates with credit unions, despite regulatory differences specifically highlighted in the proposed requirement that "directors should review . . . how conversion

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[5] ABA is flattered that the NCUA chooses to cite the ABA webpage as further support of the vendor's economic data. The source of the data aside, the method by which NCUA uses the economic data, selecting one particular year (2002-2003) and particular data points rather than a more extensive and complete analysis including regional and market differences, market trends, and a full spectrum of products and services dismisses the validity of NCUA's analysis.

[6] 71 Fed. Reg. 36946, 36953 (June 28, 2006).

[7] Id.

will affect rates and services available to members and how regulatory differences between the two institutions, such as lending restrictions imposed under the qualified thrift lender test, could affect member service."[8]

Personal Gain

Much of the NCUA's proposed changes to the boxed disclosure attempt to reach elements (real or supposed) of the transaction that are beyond the statutory competence of the NCUA – particularly conversion from the mutual to stock form of charter. NCUA justifies its actions through the potential for personal gain by directors, management and employees. It is important to remember that the process by which a mutually chartered institution changes its form to a stock-owned institution is governed by a separate statute, with separate, fully promulgated regulations that have been tested for over 30 years. The process of mutual-to-stock conversion is subject to required disclosures, separate vote of the membership, an appraisal process, and detailed regulation and supervision. Yet the NCUA believes that it, not the regulator chosen by Congress, is uniquely competent in this process. Why else does the NCUA require a statement in the "boxed" disclosures over the possibility of charter change? Why else does the NCUA speculate on future actions that would be in violation of another regulator's duly promulgated regulations?

This is another revelation of the NCUA's jaundiced rather than impartial view toward conversions, the assumption that credit unions are the best form of organization and any other alternative must be bad. This element of the proposal is a diversion and should be dismissed as irrelevant to the conversion of credit unions and beyond the jurisdiction of the NCUA. It might be a textbook example of *ultra vires* action by a regulator.

If the NCUA can engage in such a regulatory expeditionary effort beyond its authority, then the extremes to which it is willing to go to prevent credit unions from choosing their own charter form to meet customer needs may go unchallenged. NCUA ignores the many mutually chartered institutions that, under the supervision of savings association regulators, have remained mutual and have done so for well over 100 years, some almost 200 years. These mutuals make investments in their communities, have close economic ties to the communities they serve, and have long demonstrated histories of serving millions of customers.

And what might a more balanced view expose? That employees are more motivated if they own a piece of the business? That customer service improves if the performance of the institution is reflected in employee compensation? Most investors, when choosing investments, prefer companies

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[8] Id. at 36950.

where the board, management, and employees have a personal stake in the performance of the entity. Do customers suffer when companies want to do well? Quite to the contrary, customers are pleased when they receive excellent products and services provided by motivated employees in prosperous businesses. That view, unfortunately, is not required by the NCUA disclosure rules and, we suspect, would not make it past the NCUA disclosure censors.

Lastly, rather than the paternalistic approach advocated by the NCUA, regulators of the mutual to stock process understand that the decision to purchase stock is a choice – one that no regulator can force. Sometimes, newly converted stock institutions have stock prices that fall, rather than rise, or an initial pop in price that is accompanied by a substantial drop in value that takes a long time to recover.[9] Investment decisions require each investor to understand and appreciate his or her tolerance for risk. It is an individual decision, without a guarantee of return or protection from loss. A depositor in a credit union may need both a guaranteed rate of return and deposit insurance rather than the market uncertainty of a stock investment. There are many reasons why a depositor in a converting institution may or may not take the opportunity to purchase stock in the institution.[10] What is important is not whether the depositor purchases stock –what is important is that the depositor has a choice.

We make these points not to advocate their inclusion in ever lengthier disclosures mandated by the NCUA, but rather to demonstrate that this whole question of whether a mutual savings association may some day seek to convert to a stock-based corporation is beyond the authority and competence of the NCUA and should not be covered under NCUA rules. The very partial disclosure requirements in the NCUA proposal are a further powerful demonstration of NCUA's partiality regarding conversions, contrary to congressional intent and principles of good government.

CEO Compensation

Concomitant with the argument that institutions change their charter from mutual to stock because of personal gain is the NCUA statement that "bank CEOs typically receive much greater compensation than credit union CEOs."[11] Because federal credit unions are not required to disclose CEO compensation, it is impossible to tell. This is in stark contrast to the vast majority of nonprofits, including charities, hospitals, trade associations,

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[9] Id. at 36953, footnote 39 ("IPO pops vary.").

[10] Id. at 36955 (NCUA argues that depositors don't purchase stock because "they are not well informed.").

[11] Id.

foundations, and educational institutions that are required to file an Internal Revenue Service Form 990, which discloses CEO, senior management, and board compensation including benefits and other non-salary compensation. It is ironic that publicly available data is used by an industry that lacks similarly available data. The NCUA is once again arguing from a flimsy basis of what it does not know.

If public disclosure allows for informed shareholders, then applying the same logic, public disclosure of credit union CEO compensation will allow credit union members to make informed choices as to which credit union they wish to join. Full disclosure of all benefits, including trips, conferences, and other expenses paid by the credit union and enjoyed by credit union board members will also provide credit union members with a better understanding of the fiduciary care exercised on their behalf by elected boards and management.

If the NCUA truly believes in an informed membership and the benefits of disclosure, there are many areas that merit NCUA's regulatory attention, not just in the instance of a credit union leaving the credit union industry. At a minimum, NCUA should require the same public disclosures as those required of the rest of the not-for-profit, or cooperative universe. Are donors to a not-for-profit hospital more deserving of information than the members of a credit union? Are members of the credit union industry trade groups more deserving of information than the individual members of those credit unions?

This issue again is far afield from the limited authority NCUA has in the conversion process. Yet, NCUA specifically requests information on the "changes in compensation for directors and management that have occurred in credit unions that have converted to banks"[12] in addition to comments on the proposed, mandated disclosure statement. Try as it might, NCUA cannot, in compliance with the law as passed by Congress, tread on the jurisdiction of another federal regulator. Congress has allocated responsibility among the regulators and those other regulators have and continue to exercise their obligations under the law. There is no vacuum in regulation or supervision of savings associations for the NCUA to fill. And as the NCUA's mandated disclosures would not pass muster under either SEC rules or NCUA's standard of full and fair disclosure, ABA urges NCUA to eliminate the "boxed" disclosures in their entirety.

The Mutual Holding Company Option

Nowhere is NCUA's bias more prevalent than in its criticism of mutual holding companies (MHCs). NCUA fundamentally rejects MHCs as a means of allowing mutual institutions to remain mutual while gaining additional flexibility to raise capital, acquire new lines of business, and to attract and

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[12] Id. at 36956.

compensate directors, management, and employees. Again, NCUA rejects the will of Congress. Federal authority for the creation of MHCs dates to the enactment of the Competitive Equality Banking Act of 1987 ("CEBA"). OTS has had regulations implementing the CEBA-granted authority since the early 1990s.

Substituting its own judgment for that of Congress, NCUA vilifies the MHC form as an unsuitable choice designed to harm depositors. Nothing could be farther from the truth. The MHC form allows mutual savings associations to raise additional capital in order to expand products or services, add branches, acquire whole businesses, and generally adapt to serve their communities, all the while retaining their mutual ownership structure. The MHC form gives mutuals an opportunity to raise just enough capital to accomplish what is needed, rather than grow faster than prudent or wait for retained earnings to fund growth. Moreover, it is hard to find where the NCUA has any experience on this matter to give their views any credibility.

Member Communications

The proposed rule would require converting credit unions to send member communications by mail or email at the member's cost when requested. It would also require the converting credit union to post member communications on its webpage. NCUA justifies this new requirement as providing the membership with an opportunity to debate the conversion openly. Only "proper" communications may be communicated. Improper communications include those "that are impracticable to deliver, relate to personal gain or grievance, or are otherwise false or misleading with respect to any material fact."[13]

NCUA also adds a dispute resolution process if the credit union disagrees with the credit union member whether a communication is proper. If a credit union believes that any particular communication is improper, it must forward the communication to the Regional Director within seven days of receipt and include a statement as to why it believes that the communication is improper and a recommendation for fixing the communication to make it appropriate and proper under the rule. The Regional Director will have seven days to rule on the communication and "will coordinate" with the requesting member.[14] The converting credit union must mail or email the material to the members upon the direction of the Regional Director. This should be called what it is, the establishment of a program of NCUA censorship of the conversion debate. Given the demonstrated bias of the NCUA, it does not take much imagination to discern how the NCUA censors will exercise this presumed responsibility.

[13] Id. at 36957.

[14] Id.

NCUA patterned a portion of the proposed rule on proper and improper communications on a rule promulgated by the OTS. The OTS, however, does not, as a matter of course, step into the corporate governance shoes of the institution and rule on the appropriateness of the communication or edit the communication. The institution under the OTS rules is deemed capable of making that determination and steps in only when requested. NCUA, leaving nothing to chance, prefers its active participation in the governance process.

NCUA asks whether its proposed rule on member communication is appropriate and whether it should apply in more situations than just in the instance of an institution leaving the credit union industry. ABA suggests that NCUA follow the lead of the OTS in this instance and not step into the deliberation of whether a communication is proper or improper. The OTS rule is generally applicable to all member communications and allows institutions to manage all sorts of member communications including well-intentioned efforts to send charitable solicitations to the customer base. Neither credit union members nor depositors want their financial relationship used to raise monies for the favorite charity of one member or as a means to advocate a particular political or religious view. Member communications should relate to the business of the financial institution, not the agenda of a few.

NCUA requests information on alternative approaches to sending member communications. ABA suggests that simplicity should be NCUA's guide in this area. It is not simple to send a portion by email and a portion by first class mail. NCUA also suggests that an alternative would be for the requesting member to prepare the mailing, sealing the package, affixing postage, and allow the credit union to place the mailing labels on the envelopes. This "would have the potential advantage [of] not require[ing] a determination as to the accuracy of the substantive communications made by the requesting member."[15] Such alternative is admittedly completely at odds with the NCUA requirement that only "proper" communications are forwarded to the membership. Again, NCUA shows its hand at its underlying purpose behind its requirements – to erect as many roadblocks as possible to the converting credit union. NCUA is not interested in fair and accurate disclosure – only disclosure that opposes any other choice than remaining in the credit union industry. Departures from that standard will be censored.

Restriction on Ballot

One of the more obvious efforts to impede the ability of a credit union to change its charter is the proposed rule change that allows the ballot to be included only with the third mailing. NCUA is well aware that most ballots

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[15] Id. at 36958.

are cast with the first mailing. Rather than enhance member participation, NCUA seeks to restrict participation by choosing the course intended to elicit the least response. It is apparently inconceivable to the NCUA that a member would prefer to vote and be done with the process early, simply, and without repeated mailings, emailings, or other communications intended to solicit a "no" vote. NCUA refuses to trust the credit union membership to support the choice best suited to address its needs in its community. Full and fair disclosure, NCUA's standard for disclosure, is not served by restricting the inclusion of the ballot to the third mailing. This proposed requirement violates NCUA's own standard of measurement and the goal of increased credit union membership participation and should therefore be rejected.

Member Access to Books and Records

While seemingly about the need for credit union members to access the credit union's records in the normal course of operation, a right often found in corporate law for stock institutions, the proposed rule is offered as another poison pill, only applying in the instance of a credit union proposing to convert from a credit union to a mutual savings bank. The purpose of providing access is "facilitating contact with other members about the conversion or obtaining copies of documents related to the due diligence performed by the credit union's board of directors."[16] Again, the purpose is not to provide the normal access provided under corporate law, but access to facilitate member communications and to provide "pre-discovery" for those seeking to sue board members who would be brave enough to seek to use a different charter to provide financial services. This is not a rule to administer the vote; this is a rule to harass. Corporate governance requires giving members access to books and records while respecting the confidentiality of the examination process. That is not what is contemplated by this rule – this rule is designed to provide a basis for those who would oppose a credit union leaving the credit union industry to sue boards and harass members who might support the effort. It is a proposal unworthy of a prudent financial regulator and should be rejected.

Regulatory Flexibility Act

How ironic that the NCUA has lowered its estimate of the number of credit unions seeking to convert to the mutual savings bank charter from 20 per year to three. Little wonder at those hardy three. Of course under the NCUA's poison pill prescriptions that credit union leaders will think three, or four, or five times about converting. Such action paints a regulatory bulls eye on the collective backs of the boards and management. This is an observation that completely upends the purpose of the Regulatory Flexibility Act and applies

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[16] Id. at 36959-3660.

in opposition the need to justify the regulatory burden imposed. NCUA simply flaunts the law and requires its regulatees to deal with its disregard for the will of Congress.

NCUA's Regulations As Applied

If there is any doubt as to the real purpose behind the proposed rules, one only has to look at the correspondence with intrepid souls trying to leave the credit union industry. The following bullet points are just some of the information requests NCUA sent to Lafayette Federal Credit Union after reviewing the disclosure materials under the current regulations. The NCUA rejected Lafayette's initial disclosure materials because:

- Lafayette's benefit claim of expanded depositor base through conversion failed to explain why Lafayette couldn't achieve this benefit with its existing potential field of membership.
- Lafayette's benefit claim of additional funds for lending through the reinvestment of its NCUSIF deposit did not address the expense of FDIC deposit insurance. NCUA stated "We believe . . . that [FDIC] premiums could equal or exceed the ... annual earnings Lafayette believes it can earn on its withdrawn NCUSIF deposit."
- Use of the proposed rule's inclusion of the ballot with the 30-day notice (the last notice) was "suggested" as "in the members' best interests" even though the proposed rule was not finalized.
- Lafayette's statements about maintaining similar loan and deposit rates were rejected as "optimistic." NCUA stated, "The data available to NCUA indicate, however, that on average banks and thrifts provide their members with lower deposit and higher consumer loan rates than credit unions do." Again, the NCUA preamble states that rates were identical or within the same range.
- Similarly, Lafayette was admonished to "provide its members with more information about how it has determined that the loss of tax exempt status will not affect the rates, services, and the bottom line at the converted institution."
- Further, Lafayette's benefit claim that conversion would allow it to make "more loans and creat[e] new customer relationships [as] we can use our resources more efficiently since we can produce more income without additional meaningful costs" was rejected because Lafayette needed to "explain to its members why the loss of Lafayette's tax exemption is not a meaningful cost. "
- Lafayette's benefit claim of not needing regulatory waivers was rejected and further information sought. "We request Lafayette provide NCUA and its members with an explanation about why it is not practical. Eight types of waivers pertaining to business loans are available from NCUA . . . [and] NCUA routinely grants such waivers for qualified credit unions."

- NCUA rejected Lafayette's opinion on the benefits of the mutual holding company structure: "In NCUA's opinion, the MHC structure creates a conflict of interest in the board of directors who, as MHC directors, have fiduciary responsibilities to the members and, as directors of the underlying stock institution(s), also have responsibilities to the minority stockholders." [This despite the fact that NCUA does not have the statutory authority to regulate MHCs, nor is it an expert in the creation or regulation of MHCs. In addition, there is case law on dual service, Kaplan v. Office of Thrift Supervision, 104 F. 3d 417 (DC Cir., 1997).
- NCUA "suggested[ed] that Lafayette delete the word, "facts," from its "Know the Facts" document because the document contain[ed] opinions, statements about Lafayette's subjective intent that are impossible to verify, and speculation about future events that may or may not occur."
- And, NCUA "suggest[ed that] the boxed disclosures and the "Know the Facts" document should be on separate sheets of paper for clarity and to avoid potential member confusion, and not on the reverse side of each other on a single sheet of paper."
- The due diligence materials considered by the board of directors of Lafayette were rejected because they appeared to be "largely a discussion of the relative financial performance of credit unions and banks and projections of Lafayette's financial performance following conversion. NCUA believes the members of a credit union are equally interested in obtaining the financial products they want at good rates and low fees. Lafayette's due diligence material does not include any discussion of the value of a conversion to members from the perspective of financial products and services."
- Lafayette's benefit claim of enhanced mortgage loan program through conversion was rejected as insufficient: "Please explain to us how the proposed charter change will substantially enhance Lafayette's residential mortgage program. We are unaware of any regulatory impediments in residential mortgage lending that are unique to credit unions."
- Lafayette's benefit claim of enhanced branching ability was deemed inadequate because "[t]here are no regulatory restrictions on federal credit union branching." More information was requested to "explain how being a federal credit union restricts Lafayette's ability to offer increased branching."
- Lafayette's benefit claim of enhanced products and services through conversion was determined to be lacking: "Please explain how being a federal credit union restricts Lafayette's ability to offer increased products and services."
- The due diligence materials contained a chart comparing a mutual savings bank charter to that of a federal credit union. The NCUA challenged several of the bullet points in that charter including:

- Ability to own shares ("become true owners"). NCUA queried, " In Lafayette's view, who are the owners of a mutual savings bank and an MHC? In what way is this more 'true' than credit union ownership?"
- Federal preemption. NCUA asked, "The federal preemption doctrine applies to federal credit unions. . . In what way is preemption an advantage for federal thrifts?"
- Unlimited branching. Again NCUA requested clarification, "There are no regulatory impediments to federal credit union branching, and credit unions have access to extensive, low-cost shared branching networks. Please explain this bullet."

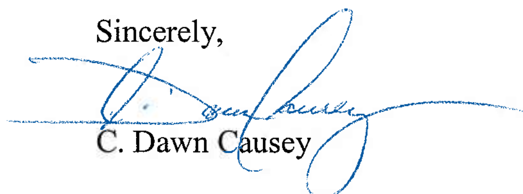
NCUA's application of its current regulation and much of the proposed regulation make it clear that it is truly the rare application that will pass NCUA's muster. Again, such actions demonstrate the true nature of the regulations and NCUA's actual intent with this proposal. It is not to "administer" the vote with "full and fair disclosure," but to contravene the intent of Congress in providing a means and a methodology for federal credit unions to choose a different charter.

Conclusion

For these reasons and others, ABA respectfully urges NCUA to abandon its quest to impede the ability of credit unions to choose other charters. There is a way to implement the will of Congress faithfully. Once again, however, the NCUA has chosen another path.

Thank you for the opportunity to comment. If you have any questions regarding our comment letter, please feel free to contact me.

Sincerely,



C. Dawn Causey