August 28, 2006

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

Re: Conversion of Insured Credit Unions to Mutual Savings Banks
71 FR 36946 (June 28, 2006)

Dear Ms. Rupp:

America's Community Bankers (ACB)[1] appreciates the opportunity to comment on the National Credit Union Administration's (NCUA) proposed amendments to its rules governing the conversion of insured credit unions to mutual savings banks or mutual savings associations under Part 708a of the NCUA's regulations.[2] In addition to representing the nation's community banks, ACB's membership includes credit unions that have expressed an interest in converting to mutual savings banks or associations.

ACB Position

ACB strongly supports the ability of depository institutions to choose the type of charter and regulatory structure under which they operate. We believe that institutions should have the freedom to convert to a different charter type when the current charter no longer fits the institution's business plan or the needs of the local community. We also strongly believe that the disclosure of accurate and complete information is essential for good corporate governance of all types of financial institutions and is particularly important when credit union members are preparing to vote whether to convert to a mutual savings bank.

NCUA asserts that it "recognizes and fully supports the right of a credit union to change its charter to a bank charter." Yet, this proposal contradicts that statement by imposing barriers to conversion and denying the option of charter choice to credit unions.

ACB supports charter choice and meaningful disclosure, and we do not believe the NCUA has the statutory authority to require converting credit unions to comply with the proposed requirements. The proposal exceeds the authority that the NCUA was granted in the Credit

[1] America's Community Bankers is the national trade association committed to shaping the future of banking by being the innovative industry leader strengthening the competitive position of community banks. To learn more about ACB, visit *www.AmericasCommunityBankers.com*.
[2] 71 Fed. Reg. 36946 (June 28, 2006).

Union Membership Access Act (CUMAA) to monitor the methods and procedures of the membership vote on conversion and goes beyond the NCUA's jurisdiction.

The NCUA notes that the statutory requirement that governs this proposal requires that the conversion rule be "consistent with the rules promulgated by other financial regulators" and that it be "no more or less restrictive than the [rule] applicable to charter conversions by other financial" regulators. Notably, the fact that the NCUA has cited these requirements had no bearing on the outcome of its proposal, which is more restrictive and inconsistent with the conversion regulations of the federal banking regulators.

The concept of credit union charter choice and member information are inexorably linked. Credit union members must have the facts to cast an informed vote for or against conversion. Credit union members are entitled to meaningful and accurate information about possible conversion to a mutual savings bank. This information should be complete, neutral, and free from speculation regarding possible future acts of the resulting mutual institution. The proposed rule, however, does nothing to promote transparency.

First, providing advance notice of the upcoming board vote on a plan of conversion as well as a comment period prior to the board vote will not provide meaningful information to credit union members or the board of directors. The advance notice and comment process is unnecessary in light of the full membership vote required to approve conversion. We are concerned that the advance notice and comment requirement would fuel the spread of misinformation about what conversion is and what it would mean for credit union members.

Second, the proposal would require converting credit unions to make disclosures that do not accurately characterize the effects of conversion. The NCUA is using the pretext of improving corporate governance to require credit unions to make misleading disclosures. Credit union members are entitled to a factual summary of the issues at hand. If NCUA opts to proceed with this proposal, ACB suggests a number of clarifications to improve the disclosures the NCUA proposes to require.

Third, the proposed certification requirement establishes a standard that would discourage credit union board members from approving a plan of conversion even if they support this option. If this requirement were to be adopted, board members may vote against proceeding with the conversion process even though they believe conversion is in the best interest of the credit union. Board members may conclude that this is preferable to opening themselves to possible lawsuits from anti-conversion activist groups. This also sets a standard of certification that is inconsistent with other corporate governance practices.

Fourth, the proposal would restrict when credit unions can mail ballots for the conversion vote. We urge the NCUA to revise the proposal to encourage the widest possible member participation in this important decision.

Fifth, the proposed member-to-member communication provisions should be further refined to clarify what communications are improper. We also make suggestions for minimizing the operational impact of this provision on credit union staff.

Sixth, credit unions should be able to fiercely guard the privacy of their members. The NCUA should not enable credit union members to access the names and contact information of other credit union members for purposes of contacting them about the proposed conversion. In addition to raising significant privacy issues, we are concerned that providing access to membership lists will allow conversion opponents to circulate materials about conversion without any controls or oversight.

Background

The CUMAA expressly limits the NCUA's authority to regulate conversions of insured credit unions to mutual savings banks or mutual savings associations.[3] The NCUA must establish charter conversion rules that are consistent with the rules promulgated by other financial institution regulators and are no more or no less restrictive than the rules applicable to charter conversions of other financial institutions. Additionally, the agency has the authority to disapprove "the methods by which the member vote was taken or procedures applicable to the member vote."[4]

The proposed rule is the third conversion-related rulemaking the NCUA has undertaken in less than three years. The confluence of several notable events and circumstances led the NCUA to propose this most recent set of amendments to its conversion regulations. Those developments include:

- An increased number of credit unions expressing an interest in converting to mutual savings banks or associations.
- Litigation in 2005 involving the NCUA's denial to approve the member vote of two Texas credit unions to convert to a mutual savings bank.
- Congressional criticism of the NCUA's handling of recent credit union conversions and the introduction of H.R. 3206, the Credit Union Charter Choice Act.

The NCUA believes the proposed revisions will improve the information available to credit union members and credit union boards of directors regarding the merits of converting to a mutual savings institution. ACB understands that several of the suggestions put forth in this proposed rulemaking are based on comments received from credit union trade associations during previous rulemakings on the conversion process.

The proposed amendments would require a converting credit union to:

- Provide advance notice to members that the credit union's board of directors will consider adopting a conversion proposal.

[3] Pub. L. 105-219, 112 Stat. 913 (Aug. 7, 1998).
[4] 12 U.S.C. 1785(b)(2)(G)(i) – (ii).

- Provide for a public comment process prior to the board's vote on whether to pursue conversion and require the credit union to post the comments on its website.
- Act as a distributor of information between credit union members.

In addition, the proposal would:

- Require credit union board members voting in favor of conversion to certify that they believe the proposed conversion is in the best interest of credit union members.
- Grant credit union members access to credit union books and records under the same terms and conditions as a state-chartered for-profit corporation in the state where the credit union is located.
- Revise the disclosures that a converting credit union must give to its members.

NCUA Authority

We believe that the proposal exceeds the NCUA's authority granted by CUMAA to monitor conversions of insured credit unions to a mutual savings bank or savings association charter. The proposal proceeds from the premise that the NCUA has the authority to regulate all information presented to credit union members concerning the vote. We believe that this is incorrect and that the proposed requirements surpass the NCUA's power to supervise voting methods and procedures.

We also believe that the proposal exceeds the authority specifically established in the statute that the conversion rules of the NCUA must be *no less restrictive* than rules applicable to the charter conversion of other financial institutions. The federal banking regulators have adopted regulations that are applicable to conversions of financial institutions. In all instances, the review of the substantive elements and requirements of disclosure are governed by the agency reviewing the application of the institution seeking to convert its charter. For example, if a savings association regulated by the Office of Thrift Supervision (OTS) wishes to convert to a national bank charter, the institution must notify the OTS but the substantive disclosures must be filed with and approved by the Office of the Comptroller of the Currency. If a credit union wishes to convert to a federal savings association charter or a state bank charter, it is appropriate for the credit union to notify the NCUA. Under the statute, the NCUA must monitor the process of voting, but the substance and content of the conversion documents is subject to the applicable rules and regulations of the OTS or state laws. Therefore, we do not believe the NCUA has the authority to require many of the proposed requirements.

Advance Notice of Board Vote on Conversion

The proposed rule would require a credit union to provide members with at least 30 days notice that the credit union board of directors will meet to vote on a plan of conversion. This amendment would allow members an opportunity to provide comment to the board before it votes on the conversion proposal. The credit union would be required to post the comments on

its website (if it has one) and the board of directors would be obligated to review the comments before voting on the conversion proposal.

ACB does not believe that the NCUA has the statutory authority to issue an advance notice requirement. Furthermore, we do not believe such a requirement would provide meaningful information to credit union members or a credit union's board of directors. Moreover, an advance notice requirement would be inconsistent with the concept of electing a board of directors and would undermine the importance of the conversion disclosure process, as well as the membership vote on whether to convert to a mutual savings bank or association.

Existing requirements already ensure that the interests of credit union members are protected. First, credit union members elect directors to make strategic decisions on behalf of the credit union membership. Second, elected directors have a fiduciary duty to make decisions that are in the best interest of the credit union, subject to the business judgment rule. Third, even if a credit union's board of directors adopts a plan of conversion, the decision of whether to convert ultimately resides with credit union members. Approval of the conversion must be made by the affirmative vote of a majority of credit union members who vote on the proposal. Accordingly, we do not believe the NCUA should establish a regulatory requirement that muddies established corporate governance processes and erodes the value of the membership vote to elect directors to set the strategic direction for the credit union and vote on conversion. Most critically, we do not believe the NCUA has the authority to issue the proposed requirements.

We are also concerned that the advance notice and comment process would fuel the spread of misinformation about what conversion is and what it would mean for the credit union and its members. Any comment letters that a credit union receives prior to the board vote may not be based on complete and accurate information. Details about the conversion are unlikely to be available because the board has not yet met to consider and vote on the conversion plan, and discussion at the board meeting may lead to a change in any conversion plan that ultimately may be adopted. Furthermore, the board may have other information that members have not considered related to the credit union's business plan. Therefore, we oppose the posting requirement because it is inappropriate to require a credit union to post letters to its website that may be based on limited information about a possible conversion.

In addition to being concerned about the factual content of these letters, we question whether they would be truly representative of the views of most credit union members. The position of the membership will only be accurately represented in the required member vote on conversion. We believe that only persons philosophically opposed to conversion would write a letter and urge the board not to adopt a plan of conversion. Members who are ambivalent or who have not yet formed an opinion are unlikely to take the time to write a letter.[5]

[5] ACB is aware that conversion opponents and others within the credit union community have pledged their resources to oppose any conversion attempt. We do not believe that a credit union should be required to post letters to its website that do not come from credit union members. Credit union board members do not owe a fiduciary duty to these persons or interest groups. Outsiders should not be permitted to insert themselves into a credit union's strategic decisions or impede the board's due diligence process.

If NCUA decides to adopt the posting provision, there should be appropriate limits on what a credit union is required to post to its website. Parameters are necessary to protect the integrity of the conversion process. We suggest that the NCUA adopt an approach that is similar to the standard in proposed 708a.4(f)(4) governing "proper-conversion-related materials."[6] This standard generally parallels OTS rules governing member communications with other members of a mutual savings bank.[7] We strongly believe this same criteria should apply to any comment letter a credit union would be required to post to its website.

Board Member Certification

The proposed amendments would require credit union board members to provide the appropriate NCUA Regional Director with a certification of support for the conversion proposal. Each director who voted for the conversion proposal would be required to sign a certification stating that the director believes the proposed conversion is in the best interests of credit union members. ACB believes that such a certification requirement would exceed the NCUA's statutory authority under CUMAA.

In explaining the proposed certification requirement, the NCUA stresses that it is "important that the directors of a converting credit union understand and acknowledge their fiduciary duties …[and] their responsibility to conduct a thorough and complete analysis of the proposed conversion transaction …."[8] We agree with both of these concepts and believe that they can be achieved without unnecessarily dissuading directors from voting to adopt a plan of conversion.

ACB strongly believes that directors should review all aspects of a conversion proposal in order to make a decision that is consistent with the institution's business plan, economic conditions, and the regulatory environment. However, we are very concerned that the proposed certification requirement is intended or will have the effect to deter credit union board members from voting in favor of a plan of conversion by increasing the potential for litigation against directors.

It would be difficult, if not impossible for a board of directors to meet the certification requirement if the NCUA adopts the proposed advance notice and comment process. As discussed above, we believe the vast majority of written comments would oppose the conversion process. Together, the certification requirement and the advance notice and comment requirement would discourage board members from doing what they genuinely believe to be in the best interest of the credit union, its members, and the communities it serves. We are

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[6] Under proposed 708a.4(f)(4), "proper conversion-related materials" would not include materials that: (i) due to size or similar reasons are impracticable to mail or email; (ii) are false or misleading with respect to any material fact; (iii) omit a material fact necessary to make the statements in the material not false or misleading; (iv) relate to a personal claim or a personal grievance, or solicit personal gain or business advantage by or on behalf of any party; (v) relate to any matter, including a general economic, political, racial, religious, social ,or similar cause, that is not significantly related to the proposed conversion; (vi) directly or indirectly and without expressed factual foundation impugn a person's character, integrity, or reputation; (vii) directly or indirectly and without expressed factual foundation make charges concerning improper, illegal, or immoral conduct; or (viii) directly or indirectly and without expressed factual foundation make statements impugning the stability and soundness of the credit union.
[7] *See* 12 CFR 544.8(c).
[8] 71 FR 36958 (June 28, 2006).

concerned that volunteer directors would choose to vote against proceeding with the conversion process rather than open themselves to possible lawsuits from anti-conversion activist groups. We do not believe that the NCUA should be promoting these requirements which advance an anti-conversion, anti-mutuality agenda.

To help justify the proposed certification requirement, the NCUA cites the certification requirements of Hawaii, Michigan, Vermont, and the OTS. These rules are mostly documentation requirements and are less onerous than requiring individual directors to certify that conversion is in the best interest of credit union members.[9]

Should the NCUA adopt a board certification requirement, we suggest that the agency amend the proposal to follow the OTS conversion model and allow credit union boards to file copies of the adopted conversion resolution and a record of the votes cast. We believe that this approach would enable directors to evaluate conversion in the context of the credit union's business plan, local economic conditions, and the current regulatory environment.

Mandatory Boxed Disclosure Language

The NCUA proposes to revise the required boxed disclosure language that must currently be included with all written communications to credit union members about a proposed conversion. The NCUA also proposes to amend the requirements for when such mandatory disclosure language must be provided to credit union members.

ACB reiterates its position that the NCUA lacks the statutory authority to regulate the information presented to credit union members about possible conversion to a mutual savings bank. Further, the mandatory disclosure language is not consistent with the conversion regulations established by the federal banking regulators. The federal banking agencies have adopted regulations that are applicable to conversions. In all instances, the review of the substantive elements and requirements of disclosures are governed by the agency reviewing the application of the institution seeking to convert its charter. Therefore, ACB believes the NCUA should withdraw the mandatory disclosure rules. ACB provides the following suggestions should the NCUA move forward with revising its mandatory disclosure language.

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[9] These state laws require institutions to:

- Certify that the meeting and the vote were valid;
- Certify that the conversion resolution is true and correct;
- Certify that the institution has complied with applicable state and federal laws and regulations.
- File certified copies of all records and conversion-related proceedings held by the board and the credit union's members.

The OTS requires that after the depositors' meeting on a conversion to a stock bank, the mutual savings bank must file a certified copy of each adopted conversion resolution, data regarding the votes cast, and a legal opinion that the mutual savings bank conducted the depositors' meeting in compliance with all applicable state or federal laws and regulations. 12 CFR 563b.240(a).

Effect of Voting For Conversion. The first required disclosure would read as follows:

> LOSS OF CREDIT UNION MEMBERSHIP. A vote "FOR" the proposed conversion means your credit union will become a mutual savings bank. A vote "AGAINST" the proposed conversion means your credit union will remain a credit union.

ACB generally believes that the content of this disclosure would be helpful to credit union members preparing to vote on whether the credit union should convert to a mutual savings bank or association. However, we believe that the header "LOSS OF CREDIT UNION MEMBERSHIP" is unnecessarily negative.

If the NCUA is determined to move forward with the proposals despite statutory constraints, we urge the NCUA to neutralize this mandatory language. It is not appropriate for the NCUA to require credit unions to print disclosure language that is biased against conversion. Therefore, we suggest that the NCUA revise the required disclosure language to read:

> CHANGE IN MEMBERSHIP. A vote "FOR" the proposed conversion means your credit union will become a mutual savings bank. Upon conversion, credit union members would become members of the resulting mutual savings bank or savings association. A vote "AGAINST" the proposed conversion means that your credit union will remain a credit union.

Rates on Loans and Savings. In addition to our statutory concerns, ACB believes that the proposed mandatory disclosure language regarding rates on deposit and loan products is misleading and should not be part of any final rule adopted by the NCUA. More fundamentally, it would be a speculative disclosure that the NCUA cannot require. The second proposed mandatory disclosure would state:

> RATES ON LOANS AND SAVINGS. If your credit union converts to a bank, you may experience changes in your loan and savings rates. Available historic data indicates that, for most loan products, credit unions on average charge lower rates than banks. For most savings products, credit unions on average pay higher rates than banks.

This disclosure incorrectly implies that rates on existing loans and deposits that are established by contract could be changed post-conversion. Furthermore, the proposed disclosure language is not representative of the actual transaction being voted on – the conversion to a mutual savings bank. Therefore, we urge the NCUA to delete this language from any final rule it may adopt.

The NCUA relies on two studies to support its position that rates and fees will be less favorable for credit union members post conversion. First, the NCUA hired Datatrac Corp. to gather and analyze data on historic loan and savings rates. The study evaluated twenty loan and savings products and concluded that historic consumer loan and savings rates offered by credit unions are

better for members than those same rates offered by banks of all types, including mutual savings banks. Second, the NCUA cites a study conducted by researchers at the University of Wisconsin – Whitewater.[10] For the following reasons, it would be bad public policy for the NCUA to adopt mandatory disclosure language based on these studies.

- These studies are not based on appropriate comparisons of pricing data. Neither study compares the rates for converted credit unions pre-conversion and post-conversion. Analysts with the firm Sandler O'Neill & Partners, L.P studied twenty converted credit unions for which five-year data were available pre-conversion and post-conversion. Among this group of credit unions, the growth rate on assets accelerated from 6.55 percent in the five years before conversion to 18.06 percent in the five years after conversion. Loan growth more than tripled from 6.26 percent to 19.64 percent.[11] Pricing and competitive rates always play a role in the growth of an institution.

- In a footnote to the proposed rule, the NCUA acknowledges that for mortgage lending and passbook savings, bank and credit union rates were almost identical, thereby contradicting the very disclosure that the NCUA would require.

- In citing pricing disparities between credit unions and banks and savings associations, the NCUA makes prominent those products that typically do not compose large portions of a mutual institution's balance sheet. In supporting its position, the NCUA highlights two products in chart form: 60-month new auto loans and 60-month certificates of deposit. It is misleading to make these rates so prominent in the preamble of the proposed rule. Mutual savings banks, and community banks in general, cannot compete with the financing incentives currently being offered by automobile manufacturers. As a result, these institutions do not have significant new auto loan portfolios. Similarly, 60-month CDs compose a small percentage of community bank deposits, which is consistent with prudent asset liability management.

We reiterate that the NCUA should not require credit unions to make mandatory disclosures about the effect of conversion on loan and deposit rates based on studies that compare credit unions and all types of banks. It would be bad public policy for a federal government agency to base mandatory disclosure language on incomparable pricing data. Accordingly, we urge the NCUA to withdraw the proposed language regarding the effect of conversion on future rates and services.

Compensation of Officers and Directors. ACB strongly opposes proposed disclosure language regarding future stock benefits that may be provided to officers and directors. The NCUA does not have the authority to require disclosures about transactions that are outside of its jurisdiction.

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[10] Jeff Heinrich and Russ Kashian, *Credit Union to Mutual Conversion: Do Rates Diverge?*, February 22, 2006.
[11] Duffy, Peter, *Nine Accusations are Flying*, CUES Management Magazine (July 13, 2006)
http://www.cues.org/pls/cuesp/!cues1.main?complex_id_in=3069489.3071923.3123024.11398399.page

A subsequent transaction 1) may not even take place, therefore making the proposed disclosures speculative and forward-looking and 2) would be overseen by the OTS, not the NCUA.

The proposed language is also misleading and inflammatory. We are very troubled that it appears to be an effort to dissuade credit union members from voting in favor of a proposed conversion. It is not appropriate for a regulator to mandate a disclosure whose tone is decidedly anti-conversion.

The proposed language would state:

> POTENTIAL PROFITS BY OFFICERS AND DIRECTORS. Conversion to a mutual savings bank is often the first step in a two-step process to convert to a stock-issuing bank or holding company structure. In such a scenario, the officers and directors of the institution often profit by obtaining stock in excess of that available to other members.

The proposed disclosure language suggests that credit union managers use charter conversions as a way to get rich at the expense of account holders and that the OTS will not adequately oversee the transactions of mutual institutions that convert to stock form. OTS regulations governing the sale of conversion shares ensure that officials of mutual savings associations converting to stock institutions are not enriched at the expense of depositors. Specifically, OTS regulations:

- Require members of a mutual savings bank to approve a minority stock offering as well as a full conversion to stock form.
- Give all eligible account holders as of a specified date first priority to purchase conversion shares. This means that members of the mutual institution can purchase all of the available conversion stock. [12]
- Limit the aggregate percentage of stock that may be purchased by the institution's officers, directors, and their associates.[13]
- Prohibit directors and executive officers from selling any stock they purchase in the stock offering for a period of one year following the date of purchase. They must bear the long-term risk associated with stock ownership and are not able to benefit from the near-term appreciation that may follow an initial public offering.[14]

The NCUA's proposed disclosure language also suggests that stock option and stock benefit plans are unfair and unethical. Performance based compensation plans, particularly stock benefit plans, have become an effective way to attract highly talented employees and to link employee compensation to the success of the institution. Many companies use employee stock benefit plans to reduce the reliance on the salary and the bonus as the primary sources of employee

[12] 12 CFR 563b.320.
[13] 12 CFR 563b.370.
[14] 12 CFR 563b.505(a).

compensation. Congress has encouraged the use of these plans, and we do not believe they are less appropriate for newly converted stock associations than they are for any other type of entity.

While stock benefits expand an institution's options for compensating employees, significant restrictions limit these forms of compensation. Management benefit plans are limited in a mutual-to-stock conversion or a minority stock offering. In addition, such plans must be approved by shareholders.

- Tax-qualified employee stock ownership plans have second priority to purchase conversion shares. They are subject to eligible account holders, which have first priority.[15]
- A converted stock institution may not grant stock options under a stock option plan in excess of ten percent of the shares the institution issued in the conversion.
- Management stock benefit plans cannot hold more than three percent of shares issued in the conversion.
- Tax-qualified employee stock benefit plans and management stock benefit plans, in the aggregate, may not hold more than ten percent of the shares issued at conversion.[16]

Therefore, we believe the proposed language can be significantly improved, should the NCUA choose, despite statutory restrictions, to retain disclosure language regarding compensation. We suggest the following:

> COMPENSATION OF OFFICERS AND DIRECTORS. A mutual savings bank may convert to a stock-issuing bank or holding company structure. Federal law requires the members of the mutual savings bank to approve any offer of minority shares or conversion to the stock form of ownership. Employees and directors of a mutual holding company or a publicly traded bank may receive stock benefits in addition to their salary and other compensation. Shareholders must approve the inclusion of stock benefits in employee compensation plans.

We find it ironic that the NCUA paints stock benefit plans as unscrupulous when the compensation of bank executives and directors of mutual holding companies and publicly traded banks is subject to substantially more transparency and scrutiny than the compensation plans of credit union executives. Securities and Exchange Commission rules require publicly traded banks to disclose executive and director compensation in the company's proxy material and registration statements. Information about stock options and deferred compensation plans must also be disclosed.

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[15] 12 CFR 563b.320(a)-(b).

[16] 12 CFR 563b.500(a)(4). The OTS may permit the qualified employee stock benefit plans and management stock benefit plans with tangible capital of ten percent or more to hold up to twelve percent of the shares (in aggregate) that the institution issued in the conversion.

Other Required Disclosures

The NCUA also proposes to require credit unions to make other disclosures about conversion. However, for these disclosures, credit unions would not be required to use specific, boxed disclosure language drafted by the NCUA. These proposals are inconsistent with the federal banking regulators and are outside the purview of the NCUA.

Future Conversion to Stock. The proposed amendments would require a credit union to state whether it *does or does not* intend to convert to a stock institution or a mutual holding company structure. This requirement was adopted as part of the conversion requirements the NCUA adopted in a previous rulemaking. At the time that amendment was proposed, ACB objected to this requirement.

We continue to believe this requirement contradicts the OTS conversion rules and therefore is inconsistent with CUMAA. Furthermore, we do not believe that this requirement would enhance a credit union member's ability to cast an informed vote for or against conversion.

Disclosure of a credit union's intent to convert to a stock institution will not result in a more informed member vote. This would be a speculative disclosure based on a decision that might be made when an institution is no longer a credit union. The board of directors of an existing credit union cannot determine how the resulting mutual institution may or may not raise capital. The board of the mutual institution must make this decision. As mentioned above, before a conversion to stock form can take place, a plan of conversion must be adopted by a two-thirds vote of the mutual institution's board of directors. In addition, the institution's members must approve the plan of conversion by a majority of the total outstanding votes.[17] Therefore, the credit union's intent to complete a subsequent conversion to stock form is irrelevant and requiring disclosure would not address the NCUA's concern that credit union members are not adequately notified of the likelihood of a second conversion to a stock institution.

Not only would disclosure be meaningless, but disclosing that the institution intends to convert to a stock institution would also violate the confidentiality requirement in OTS regulation 563b.120. This regulation requires mutual savings institutions to keep all information about a stock conversion confidential until the board of directors adopts a plan of conversion. Each mutual institution should have the ability to decide to propose to convert or not to convert based on the needs of the institution, its operating strategy, and its need for capital. Requiring a credit union to state its conversion intentions would cause these decisions to be fueled by professional investors rather than the best interests of the mutual bank and the community it serves.

ACB believes that it would be more appropriate for the credit union to simply state that mutual savings bank members have the option to convert to the stock form of ownership. Disclosure of potential long-term plans in definitive terms is inconsistent with requirements in other disclosure contexts, including under the federal securities laws.

[17] 12 CFR 563b.125, 12 CFR 563b.225(a)-(b). State laws may prescribe a higher percentage of votes before a state chartered savings association may convert to stock form.

Benefits to Directors and Senior Management. The proposed amendment would require converting credit unions to disclose any conversion-related economic benefit a director or senior management official will receive, including receipt of or an increase in compensation and an explanation of any foreseeable stock-related benefits associated with a subsequent conversion to a stock institution or mutual holding company structure. The explanation of stock-related benefits must include a comparison of the opportunities to acquire stock available to officials and employees with those opportunities available to the general membership.
Such a disclosure would be a forward-looking statement and should not be required by the NCUA as a regulator. A credit union should not be required to provide information regarding the compensation of executives and directors of publicly traded institutions that are outside of the NCUA's oversight. It is not certain that such a conversion will even take place. Furthermore, we are concerned that such a disclosure may lead to speculation by professional depositors. Like credit union executives, the institution's board of directors will determine the compensation of mutual executives. A credit union cannot disclose how the resulting mutual savings bank or a subsequent stock institution will choose to compensate its employees. If, despite statutory prohibitions, the NCUA is determined to adopt a disclosure proposal, ACB believes that it should be sufficient for a converting credit union to explain that:

- The members of a mutual institution's board of directors may be compensated for their services.
- The board will determine the salary and other benefits of the senior management of the institution.
- If members of the mutual savings bank or a mutual holding company subsequently vote to convert to the stock form of ownership, any employee stock options or stock benefit plans must be approved by the shareholders.

Effect of Conversion on Products and Services. The proposed amendments would require converting credit unions to explain how the conversion from a credit union to a mutual savings bank will affect the institution's ability to make non-housing-related consumer loans. Credit unions would be required to specify reductions in some kinds of loans products provided to members. This disclosure language implies that the Qualified Thrift Lender (QTL) test to which OTS chartered mutual savings banks and savings associations are subject will result in a reduced selection of products and services currently offered by the credit union.

ACB opposes this requirement. First, a credit union should not be required to provide its members with speculative disclosures stating that, upon conversion, the institution's focus may shift to the more limited financing of mortgages and other qualified thrift investments. A change in the provision of products and services may not even occur. Alternatively, the menu of services may be expanded. The credit union may not have any difficulty meeting the QTL test depending on its business plan and current portfolio.

Second, the OTS, not the NCUA, will evaluate a converting credit union's ability to comply with QTL requirements. The results of this evaluation will be part of the OTS decision whether to approve the credit union's application to convert to a mutual savings bank. Further, credit unions that convert to a state chartered mutual may not be subject to a QTL-like requirement.

Third, we do not believe the NCUA has a thorough understanding of QTL requirements. Many consumer products are includable in a mutual savings bank's portfolio without limit. Furthermore, the NCUA does not cite any evidence or data indicating that converted credit unions have had any difficulty in meeting the QTL requirements. The ability of a converting credit union to meet the QTL test is an issue for the OTS, not the NCUA.

Conversion Ballot

The proposed amendments would continue to require credit unions to provide a 90-day, 60-day, and a 30-day disclosure packet, as required by statute. However, a credit union would be permitted to include conversion ballots only with the 30-day notice. This requirement replaces the current rule that simply requires the ballot to be provided to members no less than 30 calendar days before the vote. The NCUA believes that this change would benefit members by providing additional time to consider the advantages and disadvantages of a conversion proposal before voting.

ACB agrees that members have a responsibility to consider the pros and cons of conversion; however, we are concerned that the proposed amendment would actually discourage member participation in the conversion process. Restricting the ballot to being mailed with the 30-day disclosure would mean that credit union members will have already seen the disclosure packet two times and are likely to discard the ballot and third round of disclosures as junk mail. We believe that the NCUA should revise its balloting rules to encourage the widest possible member involvement in this very important decision and therefore request the NCUA to withdraw this requirement. One possibility would be to allow a converting credit union to mail the ballot separately from the 30-day disclosure. The outside of the envelope could clearly state that the ballot is enclosed.

Member Communications With Other Members

The NCUA proposes to amend its conversion regulations to establish a process that enables credit union members to directly communicate with each other after the credit union's board of directors has approved a plan of conversion. These new provisions are intended to help credit union members share information and their opinions about the proposed conversion. ACB submits the following suggestions for improving the proposed member-to-member communication provisions.

Improper Communications. The proposed rule would allow a credit union member to request the credit union to disseminate "proper conversion-related" information on his or her behalf to other credit union members. The credit union would be required to send the communication by mail or by email, as specified by the requestor. A credit union that believes a particular communication is not proper would be required to forward that information to the appropriate Regional Director and explain how the information could be modified to make it proper.

ACB generally supports the NCUA's definition of "proper conversion-related materials" in proposed 708a.4(f)(4). This definition generally parallels the OTS definition of "improper communications." We request the NCUA to further specify that proper conversion-related materials distributed at the request of a credit union member should not imply that the NCUA approves the materials. We also re-state our request that this standard apply to comment letters received prior to the board vote on whether to adopt a plan of conversion. Comment letters that do not meet this standard should not be posted to a credit union's website.

Compilation of Mailing Materials. A credit union could easily be overwhelmed by requests from multiple members to mail a written communication to all credit union members. Organizing and assembling mailing materials could drain substantial credit union staff time needed to complete other tasks related to the functioning of the credit union.

Therefore, we request that the NCUA provide credit unions with the option of requiring a requestor to print all of the materials that he or she wishes the credit union to mail and to insert the materials into envelopes, if necessary. The credit union would then be responsible for printing mailing labels and mailing the materials. We believe this approach would strike a more appropriate balance between facilitating an exchange of opinions between credit union members and minimizing burden on credit union staff that may receive multiple requests to deliver conversion-related materials to its membership.

Member Access to Books and Records. The proposed amendments would allow members of a converting credit union to request and be granted access to the books and records of a converting credit union under the same terms and conditions that a state-chartered for-profit corporation in the state in which the federal credit union is located must grant access to its shareholders.

ACB strongly opposes this provision. In today's heightened sensitivity to privacy issues, this provision would subject credit unions to enormous reputation risk. Credit union members may likely consider it to be a violation of their privacy if other credit union members are able to gain access to membership lists. Credit union members may also believe that the credit union has failed to safeguard personal information.

We are not aware of any other financial services regulators that have implemented similar requirements. Federal mutual savings association members have a right to communicate with one another. However, members do not have a right to inspect or copy any portion of the institution's books or records containing a list of depositors or borrowers, their addresses, or individual deposit or loan balances.

We are also concerned that this provision would allow anti-conversion activists to mail information about the proposed conversion without there being any control or oversight regarding the accuracy and appropriateness of such material. The NCUA strictly monitors the information that credit unions provide to their members. Likewise, there should be controls on the information that credit union members are able to circulate. The NCUA cannot credibly maintain that it is working to protect the interests of credit union members when it only regulates the information that the credit union provides to its members.

Therefore, we urge the NCUA to withdraw this provision in its entirety.

Conclusion

ACB believes that credit unions, like all depository institutions, must have a meaningful right to choose the charter under which they operate. We are concerned that many of the NCUA's proposed amendments to its conversion rules are beyond the agency's authority, conflict with rules established by other regulators, and improperly characterize what conversion will mean for a credit union and its members.

We request the NCUA to withdraw this rule and re-propose one that is consistent with and not any more restrictive than other financial regulators – as required by the CUMAA. It is time to bring some common sense to the conversion process. Failure to make the conversion rules more neutral and more rational will surely yield further criticism from all quarters. This rulemaking underscores the importance of H.R. 3206, the Credit Union Charter Choice Act. This legislation clearly states that a credit union should have a meaningful right to choose its charter – something that the NCUA does not seem to support.

Thank you for the opportunity to comment on this matter. Should you have any questions, please contact the undersigned at 202-857-3187 or kshonk@acbankers.org.

Sincerely,

Krista J. Shonk
Regulatory Counsel