



Credit Union National Association

601 Pennsylvania Ave., NW | South Building, Suite 600 | Washington, DC 20004-2601 | **PHONE:** 202-638-5777 | **FAX:** 202-638-7734

cuna.org

April 18, 2008

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

Re: Comments on Advance Notice of Proposed  
Rulemaking for Parts 708a and 708b, Credit  
Union Corporate Governance Issues

Dear Ms. Rupp:

On behalf of the Credit Union National Association, this letter responds to the National Credit Union Administration Board's Advance Notice of Proposed Rulemaking issued in January that sought comments on issues regarding the regulation of mergers, conversions to another type of financial institution, and terminations of federal share insurance. By way of background, CUNA is the largest credit union trade organization in this country, representing approximately 90 percent of our nation's 8,400 state and federal credit unions, which serve 90 million members.

Due to the nature and significance of the issues raised in the ANPR, CUNA requested and appreciates the additional time to April 30 granted by the agency to provide comments. During the comment period, CUNA has spent considerable time and resources reviewing the proposal and the issues it presents with our membership. The comments reflected in this letter were developed after thorough consideration by CUNA's Federal Credit Union Subcommittee, Examination and Supervision Subcommittee, Community Credit Union Committee, Governmental Affairs Committee, and our Executive Committee.



AMERICA'S  
CREDIT UNIONS®

OFFICES: | WASHINGTON, D.C. | MADISON, WISCONSIN

## Summary of CUNA's Views

- Given the considerable regulatory burden under which federally insured credit unions must operate, CUNA does not support any new regulations suggested by the ANPR on the issues presented.
- CUNA feels very strongly that any additional regulatory constraints for credit unions at this time are unwarranted and would needlessly intrude in the operations of credit union boards.
- This includes our opposition to a prohibition on or regulation of merger dividends, any flat prohibition on communications with the members of “target” credit unions and concerns about overregulation of conversions to private insurance.
- Even so, CUNA recognizes that carefully crafted and circumscribed guidance on a very limited number of issues may be appropriate, such as communications with the members of a target credit union in a “hostile” takeover situation. We urge NCUA to work with CUNA and the credit union system in the development of such guidelines.
- We also want to work with NCUA to determine if an appropriate standard could be developed on the scope of fiduciary duties of federal credit union board members.
- Such a standard should not impose new regulatory burdens and should specifically state that it is not an invitation for examiner intrusion into the operations of credit unions.
- We realize there is concern at NCUA regarding the lack of rules to address mergers or conversions into an institution other than a mutual savings bank. Before proceeding, we urge the agency to solicit comments through a separate advance notice of proposed rulemaking on how it envisions this issue should be addressed.
- Finally, we want to use this opportunity to urge NCUA to consider broad regulatory relief for credit unions. We appreciate that NCUA has engaged in efforts in this area, including its annual regulatory review and other initiatives. We support those efforts and urge the agency to review how the examination process could be improved, including whether further streamlining of the field of membership and member business lending regulatory limitations could be achieved.

## **Discussion of CUNA's Position Background**

The ANPR focused on six types of transactions:

- merger of a federally insured credit union (FICU) into another FICU;
- merger of a FICU into a privately insured credit union (PICU);
- conversion of a federally insured state credit union (FISCU) into a PICU;
- conversion of a FICU into a mutual savings bank (MSB);
- merger of a FICU into a financial institution other than MSB; and
- conversion of a FICU into a financial institution other than an MSB.

The ANPR states that while these transactions are permissible, they could result in reducing members' ownership rights or removing federal share insurance. Also, while NCUA has issued rules to govern most of these transactions, credit union mergers or conversions to an institution other than mutual savings banks are handled on a case-by-case basis because NCUA has not developed a regulation in this area.

In the context of these transactions, NCUA has raised concerns as to whether members' interests are sufficiently protected in several areas. These include:

- Whether the lack of well-articulated federal standards for the fiduciary duties of a credit union's board members has resulted in confusion as to what standard applies, thus complicating the ability of directors to fully protect their members;
- Whether concerns about the potential for insider enrichment in conversions and mergers need to be specifically addressed in a rulemaking;
- Whether the issue of communications to members, such as in a hostile takeover attempt, should be regulated; and
- Whether abuses in member voting for mergers and conversions justify additional regulations.

### **CUNA's Opposition to Any New Rules**

Federally insured credit unions are feeling besieged under the regulatory encumbrances they face daily. Not all of the burden is the result of NCUA-driven regulations. For example, the array of compliance responsibilities under the Bank Secrecy Act (BSA) are required by Congress and developed cooperatively by the federal financial regulators.

However, NCUA has adopted or proposed a number of regulatory initiatives in the last several months. Such initiatives include new rules on bylaw enforcement and members' access to books and records, as well as additional requirements for conversions. Credit unions believe that a pause is in order, particularly since the system is generally functioning well.

Further, credit unions across the country are increasingly raising concerns about over-zealous examiners on a number of issues. This includes a continuing expectation on

the part of some examiners that credit unions maintain a 1% return on assets, despite NCUA Supervisory Letter No. 06-01 that clearly moves away from an artificial numerical goal and states:

Each credit union's earnings level must be evaluated relative to net worth needs, financial and operational risk exposures, the current economic climate, and the institution's strategic plans.

BSA compliance and negative examiner responses to reasonable efforts to assist members with mortgage workout plans are also among the concerns credit unions continue to raise.

Against this backdrop, and as credit unions work diligently to withstand any concerns the economic downturn and mortgage crisis may present for them, NCUA has chosen to issue the Outreach Task Force Report with its recommendations for additional regulatory burdens.

We urge the agency to call a halt to over-regulation and consider the broader regulatory picture as it applies to credit union operations, not just the merits of any individual rulemaking or discrete set of new requirements.

More specifically, in recognition of our members' regulatory burdens and deep concern that such burdens divert them from serving their members to the fullest, we are staunchly opposed to **any** new rules at this time on any of the issues presented by NCUA in the ANPR. This includes but is not limited to new requirements for equity distributions in a merger or conversion, on private insurance conversions, or to flatly prohibit communications to members of target credit unions.

### **Issues that CUNA Urges NCUA to Work with the CU System on Before Proceeding**

Nonetheless, NCUA has raised several highly significant issues that do deserve further consideration. Foremost on that list would be whether guidelines could be developed to address credit union board members fiduciary duties. Credit unions acknowledge that NCUA is right that there is confusion as to what the fiduciary standard is or ought to be, including among examiners. However, as CUNA Governmental Affairs Committee Member Marshall Boutwell, President and CEO of Gwinnett FCU, Georgia expressed it during the GAC's consideration of this issue: "If the fiduciary duty issue is addressed properly, the other issues in the ANPR" do not require new rules.

In light of this, CUNA wants to work with NCUA to develop guidelines, not regulations that address the appropriate standard for fiduciary duty. Such guidelines must include a directive to examiners that, as with bylaw enforcement, examiners are not granted any new authority to micromanage credit unions through the implementation of a fiduciary duty standard.

In one other area, guidelines on communications to the members of a target credit union in a “hostile” merger situation may be appropriate. While CUNA does not support new rules on this and opposes any total prohibition in this area, we would, however, like to work with NCUA to develop useful guidelines, given the number of significant issues raised.

NCUA has indicated it feels there is a need to address issues relating to a merger or conversion of a credit union into a bank or other non-MSB institution in a more formalized manner than the case-by-case approach the agency now uses. Before NCUA proceeds in this area, we urge the agency to consider whether guidelines would be appropriate and to seek ample comments from the credit union system regarding the specific approach NCUA proposes to take.

### **Credit Unions Need More Regulatory Relief**

We also want to take this opportunity, given the economic environment, to advocate that the agency consider additional ways to streamline and improve the regulatory process.

NCUA has undertaken initiatives in this area, including the Reg-Flex program and its annual review of regulations. We commend these endeavors and encourage NCUA to increase its efforts to improve the regulatory environment and examination experience for credit unions, consistent with statutory requirements.

We believe there are some specific areas that are appropriate for regulatory improvements. For example, earlier this year, CUNA sent a letter to NCUA to enhance the field of membership process. We also urge NCUA to have a dialogue with credit unions on concerns with the examination process and on member business lending regulations with the objective of facilitating such lending, given the dire need that a number of small businesses in this country have for financing.

### **Conclusion**

Credit unions are operating in a precarious environment, and the last thing they need are new rules that place additional compliance pitfalls in their paths. Rather than

developing a host of new regulations, CUNA urges NCUA to work with the credit union system to address a limited number of key issues on corporate governance through a guidelines process, as addressed above.

Thank you for the opportunity to comment on these very important issues.

Sincerely,

A handwritten signature in cursive script that reads "Mary Mitchell Dunn". The signature is written in black ink and is positioned to the left of a vertical red line.

Mary Mitchell Dunn  
CUNA SVP and Deputy General Counsel