April 21, 2008

Ms. Mary Rupp
NCUA Board Secretary
1775 Duke Street
Alexandria, VA 22314-3428.

Reference: Comments on Advance Notice of Proposed Rulemaking for Parts 708a and 708b

Dear Ms. Rupp,

Thank you for the opportunity to submit the following comments.

NCUA is seeking comments on each of the following questions:

Should the agency's rules be amended to address issues relevant to members' interests in charter changes or federal share insurance termination?

> Yes. Recent history has proven that the existing rules were inadequate to protect the member's right and property. Recent legal challenges have also failed to protect the member's rights and property. There is a clear need to bring the Federal statutes into line with the original intent and purpose of the creation of Credit Unions. Both charter changes and federal share insurance termination are in dire need of close attention and modification.

Should NCUA promulgate new rules for credit union mergers or conversions into an institution other than a mutual savings bank or should it continue to address these issues on a case-by case basis?

> Clear rules for all types of conversions are needed.
>
> Indeed, the new rules should not address any specific types of conversion but should clearly show the intent to address ANY conversion of a credit union to any other type of financial institution or organization. Indeed, they might even address some aspects of changes to the Bylaws. In Washington State, the DFI/DCU has ruled that the Board of Directors may alter the Bylaws, not tell the owners/members of the change, but hold the owner/members responsible for obedience to those unknown rules. (Re: Columbia Community Credit Union)
>
> After all, the owner/members chose to join a credit union, not some other type of organization. It is incumbent on both CUNA and NCUA to make it positive that any alteration in the institution is not only desired by the member, but also beneficial to that member, and if it is not beneficial to that individual member, that member must be given the opportunity to opt out of the change and secure the

financial benefits of his or her past association when separating from that changing organization.

The individual owner/member has a private and undivided personal ownership and investment in the credit union and should be allowed the opportunity to exercise fully exercise those ownership rights if the original contract is altered by a party.

If a new rule is in order, what should it cover?

The rule(s) should define the exact requirements for initiating and executing a change, of any type, in the form of the existing credit union. The rule must insure a fair and open information process by which ALL owner/members are fully informed of the various options available for those changes, to include mergers, conversions and simply shutting the thing down (voluntary liquidation) with the distribution of excess funds accomplished fairly, based on BOTH the volume of funds and length of membership of each individual owner/member, for both aspects were and are critical to the success of any credit union.

Specifically;

1. The rules must require, with no exceptions, a method by which ALL owner/member may openly and safely communicate their feelings and concerns to ALL other owner/members and that communication be protected from adverse actions by the credit union.

In Washington State, a Board of Directors may legally expel any member, including members of the Board or Supervisory Committee, for acting in any way the Board majority subjectively feels is harmful to the credit union. Obviously, someone who is arguing to liquidate the credit union would fall in a possible "harmful" category and, in Washington, could be legally expelled for distributing that information or argument. In fact, the specific wording in the latest bylaws are as follows:

> Section 5: Expulsion. The Credit Union may expel a member for cause upon a determination that expulsion is in the best interests of the Credit Union. Examples of cause for expulsion include, but are not limited to, conduct deemed by the Credit Union to pose a risk to the Credit Union's members, assets, Officers, or employees; causing or threatening to cause the Credit Union a loss; illegal or disruptive conduct; or any reason that is inimical to the best interests of the Credit Union.
>
> (from Definitions) "Loss" means an economic, financial, or reputational loss or impact to the Credit Union and includes the threat to cause of a loss.

It must be noted that, in at least one case, these types of rules were used to expel a member who was running for a position on the Board of Directors, another who was demanding the Credit Union obey their own bylaws and state laws, and even led to expulsion of the entire Supervisory Committee, with the exception of one person. In the State of Washington, the Board majority can expel the minority members and the entire Supervisory Committee with total impunity.

Indeed, in the State of Washington, the annual meeting rules can prohibit the introduction of ANY new business.

As a result of these abuses of process, the rules should specifically protect that type of inter-member communication.

It must also be noted that in the State of Washington, once a person is expelled, the DFI/DCU argues that the person no longer has standing to sue for recovery of his/her membership. (If you're not a member you can't sue them.) The rules must protect owner/members from such abuse.

2. The rules should require that ALL legal conversion/merger/etc. options must always be presented with any proposal for any kind of modification of the financial form.

The rules must establish minimum requirements for very comprehensive explanations of the effects of each of the options available to the organization, to include financial effects, loss of rights, loss of control, changes in voting rights, etc. and especially the rules must require the Board explain the effect of liquidation of the credit union and distribution of the excess funds. Indeed, in Washington, there is no obligation that the Board allow member to purchase shares in the newly formed bank.

3. Ownership is critical to the survival of credit unions. The rule must clarify the ownership of the credit union. There are those in the profit making end (employees, CEO, CFO, etc.) of the credit union industry who oppose the concept that the owner/members ARE the owners and have a right to the assets of the financial entity.

Without this concept clearly in the mind of the owner/members and the governing bodies, credit union are only one more kind of corporation deserving no more consideration than a bank or another lending institution.

These same people claim that small credit unions are failing and thus must merge, convert or otherwise alter their status, but the truth is it is the truly huge and the larger credit unions that are performing mergers and conversions. The argument is fallacious on its face.

4. The single most important requirement of a new rule is mandatory inter-member communication. The members must be able to communicate with each other and with the individual Board members. The Board members must be totally free to communicate with the owner/members in a free and open fashion and not be limited by some "one voice" concept.

The communication must include truthful and complete information on the proposed actions, the options to that proposal (liquidation, merger, conversion), and the assets and deficits of each of the three options.

Truth in communication MUST be mandated. In Washington state, the regulators (Ms. Linda Jekel of the DFU/DCU) has officially stated that there is no legislative mandate that a credit union tell the truth to its members and that the state has no authority to require a Board to tell the truth to its members.

Should NCUA develop a rule to address the fiduciary duties that credit union directors owe to members?

Yes. The current system is unsatisfactory and is now used to prevent open and frank discussions by Board members with owner/members. In Washington State, the DFI/DCU has made it clear that an individual Board member can be held liable in civil and even criminal actions for simply not speaking with "one voice". This concept is founded in the idea that the fiduciary duty of the individual Board member is ONLY to the corporation and is not to the individual owner/member or the owner/members as a group. If a Board member believes an action is in bad faith, he may not speak out. Officially, Ms. Jekel recommends the individual Board member employ an attorney to determine if there is a hazard to their person if they desire to speak to a member in a frank and honest fashion.

It is necessary that the NCUA clarify the fiduciary duty of the individual Board member toward the individual owner/member, the owner/members as a group and to the corporation as a financial entity.

It is my personal feeling that the individual Board member has a direct fiduciary duty to each individual owner/member first, to the owner/members as a group second and last to the credit union as a corporation. I feel the new rules should directly spell out those duties.

The concept of the legal fiduciary duty is also used, at least in the state of Washington, to prevent the individual Board member from even speaking for him or her self in an election process, preventing the Board member from expressing any opinion not approved by the Board of Directors.

For example, in Washington, if a Board majority votes to convert to a mutual bank and the Board member has knowledge that this conversion is being sought for nefarious purposes, he or she is legally forbidden from speaking out, for to speak out against the vote of the board violates the fiduciary duty of the Board member, making that person liable for civil and perhaps criminal litigation.

I would also like to see the concept of fiduciary duty to include the concept of the duty of candor to the membership. To my mind, it is a failure of the duty to not act on the financial behalf of the membership by notification of those members when, in a Board member's personal opinion, an action not in their best interests are being undertaken.

If a federal fiduciary standard is advisable, what elements of care should it address? Should there be a separate standard for directors to uphold when the transaction involves a charter change to another type of institution?

Yes, a federal fiduciary standard is advisable. It should clearly address the responsibility of the individual Board members in relationship to the welfare of the owner/members first, and specifically, last to the corporation.

In a situation where a charter change is being considered, the Directors are most specifically charged with holding the interests of the owner/members as the most important of their duties. ANY actions which do not reflect that duty should be considered a violation of their fiduciary duty and any knowingly direct action in opposition of that duty should be considered a crime.

Under those conditions, the INDIVIDUAL Director's fiduciary duty is dominantly to the individual owner/members first, the owner/members as a group second and only last to the corporation as an entity.

As such, when considering any kind of charter change or election to office, the individual Directors must be specifically freed from any concept of a "one voice" aspect or restriction in order to best allow all aspects of the pertinent questions to be presented in a fair and reasonable fashion to the membership.

It may be desirable that all Board members and employee Officers be prohibited form any form of profit for the conversion. Such a blanket prohibition may be the only way to insure a conflict-free recommendation for a conversion.

Should NCUA regulate against insider enrichment?

As there is inherent in the concept of credit unions, a declaration of "one for all, all for one", the helping of each by the actions of all, then there is no question that insider enrichment is adverse to the entire reason for the existence of credit unions.

As long as there exists the possibility of enrichment, then the individual will be temped to act in their own best interest and perhaps to the adversity of the majority or the entire membership.

By removing the possibility of insider enrichment, the purity of the motivation of the individuals involved in the governance of the credit union can be assured. To fail to do so invites further abuse of the owner/members.

If yes, should there be requirements regarding the record date for members voting on a conversion proposal or other transaction that would result in a different type of financial institution?

Yes, a definite record date must be established for all voting owner/members and for the provision of any "profits" or "rewards" of any type which would or could result from the establishment of another type of financial institution.

The establishment of that date must take into consideration the ability of the "insider" to take advantage of knowledge held in confidence. In order to prevent such an occurrence, the record date for all "insiders" should be established as prior to their assumption of that position. For example, if a Board member were to propose conversion to a mutual bank, then that Board member's record date would be the date of his first election to the Board. Likewise the record date for the CEO, CFO, etc. would be the date of the original hiring.

Only by eliminating the possibility of insider knowledge yielding profit can we reliably insure that the actions taken accurately reflect the true belief that the recommended action is really in the best interests of the owner/members.

For owner/members who have no pre-knowledge of an effort to alter the form of the institution, a record date of 6 months prior to the first public announcement is felt to be adequate.

If it is found that "insider" information relative to a potential change in form of the institution has been passed to someone, for any reason whatsoever, that individual and the informed individuals should be expelled from the credit union without any right to vote or to garner any benefits of any type whatsoever, and for civil and criminal penalties. If the individual is an employee, then the employee shall be forbidden to work for any credit union at any time in the future.

Should credit unions merging or converting to another type of institution be required to provide a merger dividend to their members as part of the process?

Yes, if a merger or conversion is correctly approved, and there is a differential in value between the merging parties or in the conversion of the institution, then the individual owner/member must be compensated in the form of currency or stock or other advantages, with the right of the individual to select the form of the compensation.

It must be required in the conversion information process that the owner/members be advised of the amount and options of such a dividend.

If not, should the directors be required to consider this issue as part of its due diligence and then justify their decision to the membership?

Yes, it is clear that the province of the Directors is the welfare of the owner/members, thus it is inherent in their duties that they properly inform their owner/members of their decisions in this area and present a valid justification for that action. That presentation should be presented in a time frame adequate for the membership to react appropriately.

Should NCUA prohibit communications from credit union officials that state or imply NCUA has endorsed a charter change or charter materials provided to members?

Yes, there should be an absolute prohibition against any advisement of approval or disapproval by any credit union of the NCUA position until such a position has been officially determined after a careful review of the charter change and its legal completion.

There should be a specific penalty for a violation of this portion of the rule, such as termination of employment of the individual ultimately responsible for the advisement. That might be the termination of employment of the CEO, CFO, Chairman of the Board, etc. Only by being harsh on this subject, can the NCUA prevent prevaricating advisements by perfidious individuals or groups.

In fact, the NCUA might consider that any credit union which used the name "NCUA" in the same paragraph as specific terms, such as variation of "approve", endorse" etc. require specific written authorization from the NCUA. Such a requirement could be executed easily and with little expense by use of an internet based application for approval of such a statement.

Should NCUA require a credit union to include a statement in its materials that NCUA has not endorsed the transaction?

Yes, the NCUA could and should execute a specific statement which the credit union is mandated to use in it's communications with the public and with the

general membership. That mandate should cover content, placement, size, type font, etc.

Should credit unions seeking to convert or merge be required to conduct research to determine if they will close branches or modify other services available to members when the transaction is completed and then disclose that information to the members?

Yes, since many of the owner/members may well have chosen the organization specifically because of the local branch location, specific services, etc., thus a failure to disclose alterations to those elements would constitute an unwarranted violation of the unspoken contract that credit unions have always held with their owner/members.

Alternatively, should NCUA adopt a more general rule regarding the need for full and accurate information to members?

No, history shows that, especially in efforts to convert or alter the form of the financial institution, the "powers that be" are ready, willing and able to distort and take advantage of every possible loophole they can find.

While it is nice to think all our fellow men operate with the general good at heart, experience indicates that to not be true.

An honest man will find no real difficulty dealing with carefully written rules. A dishonest man will certainly work to abuse a more general rule.

It is the responsibility of CUNA and the NCUA to work to insure the optimum welfare of the credit union owner/member, not to ease the work of the employee of a credit union or advantage the nefarious individual who will ultimately abuse those trusting owner/members.

History shows that there has never been a conversion that has advantaged the owner/members. Creating a careful and direct set of instructions for conversions can only do good. There may well be sufficient evidence to forbid conversions in the future, however until that day comes, it is incumbent upon CUNA and the NCUA to insure any conversion or other alteration in form is to the advantage of the owner/members, and the only way of doing that is to establish clear and distinct rules for those events.

Should NCUA issue a new rule on "hostile" mergers and what should it adders to protect members' interests?

Yes, in fact, there seems to be cause to specifically forbid "hostile" mergers.

If such hostile mergers cannot reasonably be prevented then it seems very reasonable for the NCUA to require the "hostile" credit union seek direct majority

(of the vote) approval by their own members to pursue a "hostile" event. The key to that requirement might logically be by the demand by the Board of the target of the "hostile" entity.

In this way, a wayward Board might be reigned in by its own members, or alternatively, their judgment would be justified and they could then pursue the "hostile" merger with confidence that it is the wish of their "bosses."

The target of the hostile actions should also be required to poll (by a majority of the vote,) their own members on the issue if they chose to challenge the hostile entity and require them to seek approval.

In this way, both entities would be assured they are acting with the approval of their owner/members and thus the actions would have additional validity.

Additionally, the NCUA might require a study be conducted by the "hostile" entity showing there is a financial advantage to the owner/member if the merger were to take place. If no such advantage can be shown, or the result is cautionary, then the NCUA might chose to disallow the merger for practical reasons.

A hostile merger is very expensive. The NCUA should judge if the actions are worth the ultimate cost. If a Board is engaged in a hostile merger and expending significant funds with little or no advantage to the owner/members, then the Board is failing in its fiduciary duty and should be stopped or at least the owner/members advised that their Board is, in the estimation of the NCUA, not acting in their best interests.

Should credit union management be prohibited from obtaining interim voting tallies from the election teller during the voting process in a merger or conversion to another type of institution?

Yes. All such votes should be executed under a full veil of secrecy. Once started, the NCUA should require the vote to be completed and the result be made public. No good for the owner/member is gathered by interim vote tallies being made available by the election teller.

In the majority, only if the credit union management is contemplating nefarious actions would the management desire interim vote reporting. When the management has expended significant funds in preparation and execution of a vote, the owner/member has a right to expect the outcome to be held in confidence until a decision is reached. It is a matter of internal politics, not good governance, that an interim vote reporting might be requested. There is no reason that the NCUA should participate or allow internal politics to enter this area of concern.

Should credit union management be prohibited from obtaining lists from the election teller of members who have not voted?

Yes. Again, this kind of action smacks of internal politics, not good governance. Once a vote has begun, no further campaigning or solicitation should be allowed. If the knowledge of who has voted and who has not voted yields some kind of action to influence voting, then the voters have been treated unequally, and the election results then become questionable.

If the vote is by secret ballot, then no voting lists should be released during the vote or after the vote. Not voting is a specific act which constitutes an expression of preference and in some ways constitutes a vote. Indeed, in some parliamentary systems, the number of individuals (not the specific individual) not voting is specifically recorded for record as a result.

Knowledge of who voted and who did not vote allows management to punish or reward employees, for example. In Washington state, that knowledge could even be used as a basis for expulsion from the credit union.

Credit Union management MUST be prohibited from obtaining lists of which members voted and which did not.

Should credit union employees be prohibited from soliciting members to vote?

Yes. History shows that the employees can be influenced, intimidated, and otherwise induced to provide unequal or outright incorrect data to the owner/members, and to engage in direct fraud in connection with a perceived "support" of the CEO, CFO, and other employees and the Board of Directors.

The employees do not have the same interests as the owner/members, even if they area also owner/members.

Employees should not be placed in a situation where they cannot act even in their own interests, let alone be placed in a situation where they might have to act directly in opposition of their own feelings and concerns.

By forbidding the employees from participating in the solicitation of owner/members to vote in any specific fashion, it releases them from a potential conflict of interest and other problems.

Recent actions show that the CEO and Boards have found that, by diligent use of their employees, they can control the voting and thus the results of elections. In the case of Columbia Community Credit Union, the secret instructions provided ONLY to the employees resulted in the destruction of democracy and the current iron-fisted ruling of the current Board of Directors where no new business may be

introduced by owner/members, rules have been promulgated wherein no member dare speak adversely for fear of expulsion, etc.

For that very reason, it is recommended that, due to the conflict of interests inherent in the employee/employer relationship, it may well be wise that voting by any employee be banned. Only in this fashion can the members be confident that their wishes will be honored.

Should employees be prohibited from completing member ballots or handling ballots?

Sadly, it's been shown that employees cannot be relied upon to act in an honest fashion when handling ballots, either in completing or simply transport. Again, by forbidding such acts, the employees are protected from a potential conflict of interest and other significant problems.

The use of employees in handling ballots can place them in a direct conflict with the CEO, CFO, other employees, the Board of Directors and the owner/member they serve. It is incumbent upon the governing bodies to reduce or eliminate such potentially harmful activities.

There are very few valid inhibitions to the adoption of such a rule and a great number of advantages to prohibiting employee's direct access to ballots in any form or at any time. Such a rule protects all parties from undue influence, conflict of interest, the creation of hard feelings between owner/members and employees and the senior officers and the Board of Directors. Everyone wins, no one looses.

Do members have the right to a recount if sufficient evidence exists that the original vote is unreliable? Under what circumstances should a recount be undertaken? What procedures should be followed for a member to exercise such a right?

This question does not make clear reference to the problem. What is an "unreliable" vote? Does the question refer to an inaccurate count and/or to fraudulent ballots, and/or to improper handling of the ballots?

In any case, the owner/members hold a clear right to an honest vote and an accurate count of the votes. If there is any doubt regarding fraudulent ballots or missing ballots or other such concerns, the ballot should be newly printed, secured and a new vote must be held. If there is doubt as to the accuracy of the count, then the owner/member have a clear right to a recount by a reliable third party, with a certification by a licensed and bonded agent of the state, such as an accounting firm.

If it is found there was a deliberate attempt to cause a false report of the actual vote, then the responsible party should be held liable in a criminal action at the Federal level.

There must be clear and concise methods by which a demand for a recount may be instituted. If any hard evidence can be presented to the NCUA that indicates that any kind of fraud has occurred, such as finding ballots which appear to not have been counted, missing or found ballots, mishandled ballots, etc. then the balloting must be redone. The NCUA should have the unique right to order such a recount based on this authority, with no exceptions granted or allowed.

Only if there is evidence that the count is inaccurate should the ballots be recounted by demand of the voters. That evidence may be direct, or it may be by a claim of a significant number of owner/members, such as 10% of the total number of votes cast. If there is a claim for a recount made by any individual, then the ballots must be held for a period of time, such as a 90 day period during which those making the claim have the opportunity to solicit signatures demanding the recount. If 10% of the total voting number demand, by signature, that a recount be held, then that recount should be held by a disinterested 3rd party, such as a licensed and bonded organization and held within ten days and the results announced publically by a unique notice to the owner/members and publication of the results in a local major newspaper.

An automatic recount should be initiated when the margin of win/loss is equal to or less than the normal margin of error for the number of voted being counted. That statistically allowable margin has been professionally determined. Those margins of error should be included in the new rules.

When such a recount is held, owner/members should be chosen by the sides of the issue and those individuals should be allowed to witness the recounting of the ballots, and to hand count not less than 100 real ballots for comparison with a subsequent machine counted result.

Are there any other relevant issues that NCUA should consider?

1. Yes. The NCUA should also consider establishing minimum requirements for the individual states to qualify for insurance.

Specifically, here in Washington state, the governance quality is miserable. Credit unions are not fulfilling their mandate in providing advantage to their owner/members. They are state-wide institutions, not dealing with related entities at all. The state regulators are failing in their obligation to encourage credit unions to be advocates of the lesser-served.

In Washington, the overarching drive is for corporate profits, not member welfare. The credit unions are little more than banks, and some are not even good banks. One never hears of a dividend being given to the owner/members. The average rates paid are bank rates. The fees in some exceed that of banks. In general, the complaint that credit unions are just tax exempt banks has validity.

The NCUA should establish a guideline and demand that credit unions provide the services to the underserved that was intended in the Federal legislation. That is not happening here in Washington.

Indeed, in a meeting on corporate credit union governance, Ms. Linda Jekel, of the Department of Financial institutions, and Director of the Washington State Division of Credit Unions, staunchly denied that one of the purposes of credit unions was to provide services to the underserved.

I would like to see the NCUA develop guidelines and require that credit unions actually serve as intended to qualify for Federal insurance. The number of credit unions making an effort to serve the underserved here in my area appears to be zero. There are no true "payday lending" efforts being made here, although recently a few have begun to move in that direction.

In this time of national corporate dominance, it behooves CUNA and the NCUA to step forth and demand that Washington credit unions either perform as intended or suffer the loss of Federal advantages.

2. The NCUA should establish minimum governance standards. I have only Washington as an example, but here are specific known problems with the governance of credit unions in the state of Washington and represent actions initiated or upheld by the DFI/DCU.

> A member may be expelled at the convenience of the Board for any reason whatsoever that the board deems adequate, to include running for office, speaking against the decision of the board, demanding information from the Board, demanding the Board obey the Bylaws, publishing a newspaper ad soliciting owner/member to run for the Board of Directors, and that person being expelled may be a member of the Board or Supervisory Committee.
>
> A member, once expelled, no longer has standing to sue the credit union, as the person is no longer a member.
>
> The management of the credit union has no obligation to tell the truth to its owner/members and the DFI has no authority to require a credit union to be truthful in communication with its owner/members.
>
> The Washington State DFI/DCU has published a formal governance guidance document which specifically recommends that credit unions adopt a policy of specifically requiring their employees to report evidence of internal criminal activity NOT to the local authorities but to the credit union management only.

There are only a few of the examples of the warped governance system installed in the State of Washington. Clear and definitive guidance on some or all of these and other issues could greatly simplify the current widening conflicts evident in the United States credit unions.

In other states, there is no requirement for secret ballots, thus the management knows how each of their employees votes.

Such abuses MUST be addressed, and on a national level can only be addressed by CUNA. State courts and laws have proven to be insufficient in these matters. The huge financial advantages of the corporations cannot be successfully opposed by one person or even a small group.

Thank you for the opportunity for comment on these issues, and please accept my great appreciation for CUNA and the NCUA recognition that our credit unions are in trouble and desperately need clear guidance on some governance issues.

I must also state my appreciation for CUNA and the NCUA for recognizing that the welfare of the owner/members has not been well protected in the recent past and that action is now being taken to correct that condition. No one expected the profit motive to dominate the credit union movement, but it has.

You deserve recognition and congratulations for your efforts to return the focus of credit unions to the owner/member, the people for which credit unions were intended to help and for doing so in a constructive and non-punitive way.

Thank you again,

Robert L. Tice