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April 30, 2008

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

Re: Comments on Advanced Notice of Proposed Rulemaking for 12 C.F.R. Parts 708a and 708b ("Mergers, Conversion from Credit Union Charter, and Account Insurance Termination")

Dear Ms. Rupp:

American Mutual Share Insurance Corporation (hereafter "ASI") respectfully submits the following comments on the National Credit Union Administration Board's (hereafter "NCUA," "Agency" or "Board") Advance Notice of Proposed Rulemaking (hereafter "ANPR"), issued January 24, 2008. The subject ANPR seeks comments on member rights and ownership interests in relation to federally insured credit union mergers, conversions and insurance terminations. The ANPR notes that the NCUA is considering: (1) issuing rules to govern the merger of a federally insured credit union into, or conversion to, a financial institution other than a mutual savings bank, in that NCUA does not currently have rules to govern such transactions; and, (2) amending existing regulations at 12 CFR Parts 708a and 708b, *"Mergers, Conversion from Credit Union Charter, and Account Insurance Conversion,"* to address "various issues" these transactions present that affect member rights and ownership interests.

I. Summary Comments and Observations

Fundamentally we are concerned that the ANPR requests input and observations regarding rulemaking affecting two entirely unrelated matters. The matter of credit unions converting to other than a credit union charter (Part 708a) clearly affects a credit union member's rights and ownership interest; whereas, a credit union share insurance conversion (Part 708b) in no way affects such rights or interests given no change in charter or regulatory oversight.

To include these two subjects under one ANPR places the respondent at odds with the subjects, in that many credit union advocates support choices, such as private share insurance, but do not philosophically support changes to a bank charter. In its history, ASI has never seen a credit union that converted insurance then became a bank. More realistically, credit unions that convert share insurance generally start out as state-chartered credit unions, and remain state-chartered credit unions following the share insurance conversion vote. Privately insured credit unions are subject to the same state credit union statutes, rules, governance and oversight as federally insured, state-chartered credit unions. Following conversion of insurance, these credit unions do not sell stock, pay inordinate management bonuses, issue stock options or convert ownership interests as is suggested by some recent credit union-to-bank conversions. The matters being addressed in the ANPR concerning Parts 708a and 708b are clearly unrelated. Accordingly, these issues need to be addressed separately, as they were during their most recent amendments in 2005 (Part 708b) and 2006 (Part 708a).

The following summarizes ASI's basic observations, suggestions and objections to the ANPR:

1. There is no need for new or revised regulations as they affect share insurance conversions, but instead there is need for deregulation in this area by NCUA. The most recent amendments to Part 708b, adopted in January 2005, were comprehensive and excessive, effectively diminishing state credit union rights and imposing greater costs and burdens on those federally insured credit unions electing to convert to private share insurance or to merge with a privately insured credit union.

2. NCUA has an inherent conflict of interest as federal charter regulator and share insurer of state-chartered credit unions, and the ANPR advances the agency's long-standing anti-competitive practices and further usurps state laws under the auspices of consumer protection.

3. The ANPR suggests that the consumer is not being adequately advised of the impact of a share insurance conversion due to misleading or unclear communications during share insurance conversion votes. ASI is not aware of any such conditions or events, and NCUA has never denied a share insurance conversion vote for voting impropriety; a power they currently have under Part 708b. Existing regulations governing share insurance conversions already impose biased and strict consumer disclosures that provide a clear but imbalanced explanation of the benefits of federal share insurance. ASI believes the current disclosure requirements are one-sided, lack transparency and fail to pass the test of full and fair disclosure regarding the issue being subjected to vote; that is converting to another form of share insurance as afforded under the subject state's law.

4. The ANPR further suggests that NCUA somehow disclaim their endorsement of a share insurance conversion; restrict a credit union's ability to know interim tallies of a share insurance conversion vote; and, restrict promotion of a share insurance conversion vote by employees or credit union officials. Current rules adequately warn the member of the consequences of the loss of federal insurance and strictly control the collection and tabulation of insurance conversion votes, and no further regulation is needed in this regard. As for member dialogue on the insurance conversion, we contend the right of members to openly discuss any subject affecting their credit union is a fundamental right and should not be restricted by a federal insurer of a state-chartered entity.

II. Establishing ASI's Standing as a Competitor and Affected Party

ASI is a share guaranty corporation duly authorized and licensed under Section 1761 of the Ohio Revised Code (O.R.C.), and has been providing primary share guaranty insurance since 1974 to state-chartered credit unions. The Company is currently authorized to provide such insurance in nine states, Alabama, California, Idaho, Illinois, Indiana, Maryland, Nevada, Ohio and Texas. Further, *ASI is the only company in the U.S. providing such protection of members' savings in direct competition with the National Credit Union Share Insurance Fund* (hereafter "NCUSIF") as administered by NCUA. Thus the existing rules under Part 708b, and the input being solicited under the ANPR regarding various issues under Part 708b as they relate to insurance conversions, have a direct impact on ASI and over 3,300 federally insured credit unions in ASI's nine states of authorization (31% of all federally insured credit unions nationally).

As background, over the past 33 years -- which has included three recessions -- ASI has operated a safe and sound nonfederal insurance fund responsibly examining and monitoring the risk it insures and timely paying claims on over 115 failed ASI-insured credit unions during this period; *without any loss to credit union members or taxpayers*. The Company is subject to both state and federal statutes, state rules and regulations and significant oversight and supervision by the Ohio Department of Commerce, the Ohio Department of Insurance and various state authorities in our eight other states of operation. We believe our performance is best confirmed by the fact that our annual net claims have been approximately $0.04 for each $1,000 of primary insurance-in-force, which compares very favorably with all deposit insurers in the U.S., and is about one-fourth of NCUA's loss history over the same time period.

Despite serious concerns over the NCUA's past attempts to regulate share insurance conversions, ASI has endeavored to assist credit unions in complying with NCUA rules Part 708b. However, because the ANPR proposes unnecessary restraints on state-chartered credit unions, ASI is obliged to object to the anticompetitive measures raised in the ANPR. Further, given our long history and involvement in the conversion process, we believe that ASI is the most qualified independent party to comment on the ANPR, particularly with regards to the "various issues" identified by NCUA in the ANPR that directly affect Part 708b regarding share insurance conversions and mergers between federally insured credit unions (FICUs) and privately insured credit unions (PICUs).

Since 1994, ASI has directly assisted and guided approximately three dozen federally insured credit unions in converting from federal share insurance to private share insurance, making ASI the greatest single hands-on resource in evaluating the need for the amendments out for question in the ANPR. No other organization to our knowledge has had as much direct contact with credit unions converting insurance. Also, not one of the insurance conversions we have assisted with has subsequently converted to a bank charter. *Unlike bank charter conversions, changes in share insurance have not impacted the licensure, chartering, governance, operation, or management of converting credit unions following the change in insurance.*

III. Current Rules Governing Insurance Conversions are Costly, Burdensome, Anti-Competitive, Federally Biased and Usurp State Rights

Share Insurance Conversion Rules are Excessive, Costly, Burdensome and Anti-competitive

On September 24, 2004, ASI officially commented on NCUA's most recent proposal amending Part 708b, and took exception to many of the material changes proffered at that time. Part 708b was revised in part and amended in January 2005 (hereafter "2005 Revision"), and in the 38 months since its adoption, only two federally insured credit unions have converted from federal to private share insurance (less than one conversion per year) and over 24 federally insured credit unions have successfully merged into privately insured credit unions. Additionally, two state credit unions have converted from private share insurance to federal insurance. This significant decrease in conversions is solely due to the discriminatory construct and financial burden imposed by the 2005 Revision. Comparatively, during the 10 years immediately preceding the 2005 Revision, 33 credit unions (more than three conversions per year) had successfully converted to private share insurance with ASI, suggesting the 2005 Revision has severely impeded state credit unions' interest or ability to convert insurance due to the cost and administrative burden imposed by the 2005 Revision.

The Federal Credit Union Act (the "Act") Section 206(d)(2) prescribes the requirements in order for a credit union to convert from federal insurance to non-federal share insurance and reads as follows:

> *No credit union shall convert from status as an insured credit union under this Act as provided under subsection (a)(2) of this section until the proposition for such conversion has been approved by a majority of all the directors of the credit union, and by affirmative vote of a majority of the members of the credit union who vote on the proposition in a vote in which at least 20 per centum of the total membership of the credit union participates. Following approval by the directors, written notice of the proposition and of the date set for the membership vote shall be delivered in person to each member, or mailed to each member at the address for such member appearing on the records of the credit union, not more than thirty nor less than seven days prior to such date. The membership shall be given the opportunity to vote by mail ballot. If the proposition is approved by the membership, prompt and reasonable notice of insurance conversion shall be given to all members.*

NCUA managed to take the relatively straight forward language of the Act regarding insurance conversions and generate an overly complex, 9,200-word regulation in the 2005 Revision, of which over two-thirds was subpart B of Part 708b, insurance conversion rules. Our experience confirms that the existing merger and insurance conversion regulations are excessive and that they impede the ability of a credit union and its members to effectuate a choice of share insurance in a reasonably efficient manner as envisioned by the U.S. Congress when amending the Act. The ANPR contemplates even more rules which erect greater barriers against mergers and insurance conversions.

The ANPR, as it affects Part 708b, only serves to further restrict the basic rights of choice in share insurance, conferred upon those credit unions and their members in states that provide an insurance option, by proposing to implement still another layer of unnecessary restrictions and burdensome requirements on converting credit unions. The inherent risk to credit unions from the ANPR is best demonstrated in the "Background" section of the ANPR, which states in part:

> *The primary focus of this ANPR is protection of member interests in transactions where members have a great deal at stake because the transactions involve* ***fundamental changes in their ownership or structure of their credit union****, including, in some cases, termination of a credit union charter or termination of federal share insurance.*

ANPR at 3 (emphasis added).

While we might agree that a credit union changing to a bank charter is a fundamental change in the *ownership or structure* of the credit union, we would strongly argue that a change in share insurance is not. Tantamount in our response to the ANPR is our overall question: ***"What has changed since the 2005 Revision to Part 708b that requires another amendment to the rule?"*** The 2005 Revision has essentially stopped credit unions from seeking the non-federal share insurance alternative. Any amendment to Part 708b should correct its anti-competitive slant in not permitting credit unions and their members from having a reasonably attainable option for share insurance, as permitted under the appropriate state laws.

Member Disclosures Lack Transparency and are Federally Biased

The ANPR proposes amendments to assure that credit union members understand the risks and rewards associated with insurance conversion and FICU into PICU merger transactions. We believe that this is a gross usurpation by NCUA of powers in relation to state-chartered credit unions' rights to choice, particularly given that NCUA's 2005 Revision *extensively* prescribed the details and breadth of consumer disclosures required during credit union conversions from federal to non-federal insurance. Further, the disclosure requirements in the 2005 Revision are one-sided in favor of the NCUA. For example, the 2005 Revision clearly required the disclosure of the risk of loss of the "full faith and credit of the US Government" upon converting insurance; however, the 2005 Revision made it impossible for a credit union to adequately explain private share insurance to the voting credit union members during a conversion. This is unfair and inconsistent with the spirit of full disclosure and could even be considered deceptive, a result that runs contrary to the NCUA's desire to inform and protect credit union members. Why shouldn't a credit union be permitted to disclose the private insurer's equity ratio, its loss experience or other relevant information?

We have found that since January 2005, many credit unions considering an insurance conversion did not even attempt to do so, deciding that the conversion requirements in Part 708b were too burdensome and expensive to make the conversion a worthwhile venture. Regarding cost, we have evidence that the additional burdensome requirements in the 2005 Revision increased the cost of a share insurance conversion significantly from approximately $2.50 per member to over $4.00 per member, a 60% increase. Additional burdensome requirements placed upon credit unions wishing to convert share insurance included:

- Prior written approval by NCUA for all mergers and final approval of insurance conversions;
- Use of a secret ballot for voting on the insurance conversion and use of an independent entity to tally and certify the vote;
- Strict mandates on member communications, the form of communications, including font size and appearance;
- Specific language as to the full faith and credit of the U.S. Government for NCUA and lack thereof for the private insurer in an excessive prominent presentation;
- Providing share insurance and conversion communication materials to NCUA in advance of providing them to members while leaving the door open for NCUA to challenge such materials at a later date; and,
- Providing members a 30-day notice of conversion with the right to withdraw insured funds without penalty.

The change to the voting process is a good example of how the NCUA's 2005 Revision overstepped the bounds of necessary and reasonable regulation and resulted in unnecessary regulatory burdens on credit unions. ***The voting tabulation requirements of Part 708b are more restrictive than even those of the Securities Exchange Commission (SEC).*** Although many publicly-traded companies reporting to the SEC use an independent tabulating firm to assist with the solicitation of shareholder votes, distribute their proxy materials and tabulate proxy votes, "Regulation 14A: Solicitation of Proxies," as promulgated under Securities Exchange Act of 1934, does not require the use of an independent firm to tabulate shareholder votes. The option to use an independent firm to tabulate shareholder votes for SEC-reporting companies is left to the discretion of each company under the SEC rules. In fact, the federal government has long considered corporate voting requirements to be within the jurisdiction of state laws and corporate by-laws.

NCUA's Inherent Conflict of Interest

The movement is still struggling to implement and bear the cost of the 2005 Revision requirements. As a result, ASI's growth in members has been slowed, and the rules envisioned by the ANPR would only increase those burdens. ASI contends that Part 708b is already overly restrictive in its current form; costly to comply with; anti-competitive in nature; and, burdensome to credit unions. Further, Part 708b, as it exists today, already diminishes the value of the share insurance option afforded credit unions under state laws in at least nine states. Given the fact that the NCUA is the only federal agency responsible for administering the NCUSIF, and, that the income from the NCUSIF pays 53.3% of the NCUA's annual overhead as a licensing and regulatory agency (per NCUA 2007 budget), any actions by NCUA to place greater impositions on federally insured credit unions seeking to convert share insurance or change insured status as the result of a merger with a privately insured credit union, raises questions as to the raw anti-competitive nature of the proposed rulemaking.

In summary, the ANPR is an extension of the Board's apparent belief that no informed member would ever choose private over federal insurance if they understood the ramifications of foregoing federal insurance. In essence, it is the Board's position that there should be no privately-insured credit unions. See, e.g., ANPR at 3, where the Board cautions, "while these transactions are legally permissible . . . members may . . . be deprived of the security of federal share insurance." (Emphasis added). This viewpoint by the Board ignores the fact that members may be "deprived" of the benefits of private share insurance if a conversion is made unduly burdensome and expensive. ASI respectfully submits that NCUA's proper role is to assure that members are adequately informed of the risks and benefits. That should be accomplished by regulations which do not reflect an obvious bias for, or against, private share insurance.

IV. Interference With the "Dual Chartering System" Congress has Consistently Sought to Preserve

Credit unions in the United States began as state-chartered and state-regulated financial institutions. In 1934, when the Act was first adopted, it was designed to create a federal credit union system to operate side by side with the existing state system. Under this "dual-chartering" system each of the fifty states has a state regulatory agency that regulates the safety and soundness of its state-chartered credit unions. Congress has never sought to preempt this historical, well-established and well-run state regulatory system except in specific, quite limited respects.

Indeed, in 1970 when Congress enacted Title II of the Act to establish the NCUSIF, it was again designed to complement the existing state regulatory system and not preempt or supplant it. Two federal courts have examined the extent to which Congress intended to preempt state law by the 1970 amendments to the Act. Both courts found that Congress had no intention to preempt state law for private insurance. To the contrary, Congress specifically recognized that state regulatory authority remained the primary authority over state-chartered credit unions:

> *The legislative history of the Act also evinces no explicit Congressional intent to exclude state regulation of insurance for state-chartered credit unions. In 1970, Congress amended the Act to provide insurance for federal credit unions. The 1970 amendment made the newly created federal insurance funds available to state credit unions as well. Congress deemed it necessary to offer insurance to state credit unions because, at the time of the amendment's passage, only Massachusetts, Rhode Island, and Wisconsin had some form of state credit union insurance. Extending federal insurance coverage to state-chartered credit unions was an effort to provide protection for citizens' accounts because the majority of states were not then equipped to provide such insurance. H.R. Rep. 91-1457, 91st. Cong., 2nd. Sess., reprinted in 1970 U.S. Code Cong. & Ad. News, 4166, 4167-68.* ***There was no intent in the 1970 amendment to take away state authority over insurance for state-chartered credit unions****. The House Report prepared by the House Banking and Currency Committee states that the legislation was "designed solely to give credit unions the same insurance afforded other federally chartered financial institutions and should be considered as a reward for the outstanding job performed by credit unions." Id. at 4167. The opportunity to receive federal insurance was extended to state credit unions as an aid to, not in lieu of, state regulatory power.*

National Deposit Guaranty Corp. v. Sauls, 684 F. Supp. 262, 266 (M.D. Ala. 1987) (emphasis added).

Six years later, a federal court in California reached the same conclusion. In Donald v. The Golden 1 Credit Union, 839 F. Supp. 1394 (E.D. Cal. 1993), the Court rejected the claim that because Congress had preempted state usury laws it had preempted state contract law as related to credit unions.

> *While there is evidence that Congress has chosen to preempt state usury laws—especially interest rate controls—as applied to national banks and other federally-insured financial institutions, there is absolutely no indication that Congress intended to completely preempt laws which set the general rules of contract. Cal. Civ. Code § 1671 applies generally to agreements governed by California law, it is neither directed toward nor limited to those contracts entered into by financial institutions. It does not specifically govern late fees, interest rates, or any other incident of business unique to credit unions.*
>
> *Further,* ***this is not a situation in which the federal government has stepped in to completely regulate the area of law****. Congress has not undertaken the regulation of credit unions to nearly the same extent as it has employee pension plans or collective bargaining agreements. The states have remained the primary government regulator of credit union activities. See, e.g., Cal. Fin. Code § 14000, et. seq. (California statutes regulating credit unions).*

839 F. Supp. at 1401-1402.

V. Specific Topics that Should Not be Subject to Additional Regulation

ASI further objects to the following specific areas of proposed rulemaking in the ANPR that would bear directly on federal to private share insurance conversions.

Communications to Members: Improper or Misleading Communications

NCUA states in the ANPR that the risks and benefits of the charter or insurance conversion transaction must be communicated accurately, be sufficiently comprehensive and not be misleading. NCUA further provides isolated examples of misleading conversion communications, stating that such examples are most prevalent in conversions to mutual savings banks, but that it could also *"...arise in any transaction in which a credit union sends materials to its members, such as federal to private insurance conversions..."* Having been directly involved in every share insurance conversion since 1994, including conversions conducted under the requirements of the 2005 Revision, we would challenge NCUA to provide any evidence of such misleading communications with regard to insurance conversions. In fact, NCUA has the power to deny any insurance conversion, but instead they have approved every credit union conversion to ASI primary insurance since 1994.

Improper or misleading communications to members are already prohibited by the Board's strict rules governing member communications. See § 708b.206(a) (share insurance communications are subject to the Board's "Accuracy of Advertising" rules (§ 740.2)); and, § 708b.206(d) (prior NCUA review is required of all share insurance communications made during the voting period). As noted in the ANPR at 17-18, there has been no incident in which a credit union has represented that the NCUA endorsed a federal to private insurance conversion. Indeed, given the conspicuous and repetitive disclosures required in such contexts, it is incredible to think that any reader would be left with the impression that the NCUA endorsed such a change. Insofar as prophylactic regulation may be deemed necessary to prevent such an impression, it would suffice to forbid credit unions from stating or implying that the NCUA has endorsed the transaction. ***There is quite simply no need for an affirmative disclosure on this topic.*** Finally, if any disclosure is mandated, it should be expressed in neutral terms (e.g., "The NCUA has not endorsed or opposed this transaction").

The ANPR's suggestion that share insurance communications state that "NCUA has not endorsed the transaction" (ANPR at 18) would lead members to believe that NCUA withheld its endorsement, thereby casting a negative view of the transaction. This form of persuasion transcends NCUA's legitimate role as a regulator and would only serve to reinforce the anticompetitive nature of the share insurance communication regulations, implying once again that no informed member would ever vote to be "deprived" of the security of federal share insurance. Although NCUA may harbor such a belief, it is antithetical to the dual structure of federal and state-chartered credit unions as well as anticompetitive.

For these reasons, we strongly disagree with NCUA's contention as to the need for a rule to address misleading conversion communications. The NCUA can "protect the interests of credit union members" through the existing law and rules, dealing with exceptions and misleading conversion communications by simply not approving a charter or insurance conversion or FICU into PICU merger.

Member Voting: Right to Request a Recount

As the Board is aware, there is, for the most part, no federal law of corporations. Nor should there be in the context of insurance conversion votes by state-chartered credit unions. The right to request a formal recount is peculiarly within the province of state law and there has been no justification proffered for the proposed preemption of state law in this area. It suffices to say that NCUA has not identified a single instance of miscounting on an insurance conversion vote. Although burdensome and costly, the new requirement under the 2005 Revision that votes be tallied and certified by an independent entity (see § 708b.202(d)) was designed to insure the integrity of the vote count, and there is no reason to believe that it has not been or will not be effective.

None of the states that authorize private share insurance (or any of the other state insofar as we are aware) grants shareholders or members of credit unions a right to request a recount, regardless of the narrowness of the margin of any vote. Although entities may include such rights in their bylaws, such provisions typically require a threshold percentage of shareholders or members to invoke a recount. Our research has not found any organization that allows a single shareholder or member to trigger a recount.

If one considers the corporate world and SEC-reporting companies, there are no recount rules, such as those being proposed. Challenges to a shareholder vote, whether due to margin of decision or due to concerns over the reliability of the vote, can be made by shareholders through a court of law and the appropriate response is handled through the judicial process...so we ask, what makes credit unions different in their member vote process? We do not believe that a recount provision in NCUA's rules is necessary since there are other avenues in law to address a recount or alleged vote impropriety.

In apparent recognition of the paucity of state corporate law granting rights to request a recount, the ANPR refers to state law on political vote recounts as a possible guide in creating such rights for credit union members. ANPR at 21. However, insurance conversion votes are business decisions, not political elections. Moreover, under state election laws, a single candidate not the voters, or a group of at least five electors in the case of a ballot issue, have the right to request a recount. See, e.g., O.R.C. 3515.01. Most states require that the candidate request the recount, although some states have automatic recounts in the event of a "close election" (one-quarter to one-half of one percent margin). The candidates or elector groups obviously have a greater stake in the election than any individual voter; and, unless the vote is designated a "close election," they also have responsibility to reimburse the state for the cost of the recount if the recount does not alter the outcome of the election. Id.

The decision to convert to private insurance is no more important than a variety of other governance issues that are governed by state law. Allowing a single member to request a recount for any vote and not just a "close election" would allow any dissenter to raise the cost and extend the time required to complete the conversion process.

The independent entity vote tabulator requirement already assures fair and accurate vote tallies. Converting credit unions incur substantial costs (up to $2.00 per member) in order to conduct votes under the auspices of independent entities. These firms have legal as well as professional obligations to make sure that votes are counted properly, and under the 2005 Revision must attest to this in writing following the special meeting of the membership. Thus, there is no gaping void that needs to be filled.

Member Voting: Use of Interim Tallies

We agree that a membership vote should be conducted in a manner so that credit union members have no reason to question the integrity and fairness of the voting process. By the same token we would also argue that the 2005 Revision put severe disclosure restrictions upon those credit unions seeking a vote on share insurance conversion. Such credit unions are only permitted to provide information about NCUA, to disclose the fact that the alternative insurer does not have the full faith and credit of the US Government and to only allow limited disclosures about the non-federal insurer. This severe limitation in disclosures is manipulative, one-sided and is not in the spirit of full disclosure. NCUA has sufficient ability and opportunity under its current rules to address any concerns it may have in any merger and insurance conversion vote process; i.e., NCUA can challenge any vote and disapprove any vote process when improprieties are discovered and it has done so in a few cases in the past. It has the same powers over share insurance conversion votes, yet to date it has not disallowed a single insurance conversion. *Additional rules are not needed to give NCUA the authority to monitor the voting process.*

As much as any of us may not like to admit, a majority of the credit union members are not interested in the voting process. In general, investors, including credit union members, are inundated with proxy materials that request votes, often for routine proposals such as election of directors and the ratification of auditing firms, and they often ignore, throw away, destroy or otherwise overlook these calls to vote. Credit union management can help ensure that members participate in voting processes, particularly for important decisions such as charter conversions, mergers and insurance conversions by monitoring interim vote tallies.

Allowing management to obtain interim voting tallies in summary form helps ensure that sufficient votes are obtained to meet the daunting minimum 20% of members vote requirement under the Act, which helps reduce the cost of re-voting an issue. Otherwise, the vote will be effectively nullified and the credit union will be forced to incur the cost of a second or third round of voting. Also, allowing management to obtain listings of members who have not voted and soliciting members to vote helps to ensure that members understand that their vote matters and that the member is voting on an important issue. Further, most credit union employees and officials are members of the credit union as well and should have the right to discuss the vote proposals with other members. Any efforts to promote member voting should be encouraged not discouraged, yet NCUA's proposal, if enacted, will serve to eliminate such promotion.

The ANPR's concern that vote tallies may be used to promote an affirmative vote on conversion proposals belies a fundamental antagonism against insurance conversions. The very same fiduciary duty that requires board members and managers to exercise their judgment in the best interests of the members calls them to advocate in favor of proposals that they recommend. The board and management are not neutral observers in the voting process. Having concluded by majority vote that a change in insured status is in the best interests of the members, they are duty bound to exercise their best efforts to see that their recommendations are implemented.

NCUA has a legitimate interest in insuring that members are fully apprised of the benefits and risks of an insurance conversion. That interest is protected by the existing rules governing the content of member communications. However, NCUA does not have a legitimate regulatory interest in limiting responsible communication -- especially those designed to encourage members to vote on the proposals. *Thus, NCUA should not prohibit the board or management from obtaining interim vote tallies or lists of members who have not voted, or prohibit employees from soliciting members to vote or helping members to vote by handling their ballots.*

Perhaps most notably, NCUA rules do not prohibit opponents of a conversion of insurance or charter from communicating with members to encourage them to vote "no." Indeed, NCUA rules do not even discourage opponents from engaging in false or misleading communications with members. The board and management are already severely restricted in what they can and must say in member communications. They should not be hindered from encouraging members to exercise their rights to vote on proposals that the board and management believe are in the best interests of their members. It would be patently arbitrary and capricious to require minimum participation levels on the one hand, while prohibiting credit unions from encouraging their members to vote on the other hand.

Fiduciary Duty: Definition of Standard of Care Regarding Specified Transactions

It is indisputable that credit union board members have a fiduciary duty to act in the best interests of their members in all matters including, but not limited to, federal to private share insurance conversions. The ANPR asserts that there may be a need to eliminate "confusion" arising from the lack of uniformity between credit unions in one state from credit unions in other states. ANPR at 13. This proposal is misguided in at least two important respects. First, state-chartered credit unions are subject only to the law of the state in which they are chartered. Thus, the fact that Indiana law might differ from Illinois law does not mean that an Indiana state-chartered credit union must understand or follow the law of Illinois or that of any other state. Rather than "eliminate confusion resulting from differences in state law and . . . make it easier for credit union boards to fulfill their duties to members," id., mandating a new standard of care for the transactions discussed in the ANPR would create the possibility of confusion by requiring boards to understand and apply different standards to different categories of issues.

Second, under the dual system of federal and state-chartered credit unions expressly preserved by Congress, variation in state laws is a virtue, not a vice. See, e.g., Gregory v. Ashcroft, 501 U.S. 452, 458 (1991) ("This federalist structure of joint sovereigns preserves to the people numerous advantages. It assures a decentralized government that will be more sensitive to the diverse needs of a heterogeneous society; it increases opportunity for citizen involvement in democratic processes; it allows for more innovation and experimentation in government; and it makes government more responsive by putting the States in competition for a mobile citizenry.")

Although Congress arguably could federalize regulation of all credit unions, it has quite clearly elected not to do so. See National Deposit Guaranty Corp. v. Sauls, 684 F. Supp. at 266 ("There was no intent in the 1970 amendment to take away state authority over insurance for state-chartered credit unions."); Donald v. The Golden 1 Credit Union, 839 F. Supp. at 1402 ("[T]his is not a situation in which the federal government has stepped in to completely regulate the area of law."). Each state's law defines the standard of care applicable to boards of credit unions chartered by that state. *Imposition of a second, federal standard applicable to only certain transactions would complicate -- not simplify -- board members' tasks.*

VI. Closing Comments

In closing, we would encourage the Board to give serious consideration to the burdensome and excessive regulations that currently exist in Part 708b which, accordingly, require no further regulations with regard to insurance conversions. Further, the matters being addressed in the ANPR concerning Parts 708a and 708b are clearly unrelated and, in order to avoid confusion by the credit unions being regulated, should be addressed separately, as they were during their most recent amendments in 2005 (Part 708b) and 2006 (Part 708a).

Sincerely,

Dennis R. Adams

DENNIS R. ADAMS
President/CEO

DRA/krb