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

Re: Comments on Advanced Notice Proposed Rule Making
For Parts 708(a) and 708(b)

Dear Ms. Rupp:

This letter is written on behalf of Messick & Weber P.C., a law firm located in Media, Pennsylvania. The law firm represents credit unions and credit union service organizations nationwide. The proposal sets forth a number of questions and requests for comments. This letter is responsive to many but all of those questions and requests for comments.

It is clear from the many conversion cases that it is a problem that the boards of directors of federally chartered credit unions do not have uniform fiduciary standards. We believe that uniform fiduciary standards are needed. In cases involving credit unions, state courts have generally applied fiduciary standards applicable to state corporations which are not uniform throughout the country. The regulator and the regulated need to work with the same fiduciary standards throughout the federal charter. Otherwise, there can be wide variance of results from the same actions and a greater number of unintended consequences. It is only fair that directors, officers and members have a clear understanding of the standard by which the decisions of the directors and officers will be measured.

We believe that NCUA has the power to create regulations regarding duty of care as the Federal Credit Union Act refers to fiduciary duties and the NCUA's power to perform enforcement actions for the breach. The Act does not define the duties however is our opinion that NCUA has the ability to do so. We strongly encourage NCUA to establish the fiduciary standard of care for directors and officers of federally chartered credit unions.

We would hope that any definition of the duty of care will provide guidance on the standard of care and loyalty needs to deal with conflict of interest situations, standards for forthrightness of communication with members and fairness standards in the decision making process regarding fundamental corporate change.

The first question is to whom does the duty of care and loyalty flow? It is our belief that the duty flows to both the members' interest individually and the members' interest in the continuing credit union as an institution. For example, if the membership is offered a cash sum to "sell" their credit union to a bank, a board must weigh the advantage to the members of this cash in their pocket versus the advantage to the members by having the credit union as an institution continue to serve them. While both are ultimately duties to the members, there is a recognition that the duty to the members does not necessarily mean short term personal gains. If the board can consider and articulate how their decision will be the best decision for the members, the board will have effectively discharged their duty.

In the day-to-day affairs of managing the credit union, we believe that it is appropriate that the director's fiduciary duty be defined by the business judgment rule; i.e., the fiduciary duty of the board is met so as long as there is no evidence of fraud, bad faith, self-dealing, and the action is not irrational or grossly negligent. We believe that such a standard is sufficient to protect the members and the credit union without being unduly onerous on the day-to-day management of the credit union. There are countless decisions that a board has to make to govern the operation of a credit union and we believe that a board should be held to a standard that will not unduly prolong the decision making process as credit unions have to react to a dynamic financial marketplace in order to compete for their members' business.

However, we believe that in a change of control situation, the standards should be higher due to the drastic change for the members and the credit union. This change of control situation would be in mergers and conversions. In these situations, we propose that the business judgment rule would not apply but rather a heightened standard should be imposed. We believe that the negligence standard or the trustee standard should apply.

In conversion situations we have witnessed directors and officers of the credit union being offered items that personally benefit them such as stock options, bonuses and guaranteed paid board positions. In these situations, there has often been little or no critical analysis by boards of the costs and benefits to the members. Members who have opposed the proposed change of control have been hampered in their ability to communicate their concerns with other members.

Credit unions are member owned and formed for the mutual benefit of the members. Boards should be held to a standard of care that will require them to engage in a thoughtful and critical analysis of the costs and benefits to members when a proposed change of control is presented. This analysis should be shared with the members and the members need to have an opportunity to communicate their concerns with the credit union providing the means to do so.

If any credit union official will personally benefit from a conversion now or in the future, that conflict needs to be disclosed and the official needs to remove himself or herself from the decision making function. We recommend that a non-conflict statement needs to be signed by each credit union official (directors and senior staff) and disclosed to the members in conversion situations. We also believe that the members need to be given a collective individual right, apart from the credit union to sue the officials personally if the official is found to have violated the conflict of interest statement and has personally benefited. This right must survive the termination of the credit union charter if it is to have any effect, i.e. the benefit to the official is often after the initial conversion from the credit union to a mutual savings bank and exists when the mutual converts to a stock bank. All members need to be treated on an equal basis with the same set of rules and if that is not being done, the members need to know about it.

In most change of control situations, there are agreements as to post merger/conversion board make-up. This is an inevitable consequence of any merger and directors should not have a conflict just because there is an agreement that directors continue on the board post merger/conversion unless they are promised compensation for their new position, in which case there is a conflict and the directors should either recuse themselves or decline compensation. If the new institution permits the payment of compensation, compensation should only be paid when and if the directors are elected as a director in the new institution. There cannot be any guarantee of continuing board positions in the new institution beyond the normal election process of the new institution.

We do not believe that the members should be given an absolute right to the credit union's equity as this could adversely affect the viability of the continuing institution and pose a threat of credit union members who vote to convert just to "cash in their chips." However, we believe it is important in each change of conversion to have the board consider whether and how much equity should be distributed to the members by way of a special dividend. If this issue was not considered in a change of control situation, we believe that the board will have failed to discharge their fiduciary duty.

We believe that credit union boards will have a much easier burden of justifying a credit union merger versus a conversion to a bank. In a merger, the members will still have all the rights of a credit union member. The key questions in a merger to be answered by the board's analysis is how will the merger affect the ability to serve the members and what amount, if any, should be distributed to the members of the merging credit union as an equity adjustment.

As to the voting process in change of control situations, interim tallies should not be permitted and safeguards should be in the process to insure that the members have all the information they need prior to the vote and in sufficient time to communicate their thoughts and arguments to other members.

We suggest that the principals to keep in mind when considering what to include in the new rule making are:

1. Provide a clear and uniform fiduciary standard to judge the correct conduct of credit union boards and directors in the day-to-day management of the credit union and in change of control situations.

2. Have a fiduciary standard in a change of control situation that requires the board to:

    a. Consider the effect of the decision on the ability of the continuing entity to serve the financial needs of the members and the relative costs of the services in the continuing entity.

    b. Consider whether, and to what extent, the members of the merging or converting credit union should be provided a special dividend as an equity adjustment.

    c. Disclose to the members any conflict of interest by the senior officials of the credit union and those with the conflict shall recuse themselves from the decision making process.

    d. Communicate with the members the facts and analysis that justifies the decision of the board for a change of control in sufficient time for the members to review and discuss.

    e. Provide the means for the members to communicate with the board and other members their thoughts and opinions of the board's decision.

    f. Hold elections that are fair to all concerned with no side being able to obtain interim counts.

If the board has responsibility discharged their duties and the decision making process meets the fairness standards set forth above, we believe that the members will be well served and they have the basis to decide the future of their credit union.

Respectfully submitted,

Guy A. Messick