CUNA
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VIA E-MAIL – regcomments@ncua.gov

December 22, 2008

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

Re: CUNA Comments on Share Insurance Coverage and the Official Sign

Dear Ms. Rupp:

The Credit Union National Association (CUNA) appreciates the opportunity to comment on the interim final rule that will provide options for displaying the official share insurance sign to reflect the increase in the maximum share insurance amount from $100,000 to $250,000 and that will increase the coverage for custodial loan accounts, which will now be referred to as "mortgage servicing accounts." CUNA represents approximately 90 percent of our nation's 8,200 state and federal credit unions, which serve 92 million members.

Summary of CUNA's Comments

- CUNA supports the increase in the share insurance limit to $250,000 and the flexibility that the rule provides in displaying the official sign to reflect these new levels, which includes using current signs, new signs, or modifying the current signs.
- CUNA also supports the expansion of share insurance coverage that will now insure the principal and interest portion of a borrower's payment separately from the borrower's individual accounts, which will be consistent with the deposit insurance rules, as administered by the Federal Deposit Insurance Corporation (FDIC).
- CUNA would also like to take this opportunity to restate our request that the NCUA Board approve full deposit insurance coverage for noninterest bearing transaction accounts, as the Federal Deposit Insurance Corporation has provided for the banks it insures.

Reflecting the Increase in Share Insurance in Official Signs

The rule provides the following options with regard to the extent changes need to be made to the official sign to reflect the temporary increase in the maximum share insurance limit:

- Continue to display the current sign, and there will be no penalty for credit unions that choose this option. Credit unions that do not alter the current signs may post additional signs in their lobbies or place a notice on their websites.
- Display the sign that NCUA will distribute and post on its website that reflects the temporary increase.
- Alter the current sign to reflect the temporary increase, by hand or otherwise, as long as the altered sign is legible. An example would be placing a sticker that reads "$250,000" over the portion of the current sign that reads "$100,000."

For the mortgage servicing accounts, share insurance coverage will be expanded by insuring the principal and interest portion of a borrower's payment separately from the borrower's individual accounts. Until now, these accounts were combined with the borrower's other accounts at the credit union for purposes of share insurance coverage. The taxes and insurance portion of these payments will continue to be combined with the borrower's other accounts at the credit union for share insurance purposes. These rules for mortgage servicing accounts will now be consistent with the coverage provided by the FDIC for banks and thrifts.

CUNA supports the increase in the share insurance limit to $250,000 and appreciates the flexibility the rule provides in displaying the official sign to reflect these new levels, as described above. We believe the range of options cover all the reasonable alternatives that will provide the necessary information to members, without significant burdens for credit unions.

Changes in Insurance Coverage

CUNA also supports the expansion of share insurance coverage that will now insure the principal and interest portion of a borrower's payment separately from the borrower's individual accounts. We support these provisions, as well as the change in the term from "custodial loan accounts" to "mortgage servicing accounts," as they will now be consistent with the deposit insurance rules, as administered by the FDIC.

CUNA Supports Full NCUSIF Coverage for Noninterest Bearing Transaction Accounts

We would also like to take this opportunity to once again advocate that the NCUA Board provide full share insurance coverage for noninterest bearing transaction accounts, as the Federal Deposit Insurance Corporation has done for the institutions it insures. As summarized below and as we have provided to agency staff previously, the NCUA Board has ample legal authority to increase the coverage for these accounts.

The need for NCUA to act is not just theoretical. Some credit unions feel they have been disadvantaged by the lack of full insurance for these accounts because they have either lost out on accounts they might otherwise have had or members have taken deposits to competing institutions. One large bank in California is reportedly offering a range of accounts with full insurance coverage, making it difficult for credit unions in that market area to continue offering accounts for businesses.

The authority cited by the FDIC in announcing its two-part program -- one aspect guarantees debt and the other provides full deposit insurance coverage for noninterest bearing transaction accounts – is a provision in the Federal Deposit Insurance Corporation Improvement Act of 1991. The provision, 12 USC 1823(G) states:

> G) SYSTEMIC RISK-
>
> (i) EMERGENCY DETERMINATION BY SECRETARY OF THE TREASURY- Notwithstanding subparagraphs (A) and (E), if, upon the written recommendation of the Board of Directors (upon a vote of not less than two-thirds of the members of the Board of Directors) and the Board of Governors of the Federal Reserve System (upon a vote of not less than two-thirds of the members of such Board), the Secretary of the Treasury (in consultation with the President) determines that--
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> (I) the Corporation's compliance with subparagraphs (A) and (E) with respect to an insured depository institution would have serious adverse effects on economic conditions or financial stability; and
>
> (II) any action or assistance under this subparagraph would avoid or mitigate such adverse effects,

> the Corporation may take other action or provide assistance under this section as necessary to avoid or mitigate such effects.

This language directs the FDIC to resolve problems in the least costly manner (12 U.S.C. § 1823(A)) and without protecting depositors for more than the insured portion of their deposits (12 U.S.C. § 1823(E)) unless the FDIC determines, in concert with the other regulators, that such action or assistance is necessary to avoid systemic risk. The FCU Act does not include this provision, and NCUA has taken the position that as a result, it is powerless to provide the full coverage. Nonetheless, NCUA found sufficient authority under the FCU Act to initiate the debt guarantee program for corporate credit unions, which is very similar to the debt guarantee that the FDIC announced under its authority in 12 US.C. § 1823 when it unveiled the increased insurance.

In any event, while the FCU Act does not contain the specific provision FDIC relied upon, the NCUA Board has the power and may even be required to match the FDIC's deposit insurance guarantee under 12 U.S.C. § 1787(k)(1)(A). If the NCUA feels further authority is necessary, it may act under its incidental powers contained in 12 U.S. C. § 1789(7), as it did when it announced the corporate credit union debt guarantee program.

Section 207(k)(1)(A) of the FCU Act requires the NCUA Board to make insurance coverage determinations "consistently with actions taken by the Federal Deposit Insurance Corporation under section 1821(a) of this title." (12 U.S. C. § 1821(a) governs net deposits insurable by the FDIC and any decision of the FDIC regarding deposit insurance involves this provision.)

In our view, because the FDIC has acted to increase the maximum dollar amounts that are insurable at banks, NCUA is empowered and arguably required to act in a parallel manner for credit unions under the clear, plain language of Section 207(k)(1)(A) of the Act. Because the provision unquestionably authorizes insurance parity for federally-insured credit unions with FDIC-insured institutions, what is not clear is the authority NCUA is relying to avoid this directive.

Even if Section 207(k)(1)(A) did not compel the NCUA Board to take action equivalent to that of the FDIC, the NCUA Board has the authority to take such an action pursuant to its incidental powers clause.

Section 209 of the Act authorizes the NCUA Board to "exercise . . . such incidental powers as shall be necessary to carry out the powers" granted to NCUA in Title II of the Act, 12 U.S.C. § 1789 (7). The courts have said that statutory "incidental powers" clauses are independent grants of authority that must only be reasonably related to the powers specifically enumerated in a statute. That is, the powers specifically enumerated are to be viewed as

examples of the agency's authority, not an exhaustive list. NationsBank, N.A. v. VALIC, 513 U.S. 251, 257-59 & n.2 (1995).

The NCUA Board is therefore permitted to authorize as incidental a power that is reasonably related to an express power provided under Title II of the Act, including:

- Section 207(k)(1)(A) (requiring actions regarding maximum amounts of share deposit insurance to be consistent with FDIC's), and

- Section 208(a)(2) ("[T]he Board may . . . guarantee any person [such as a credit union] against loss . . .").

The fact that the FDIC has a "systemic risk" provision in its statute and NCUA does not would not be dispositive in a judicial review of NCUA's use of its powers. Under the Supreme Court's Chevron doctrine for evaluating challenges to agency actions, the existence of authority in a different act is generally not relevant and such agency action would be reasonable under the present circumstances affecting the credit union system.

More specifically, when evaluating administrative interpretations, the courts have said the relevant question is not the existence of other statutory provisions, but whether there is a provision within the same act that would prohibit its interpretation. *Gustafson v. Alloyd Co., Inc.*, 513 U.S. 561, 568-74 (1995); *Indep. Ins. Agents v. Hawke*, 211 F.3d 638, 640-43 (D.C. Cir. 2000).

In sum as it relates to noninterest bearing transaction accounts, we strongly maintain that NCUA has more than sufficient authority to provide full insurance coverage for these accounts and urge the Board to take that action.

Thank you for consideration of our comments on the interim final rule. If you or other Board staff members have questions about our comments, please feel free to give me a call at (202) 638-5777.

Sincerely,

Mary Mitchell Dunn

Mary Mitchell Dunn
Deputy General Counsel
And Senior Vice President