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April 30, 2008

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

Via EMAIL: regcomments@ncua.gov

Dear Ms Rupp:

This letter contains our comments on the Advance Notice of Proposed Rulemaking and request for comment ("ANPR") regarding comments on the ANPR for Parts 708a and 708b.

We agree with most of the comments submitted to date which oppose the proposed increased regulation in the area of charter conversions and mergers. As to the proposed increased regulation relating to a conversion to a mutual savings bank ("MSB"), we believe the NCUA has already exceeded its statutory authority in regulating this area, violating the Credit Union Membership Access Act ("CUMAA") of 1998.

CUMAA required that the NCUA regulations governing charter changes to a MSB be consistent with, and not more restrictive than, the charter change regulations of the other banking regulators. This is hardly the case. The NCUA has had three rulemaking bites at this apple to date, and each has made it more difficult for a credit union to change its charter, all under the guise of protecting member rights, providing "appropriate" disclosure and ensuring a fair voting process. In fact, the existing regulations do nothing of the sort. They simply enable members and outside parties opposed to a charter change to disseminate information, much of which is opinion unsupported by fact, or is actually false and misleading. These members and outside third parties are able to use the NCUA's required "Box Language", which is speculative in nature and which the Office of Thrift Supervision has stated is false and misleading, to support their conclusions. Furthermore, the NCUA enables groups opposed to conversion to circumvent the NCUA's regulations by requiring the credit union to direct all its members to unregulated web sites sponsored by third parties opposed to charter change. These web sites contain false and misleading information and allow anyone to post comments, thus eliminating the credit union's ability, and the NCUA's obligation, to review and oppose information that is not "proper conversion related material" as required by the NCUA regulations. Accordingly, the NCUA's existing regulations do not result in fair and accurate disclosure to members in practice (except for the disclosure provided by the credit union, which is highly regulated), but rather promotes and encourages individuals opposed to the charter change to make inaccurate, misleading and even outrageous statements to confuse as many members as possible. This results in substantial

additional costs to the credit union to attempt to correct this erroneous information, makes it more difficult to obtain a favorable member vote on the charter change issue and may raise safety and soundness concerns as third parties improperly impugn the integrity and good faith of existing management and directors for daring to bring the charter change issue to a vote of members.

As pointed out by one of the credit unions commenting on the ANPR, the NCUA has an enormous conflict of interest in dealing with proposed charter conversions where it would not regulate the surviving entity. A significant portion of the budget of the NCUA is derived from the deposits credit unions must maintain with NCUSIF, and the NCUA understands the impact of losing larger credit unions to more flexible charters. The NCUA believes it can overcome this conflict but does not seem to believe the board of directors of a credit union can overcome its hypothetical conflict and propose a charter change to its members without being motivated by greed-- hence the "Box Language" requirement. We have found the opposite to be true. Most credit union boards are motivated by the best interests of their members rather than by any personal interests.

With that background, the following are our specific comments on the ANPR issues raised.

1) Credit union merger or conversion into a financial institution other than an MSB. We believe the existing case by case method of dealing with these very unusual and complex transactions is appropriate. They often present unique circumstances, have unusual fact patterns and do not lend themselves easily to comprehensive regulation.

2) Management's duties. The ANPR seeks comments on a NCUA standard for fiduciary duty and whether additional regulation is needed to deal with insider enrichment. An attempt to establish a NCUA standard for fiduciary duty would be misguided. It is not difficult to write a regulation in this area using prudent man type language. The difficulty arises from the interpretative nuances that would be required on a case by case basis, dealing with not only the fiduciary standard established, but the proper interpretation of any business judgment rule that would also be established. State laws in this area have the benefit of many years of experience interpreting the facts of hundreds of cases that have come before the courts. Each state has subtle (and sometimes rather large) distinctions in how it interprets similar basic principles. It would not be practical for the NCUA to begin this process now and attempt to replicate or modify this significant body of law. It is also questionable whether the NCUA would be able to decide these issues competently (and without bias due to its obvious conflict of interest) on a case by case basis as each state court has done over decades. This is simply outside the purview and expertise of the agency.

   With regard to insider enrichment, we agree with the many commenters who contend this would simply be additional burdensome and unnecessary regulation. The only context we are aware of where this issue arises is that of a charter change and the disclosure required by the NCUA in this area is already significant. We are concerned this additional regulation would be an attempt to move further into this area which is outside its statutory authority.

Regulations regarding how far back a credit union must look in establishing an appropriate voting record date would be superfluous. We have worked with the majority of credit unions that have attempted conversions to MSB charters and none of them have been foolish enough to think that by adding a few friends and family members to the credit union membership they could influence the vote. Even the smallest credit unions have thousands of members and no board ever knows how the membership will vote on the issue. Any new regulation is this area is as likely to keep out new members who would oppose a charter change as new members who might favor such a change.

3) Member right to equity. As a number of commenters have stated, including the two law firms using the same comment letter that are generally in favor of the ANPR, no member has a right to the equity of a credit union except in the event of a liquidation. We do not object to the payout of member equity in a merger or charter change, but believe it should be the responsibility of the board of directors to determine if such a payout is appropriate under the circumstances. The NCUA, in its examples in the ANPR, deals with the payout of equity to members of the disappearing entity in a merger where the disappearing entity has a higher net worth than the survivor. What if the situation was the opposite, i.e. the survivor has the higher net worth. In that case the members of the surviving credit union are being unfairly diluted under this theory. Should the members of the disappearing entity be required to make an additional payment to the surviving credit union? Our view is that the interests of the members in the net worth of a credit union are inchoate interests. If the board of directors chooses to make a special dividend in selected circumstances, that should be a decision left to the board.

4) Communications to members. The NCUA goes to great lengths to appear to regulate in this area in a fair and impartial manner. This is simply not the case in practice. The ANPR states "NCUA encourages a FICU converting to an MSB to communicate freely with its members. There are no limits or restrictions on the number or kind of communications, provided the communications are accurate and not misleading and otherwise comply with NCUA's rules for written member communications." In the real world, a converting institution must tread very carefully in its written disclosure, oral communications with members, media interviews, website statements and in any other communications in order to obtain NCUA approval of the methods and procedures used in the voting process. Otherwise, the NCUA simply denies approval and the credit union must then file a lawsuit against the government or start the very long and expensive voting process again. This makes responding to any dissident comments difficult in practice, even when the "dissidents" are a handful of members funded by and whose comments are scripted by a credit union thousands of miles away that does not believe in charter choice. It is obvious from the speculative "Box Language" that the NCUA does not endorse the charter change or the charter change related materials. Saying it will not change anything or change anyone's impression of the situation.

   The NCUA is also seeking comment on false and misleading statements regarding any required branch closings or changes in shared branching as a result of a proposed charter change. The NCUA reviews the disclosure regarding these issues and, in our experience, asks numerous questions on these issues. Sometimes the answers are not clear, despite

the best intentions of the credit union, such as when a shared provider network has the power to prohibit an MSB from allowing its members to use shared branches, but is not required to do so and has not made a determination of what it will do at the time of mailing of the voting and disclosure materials. Disclosure is often revised multiple times on these issues and eventually, the NCUA agrees that it has no further comment in these areas. We believe the current process is quite burdensome in dealing with these issues and additional regulation would significantly add to that burden without providing any further clarity.

5) Member voting. The issue of the accuracy of the voting on charter changes has already been addressed in prior regulations requiring an independent, experienced inspector of elections to count the votes and make any determinations as to the validity of individual votes. It would be needlessly expensive to permit a dissident member or group of members to demand a recount, absent evidence of significant problems in the voting and the refusal of the NCUA to investigate on its own. Voting procedures are now more than adequate to protect the integrity of the process, and have become quite established. The only reason we can see for allowing a recount to be required by members, rather than the NCUA, is to further increase the time and costs of a charter change to discourage credit unions from attempting them.

   The NCUA also is considering banning interim tallies of the vote count from being communicated to management. The NCUA believes management uses them improperly, such as to encourage members to vote for a charter change. It must be noted that the board and management have already recommended the charter change to members and that the voting materials state clearly that the board recommends a vote in favor of the charter change. The existing regulations prohibit the independent inspector from telling management how any member has voted and prohibit the inspector from communicating with management any information that would enable management to obtain this information. The NCUA is also considering banning the inspector from providing management with a list of members who have not yet voted and prohibiting credit union employees from soliciting member votes or handling member's sealed ballot envelopes. All of these provisions are intended to make it more difficult for a credit union to encourage members to vote on the important issue of a charter change in case management or any employees might favor such a change and communicate this to members. Of course management is in favor of a charter change or it would not have been proposed. Interim voting tallies assist management in knowing whether it should spend additional credit union money in soliciting further votes from members. If the vote is lopsided either way, no additional money need be spent. If the vote is close, there is nothing at all wrong with management encouraging members who have not voted to vote in order to pass a proposal that the board and management believe is in the best interests of members, a fact that now must be certified to the NCUA. Prohibiting employees from soliciting votes, (while not requiring that they do so), is muzzling employee members of the credit union and is never appropriate. Prohibiting employees from handling sealed ballot envelopes when a member comes into a branch and insists on getting the kind of service he or she expects to receive, is simply a recipe for losing members or, alternatively, setting up a situation where the NCUA refuses to approve the methods and

procedures because employees provided good customer service. If a member entrusts an employee of the credit union to handle his or her sealed ballot envelope, the NCUA should have no reason to be concerned.

Finally, we believe the NCUA should permit potential acquirors of credit unions to appeal to credit union members directly, as long as those direct member communications are accurate and not misleading, and if a credit union's board of directors refuses to consider a merger proposal that might be in the best interests of members. If the NCUA believes that credit union members are the true equity owners of a credit union, then members should be treated like owners and allowed to decide if a merger proposal is something the board of directors should consider. We recognize that this could play havoc with the industry, allowing larger credit unions that may offer better rates to members than smaller credit unions because of size efficiencies, to attempt to compel smaller credit union boards to consider a merger by direct appeal to the smaller credit union's members. This is entirely consistent, however, with the NCUA's view that members are the equity owners of credit unions and should have the same rights as stockholders of for profit companies, a position the NCUA has taken repeatedly in connection with charter change and other proposals.

We appreciate the opportunity to comment on the ANPR.

Silver, Freedman & Taff, L.L.P.

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