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April 30, 2008

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

RE: RIN 3133-AD40; Notice of Proposed Rulemaking; 71 Fed. Reg. 5461-01

Dear Secretary Rupp:

The Georgia Department of Banking and Finance (Department) appreciates the opportunity to comment on the Advance Notice of Proposed Rulemaking and Request for Comment (ANPR), RIN 3133-AD40, 71 Fed. Reg. 5461-01.

In the ANPR, the National Credit Union Administration (NCUA) addresses rulemaking regarding six types of transactions: merger of a Federally Insured Credit Union (FICU) into a FICU; merger of a FICU into a Privately Insured Credit Union (PICU); the conversion of a Federally-Insured State Credit Union (FISCU) into a PICU; the conversion of a FICU into a Mutual Savings Bank (MSB); the merger of a FICU into a financial institution other than a MSB; and the conversion of a FICU into a financial institution other than a MSB. The NCUA has requested comments on a number of proposals which would focus on these transactions.

The following represents the views of the Georgia Department of Banking and Finance on the proposed rulemaking in these areas:

A. Merger or Conversion to a Financial Institution Other Than an MSB

The NCUA has requested comment on whether it should issue a rule regulating the merger or conversion of credit unions into a financial institution other than a MSB or continue to address these transactions under the NCUA's statutory authority. The NCUA indicates that a rule governing these transactions would likely be complex. We would agree that the nature of these transactions would lead to complex transactions that don't readily lend themselves to uniform rulemaking.

Credit unions are currently subject to state laws which regulate mergers as well as conversions to different types of entities. Some states do not permit the conversion of credit unions to other financial institutions, although this is contemplated under Georgia statute. Many provisions in state law are designed to protect the shareholders or members of such entities. Moreover, NCUA lacks the demonstrated statutory authority to preempt established state law governing the corporate structure and fiduciary responsibilities of state chartered entities. It is unlikely that credit unions or their members would benefit from a complex new regulatory structure intended to offer similar or additional protections. Adding a complex regulatory structure to this process would significantly increase the costs of doing a merger or conversion transaction. A new federal regulatory structure governing these transactions would likely propose to preempt any existing state laws which are inconsistent with these provisions. The NCUA's proposed regulations would establish extensive member notice, voting, and approval requirements; they would establish a standard of care for directors and officers considering conversions; would establish record dates for member voting on conversions; would require credit union directors to set a merger dividend in the case of the merger of credit unions with unequal net worth; and it would establish limitations on member contacts when the management of a credit union is proposing a merger or conversion. As indicated above, we believe NCUA lacks the statutory authority for the promulgation of a regulation preempting state law in this area (corporate governance), at least insofar as federally insured state-chartered credit unions (FISCUs) are concerned. Furthermore, such a standardized regulatory approach would remove the flexibility needed to make certain that such plans of merger or conversion are reasonable and equitable to the individual circumstances of each proposed transaction.

In the case of state-chartered credit unions, Georgia law provides ample authority for the Department to regulate conversions undertaken by Georgia credit unions and to monitor and prevent actions which would be detrimental to the interests of credit union members (O.C.G.A. § 7-1-668). The NCUA's proposals could preempt most, if not all of the provisions of these provisions of state law.

The foregoing proposals would additionally propose to preempt significant portions of state laws dealing with corporate governance. The NCUA cites 12 U.S.C. § 1766(a), 12 U.S.C. § 1785(b), 12 U.S.C. § 1785(c), and 12 U.S.C. § 1789(a) as authority for its proposed regulation. None of these statutes either expressly or by implication evidences Congressional intent to preempt state laws pertaining to corporate governance in the case of FISCUs. FISCUs are state corporations created by and subject to the laws of their home state. It is reasonable and consistent that state corporations created under state law should be subject to corporate governance provisions of the jurisdiction that chartered the corporation.

Among other things, the non-profit corporation laws in the states are designed to protect the interests of the members of nonprofit corporations. In the case of FISCUs, the NCUA's proposal would replace an existing regulatory structure which protects members' interests with one designed by the NCUA. The NCUA has not demonstrated a compelling reason for doing this. The scenarios discussed in the ANPR do not justify the creation of a new regulatory framework to address them. Further, the NCUA has failed to demonstrate that the issues discussed in the ANPR are not addressed under existing federal or state law.

The addition of such a regulatory structure would create confusion and uncertainty for credit unions desiring to merge or convert to another entity while complying with both federal and state law in the process. The added costs and confusion would not be sufficiently offset by any enhanced protection to credit union members. Congress has been clear in previous discussions with the NCUA that it is not appropriate to create unreasonable regulatory burdens or impediments upon charter conversions and these proposals could have such an effect.

In summary, we believe that a new NCUA rule regulating credit union mergers or conversions to another type of financial institution would be outside of the agency's authority, ill-advised and detrimental to the interests of credit union members. Accordingly, we **oppose** the NCUA's proposed rule-making regarding the merger or conversion of a credit union into a financial institution other than an MSB.

B. Issues Affecting Members' Interests

The NCUA has requested comment on a number of issues which affect the interests of credit union members in restructuring transactions.

> 1. Management's Duties. The NCUA seeks comment on the need for a regulation establishing a standard of care for directors to help ensure that directors meet their fiduciary duty to credit union members. The NCUA recognizes that this is an area currently governed by state law. The NCUA opines that a uniform standard on this issue may eliminate confusion in the state-to-state differences in this area. We strongly **oppose** the issuance of a regulation by the NCUA to create a standard of care for credit union directors.

pp, Secretary of the Board
Credit Union Administration
2008

.n NCUA regulation creating a standard of care for credit union directors would e intended to preempt existing state statutory and case law governing the subject. eorgia statute specifically provides for the duties of credit union directors and ıe standards of care applicable to the directors of non-profit corporations. onprofit corporation directors must act in good faith, with the care an ordinarily rudent person would exercise under similar circumstances, and in a manner the irector reasonably believes to be in the best interests of the corporation .C.G.A. §§ 7-1-656 and 14-3-830). The NCUA's proposed regulation would reempt these laws in the case of Georgia state-chartered credit unions. In ddition to the fact that there is no statutory authority for the preemption of state aw in this area, the NCUA has not articulated sufficient justification for taking uch an action.

eorgia statute also extensively addresses conflict of interest transactions ngaged in by non-profit corporation directors (O.C.G.A. §§ 14-3-860 through 4-3-865). There is no demonstrated need to enact a federal regulation which ould cover the same issues and preempt existing state law on the subject. The ıere fact that differences exist from state to state is not a lawful basis to preempt tate law.

/e are also unaware of any provision in the Federal Credit Union Act which ould empower the NCUA to issue a regulation preempting state laws governing ıe fiduciary duties of directors and officers of state-chartered credit unions. niformity is not adequate justification for replacing state law with an NCUA-esigned standard governing the fiduciary duties of directors in merger and onversion transactions. Putting aside the issue of the lack of statutory authority, ıere is no evidence that there is a need for such preemption based on our xperience and based on our interaction with other state regulators.

the ANPR, the NCUA acknowledges that merger and conversion transactions e legally permissible (73 FR 5462). Despite that acknowledgment, the NCUA ates "many observers believe" conversions to an institution other than an MSB e in the best interest of members only in unusual circumstances (73 FR 5463). hese statements cause one to question whether the NCUA is reasonably bjective regarding these issues. It is our view that the membership of a state hartered credit union is in the best position to make such a determination of what onstitutes the best interests of the membership, based on full and accurate formation in accordance with state law.

or these reasons, we **oppose** the NCUA's issuance of a regulation creating a niform standard of care for credit union directors.

2. Insider Enrichment. The NCUA has observed a problem with family members of credit union board members joining credit unions in noticeable numbers before a conversion transaction in order to take advantage of the eventual sale of the new entity's stock. Although we are careful to review proposed transactions for such features, and have not observed this problem in our state, we would find such features very troubling, and would not permit such a transaction detrimental to the interests of the membership to occur. To the extent this problem arises, it can be addressed under existing state laws. Georgia statute deals with conflict of interest transactions engaged in by non-profit corporation directors as discussed in the statutory cite above.

Georgia statute also deals extensively with the subjects of record date for notice, voting, and members' exercise of any rights with respect to lawful actions of a non-profit corporation. These statutes generally allow the record date for member voting and other actions to be determined by the bylaws of a non-profit corporation.

We believe that the provisions of the Georgia Non-Profit Corporation statutes provide sufficient restrictions to prevent actions of conflict of interest and undue insider enrichment. We also believe that the other statutory provisions in the Georgia Code regarding mergers and conversions of the credit unions provide the Department with sufficient authority to prevent any undue insider enrichment from these proposed transactions. There is no need for NCUA to preempt these state statutory and regulatory requirements and such a result would be without benefit to either the credit unions or their membership.

3. Member Right to Equity. The NCUA notes that there can be unequal net worth ratios among merging credit unions. The NCUA further notes that this imbalance can result in unfair treatment of members of a credit union with higher net worth than the credit union's merger partner. To address this issue, the NCUA proposes a regulation requiring a merger dividend in such cases or alternatively requiring credit unions' boards to consider this issue in their pre-merger due diligence. The NCUA recognizes that not imposing such a requirement allows credit unions the flexibility to decide for themselves whether to include a merger dividend in merger negotiations, as well as the calculation of a merger dividend. It is imperative that such flexibility should remain in place, and I would argue based on my experience as a regulator that it is impossible to craft a regulation with sufficient flexibility to address the specific structural

A merger dividend requirement would inject the NCUA into the deliberations occurring when a credit union's board considers a potential merger. This requirement would give the NCUA certain control over the monetary terms of a merger. This is a matter which is not appropriately within the responsibilities of a financial institution regulator; rather it should be the responsibility of the management of the merging credit unions to provide a plan, which should then be subject to regulatory review and approval.

Georgia credit union statute requires credit unions to file a plan of merger prior to a proposed merger transaction, subject to the approval of our Department. Not only must the board of directors of each credit union approve the plan of merger, the members of each credit union must approve it by a majority vote (O.C.G.A. § 7-1-667). In light of these requirements, the members of a credit union can block a merger if the members determine their credit union will not be treated equitably in the transaction. Furthermore, our Department would not approve any plan of merger that would create any inappropriate transactional balance or safety and soundness issues in the surviving credit union.

For the foregoing reasons, we **oppose** this proposal.

4. Communications to Members. The NCUA is concerned that improper communications are made with members when a credit union is considering a conversion. The NCUA believes there are occasions when a credit union's board has implied to members that the NCUA endorses the transaction. To address the problem, the NCUA is considering specifically prohibiting communications from credit union officials that state or imply that the NCUA endorses the charter change. The NCUA is also considering requiring a credit union to include a statement in its materials to the effect that the NCUA has not endorsed the transaction.

We believe there may be value in prohibiting credit union officials from stating or implying that the NCUA endorses a charter change when that is not the case. Such conduct is clearly improper and we take no exception to the NCUA's effort to establish such standards, which deal specifically with the position of their

We do, however, strongly **oppose** a requirement that a credit union include a statement in merger materials sent to members that the NCUA has not endorsed the transaction. Such a statement would create the impression that NCUA is against the charter change or feels it is ill-advised. The NCUA should maintain a position of neutrality regarding the chartering decision, and properly leave such a decision to the membership of the credit union. Such a communication would also add to the costs of the materials a credit union must prepare and send to its members in the event of a proposal to convert the credit union to another entity. We are therefore **opposed** to such a requirement.

5. Third Party Communications. The NCUA has noted a problem with communications being directed from a credit union desiring to acquire another credit union to the target credit union's members. The NCUA is considering whether to rely on existing regulations to address this problem or to issue a new regulation addressing the problem.

We recommend that the NCUA continue to address this problem through its existing regulations. Tailoring a new regulation to address this problem would be complex, since communications to a target credit union's members can take many forms and address many issues. In some cases, a ban on such communications could prove to be detrimental to the interests of the members of a target credit union. We believe that there is sufficient flexibility in current regulations to deal with such issues on a case-by-case basis.

6. Member Voting – Recount Requests and Vote Tallies. The NCUA indicates that in its review of close votes on conversions in recent years, it has found irregularities and improprieties in a number of cases. The NCUA has noted that at times management will obtain interim vote tallies and then contact members who have not voted and encourage them to vote for conversion. The NCUA is considering prohibiting management from obtaining interim vote tallies, prohibiting management from obtaining lists of members who have not voted, prohibiting management from soliciting members to vote, and prohibiting credit union employees from completing ballots or handling ballots. While the Department believes that it is important to maintain the integrity of the voting process particularly regarding the completion or handling of ballots, we believe that such matters of corporate governance in state chartered credit unions should be properly governed by state law.

It has been noted that such activities are not uncommon in for-profit corporations, where proxy statements often provide the recommendations of management to shareholders on various resolutions or other matters subject to shareholder vote.

It appears from this proposal that NCUA wishes to prohibit credit union management from in any way commenting on a proposed restructuring of the credit union. Such a goal is neither realistic nor fair, and it appears contrary to commonly accepted corporate practices. We note that NCUA does not propose similar restrictions or limitations on parties who may be opposed to such actions, even when such communications may be inaccurate or unfair. Our Department believes that we have the necessary statutory and regulatory powers to assure that communications between credit union management and the membership of the credit union are maintained on a fair and accurate basis. Furthermore, we believe that voting procedures in a state chartered financial institution, like voting procedures in other for-profit and not-for-profit corporations should be governed by state law. We **oppose** the proposed restrictions on communications by the management of the credit union as being over-restrictive, unfair and inconsistent with corporate practice.

One of the NCUA's proposals for preventing any management influence over members' votes on a restructuring transaction is to prohibit credit union employees from handling or completing ballots. Prohibiting credit union employees from handling ballots would require credit unions to hire an independent third party to handle and count ballots. This would again greatly increase the costs of the voting process in these circumstances.

It is unclear why such a prohibition of employee involvement should apply only in the singular case of a restructuring of the credit union. A broader application of these provisions would not only be more costly for the administration of the credit union but would be more likely to harm rather than benefit the interests of the membership. For these reasons, we are **opposed** to the NCUA's issuance of a rule prohibiting credit union employees from handling ballots when members vote on a proposed restructuring transaction.

ummary, we believe that most of the issues addressed in the ANPR are governed by existing eral and state law. To the extent the NCUA would adopt rules implementing some or all of proposals discussed in the ANPR to state chartered credit unions, we believe that the NCUA s statutory authority to impose any of those requirements on state-chartered credit unions and reempt state law. We believe that the issues identified in the ANPR are being effectively ressed by state laws and regulations both in our state and in other states around the nation.

We appreciate the opportunity to have meaningful dialog regarding this ANPR and valu
cooperative relationship that we maintain with the NCUA regarding the safety and soundn
state chartered, federally insured credit unions.

Sincerely,

Robert M. Braswell

Robert M. Braswell
Commissioner
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