STATEMENT

OF

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"H.R. 3206, CREDIT UNION CHARTER CHOICE ACT."

BEFORE THE

SUBCOMMITTEE ON FINANCIAL INSTITUTIONS AND CONSUMER CREDIT
U.S. HOUSE OF REPRESENTATIVES

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Chairman Bachus, Ranking Member Sanders, and Members of the Subcommittee, on behalf of the National Credit Union Administration (NCUA), thank you for the opportunity to present the Agency's views on H.R. 3206, the Credit Union Charter Choice Act,

introduced July 12, 2005 by Representative Patrick McHenry, and on credit union conversions to mutual savings banks or associations (MSBs).

NCUA's primary mission is to ensure the safety and soundness of federally insured credit unions. It performs this important public function by examining all federal credit unions (FCUs), participating in the supervision of federally insured state chartered credit unions (FISCUs) in coordination with state regulators, and insuring credit unions. In its capacity as the administrator for the National Credit Union Share Insurance Fund (NCUSIF), NCUA provides oversight and supervision to approximately 8695 federally insured credit unions, representing 98 percent of all credit unions and approximately 84 million members. [1]

A credit union is owned and governed on a democratic, cooperative basis by the members. It is the member-owners, not NCUA or any other group, who should decide the future of their credit union. NCUA fully supports the right of credit union members to decide the business model that is most appropriate and beneficial to them, and whether a charter conversion serves their best interest. In that regard and in the interest of basic consumer protection, NCUA strongly believes that the member-owners deserve to receive information about the conversion of their credit union to another form of financial institution that is accurate, complete and understandable.

My statement today provides a brief history of NCUA's rulemaking on conversions, responds to criticism of NCUA's current rule, addresses the statutory limitations on NCUA's rulemaking authority and provides comments on H.R. 3206.

History of Statutory Provisions and NCUA Rulemakings on Conversions

In 1995, NCUA first adopted a rule to address the conversion or merger of a credit union into a non-credit union institution. [2] The purposes of the rule were to ensure that transactions took place only pursuant to an informed vote of the credit union's member-owners and to prevent self-dealing and other abuses by individuals involved in the transactions.[3] The rule addressed, among other things, voting procedures, disclosures, member approval, and NCUA approval.

Congress enacted the Credit Union Membership Access Act (CUMAA) on August 7, 1998.[4] Section 202 of CUMAA amended the provisions of the Federal Credit Union Act (Act) concerning the conversion of insured credit unions to MSBs. These amendments

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[1] Approximately 180 state chartered credit unions are privately insured and are not subject to NCUA oversight.
[2] 60 Fed. Reg. 12695 (March 8, 1995). In 1995, prior to CUMAA, the Federal Credit Union Act stated that no credit union could convert into a noninsured credit union or institution without the prior approval of the NCUA Board but contained no other provisions relating to MSB conversions. NCUA's 1995 rulemaking specific to MSB conversions was in response to problems observed in credit unions attempting to convert. 59 Fed. Reg. 33702 (June 30, 1994)(Proposed NCUA Rules on Mergers of Federally-Insured Credit Unions; Voluntary Termination or Conversion of Insured Status).
[3] *Id.*
[4] Public Law 105-21.

provide that a majority of a credit union's board of directors must approve a proposal to convert, and membership approval shall be determined by a majority of the members who vote on the proposal.[5] The CUMAA voting standard was a significant departure from the pre-CUMAA standard, which required that a majority of the credit union's members approve a conversion, not just a majority of those members who actually voted on the proposal.

CUMAA requires that a credit union give its members notice of the vote 90 days, 60 days, and 30 days in advance and provide NCUA with notice of its intent to convert.[6] CUMAA also requires that NCUA administer the member vote on a proposed conversion and review the methods and procedures by which the vote is taken. It provides authority to either NCUA or the federal or state regulatory agency that would have jurisdiction over the institution after the conversion to disapprove of the methods by which the member vote was taken or procedures applicable to the member vote and to require that the member vote be taken again.

Under CUMAA, NCUA was required to promulgate final rules regarding charter conversions within six months of the passage of CUMAA that were: (1) consistent with CUMAA; (2) consistent with the charter conversion rules promulgated by other financial regulators; and (3) no more or less restrictive than rules applicable to charter conversions of other financial institutions. NCUA issued final rules on November 19, 1998 to implement §202 of CUMAA.[7]

NCUA's first post-CUMAA conversion rule, while necessarily different from NCUA's pre-CUMAA rule, shared the common goal of enhancing consumer protection for credit union members. The rule acknowledged that under CUMAA, an insured credit union could convert to an MSB without the prior approval of the NCUA. It also articulated NCUA's statutory responsibility to administer the methods and procedures of the member vote, and to disapprove them and direct a new vote be taken if warranted.

In the approximately 8 years since the first post-CUMAA conversion rule was issued, NCUA has refined the rule three times.[8] In each of these rulemakings, NCUA has been motivated by the same basic concern, namely, that members receive accurate and complete information to make an informed decision on a conversion proposal. Among these amendments were requirements that converting credit unions disclose additional information to their members, that the member vote be by secret ballot, and that the vote be conducted by an independent entity.

Since 1995, of the 33 credit unions that sought to convert to MSBs, 29 have converted. Of the four that did not convert, one did not receive the requisite member vote under

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[5] 12 U.S.C. 1785(b)(2)(B).
[6] 12 U.S.C. 1785(b)(2)(C); 12 U.S.C. 1785(b)(2)(D).
[7] 63 Fed. Reg. 65532 (November 27, 1998).
[8] 64 Fed. Reg. 28733 (May 27, 1999); 69 Fed. Reg. 8548 (February 25, 2004); 70 Fed. Reg. 4005 (January 28, 2005).

provisions of the relevant state credit union law; one had difficulties with the banking regulators and withdrew its application to become a bank; one chose not to conduct a second member vote after NCUA discovered significant problems and irregularities, such as failure to allow some members to vote and inconsistencies in voting procedures; and one withdrew its application for reasons unknown to NCUA after sending its 90-day notice and ballot to members.

Overview of NCUA's Current Conversion Rule

As noted above, the Act requires NCUA to administer the member vote on a proposed conversion and review the methods and procedures by which the vote is taken.[9] This requirement is a directive to ensure converting credit unions provide accurate and complete disclosures to members so that they can make an informed decision about the conversion. Towards that end, NCUA's conversion rule requires a converting credit union to provide disclosures to its members with the statutorily required three written notices at 90, 60 and 30 days prior to the vote. It also specifies that the member notices must adequately describe the purpose and subject matter of the vote.

Additionally, NCUA's rule tracks the Act's language that allows a converting credit union to notify NCUA of its intent to convert. The credit union must provide NCUA a copy of its member notice, ballot, and all other written materials it has provided or intends to provide to its members in connection with the conversion. A converting credit union has the option of submitting these materials to NCUA before it distributes them to its members. This enables the credit union to obtain NCUA's preliminary determination on the methods and procedures of the member vote. If NCUA disapproves of the methods and procedures of the member vote after the vote is conducted, then NCUA may direct the credit union to take a new vote. NCUA's responsibility to review the methods and procedures of the member vote includes determining that the member notice and other materials sent to the members are accurate and not misleading, all required notices are timely, and the membership vote is conducted in a fair and legal manner. As discussed below, these requirements are consistent with and no more or less restrictive than the rules promulgated by other financial regulators, including the Office of Thrift Supervision and the Office of the Comptroller of the Currency.

A converting credit union can provide information to its members regarding any aspect of the conversion in any format it wishes, provided all communications are accurate and not misleading. In accordance with the Act and NCUA's rules, a converting credit union must provide certain minimal information in the notices to members. Most converting credit unions choose to provide significantly more information concerning the conversion.

NCUA's conversion rule allows a converting credit union to communicate with its members as it deems appropriate, but requires that members receive a short, simple disclosure prepared by NCUA. This disclosure, which is included with the three notices

[9] 12 U.S.C. 1785 (b)(2)(g)(ii)

and other written communication to members after the board votes to convert, addresses: (1) ownership and control of the credit union; (2) operating expenses and their effect on rates and services; (3) the effect of a subsequent conversion to a stock institution; and (4) the costs of conversion.

This disclosure represents basic and fundamental consumer protection. Additionally, it maximizes the ability of members to exercise real control over an institution that they not only own but to which they have contributed in the accumulation of owner equity.

Credit union members should be particularly aware of these topics as they consider voting to convert their credit union to another form of financial institution. NCUA recognizes a credit union might discuss these topics elsewhere in its communications with members, but NCUA is concerned that this information may not be conspicuous or clearly stated, given the volume of information provided. Accordingly, a converting credit union must include the form disclosures in a prominent place with each written communication it sends to its members regarding the conversion and ensure that the disclosures are conspicuous to the member. If a credit union wishes to modify the disclosure, it may do so with the prior consent of the Regional Director and, in the case of a state credit union, the appropriate state supervisory authority.

A converting credit union must conduct its member vote on a conversion in a fair and legal manner. NCUA requires the credit union to conduct the vote using secret ballots and an independent teller to ensure the integrity of the voting process and the privacy of each member's vote. To assist credit unions in achieving the goal of a fair and legal voting process, NCUA's conversion rule includes guidelines that address such topics as understanding the relationship between federal and state law, determining voter eligibility, and holding a special meeting.

H.R. 3206, "The Credit Union Charter Choice Act"

NCUA appreciates the concerns of Representative McHenry and the cosponsors of H.R. 3206, The Credit Union Charter Choice Act, for recognizing the importance of the credit union conversion issue.

Provisions NCUA Supports

Two provisions of H.R. 3206 would improve current law – the requirements for a secret ballot and an independent inspector of elections. NCUA's current conversion regulation includes both of these provisions and adding them to the statute as well will ensure that credit unions conduct charter conversion elections fairly. Further, we support the retention of the requirement to notify credit union members of the conversion vote 90, 60, and 30 days before the vote. NCUA also has no objection to being required to review the proposed notices within 30 days. These proposed changes to the statute further enhance transparency and member ability to exert control over the voting process.

Provisions NCUA Does Not Support

However, NCUA respectfully suggests that many of the provisions of this bill will prevent the agency from achieving the goal of allowing informed credit union members to select the type of charter that best serves their needs. NCUA is concerned that provisions of H.R. 3206 will prevent members from obtaining complete and accurate information regarding the potential conversion of their credit union. H.R. 3206 seriously diminishes oversight in a conversion vote. The bill deletes the requirement for NCUA to administer the vote. Without this oversight, there would be no enforcement of the bill's notice provisions or of the requirements for secret ballots and independent inspectors of election.

NCUA does not seek to block conversions, but to ensure that member-owners of the credit union understand the fundamental change on which they are voting, and that the vote is transparent and legal. Absent NCUA's authority to administer the vote, there would be no consequences for violations of the conversion notice and voting requirements. NCUA's oversight protects members' right to complete and accurate information, and this role should be preserved.

The importance of regulatory oversight was underscored during a recent widely-publicized conversion case. Allegations were made of misrepresentations by management concerning issues such as post-conversion access to credit union shared service centers, ability of management and board members to acquire stock other than through the IPO, and ability of management to freely communicate with members. Through its oversight authority, NCUA was able to promptly address and clarify these issues.

H.R. 3206 would also prevent NCUA involvement in the key area of communications. The bill recognizes the current ability for the management of the credit union to engage, in direct communication to members in addition to the 90-, 60-, and 30-day notices, but eliminates any effective oversight on the content of this communication. Although the bill prohibits inconsistent, false, or misleading information in any additional communications, the bill prohibits NCUA from reviewing any of these communications. NCUA encourages open and honest communication to members before a conversion vote and does not seek to limit management's ability to communicate about a conversion proposal. However, any such communications should be subject to oversight to ensure accuracy and fairness.

NCUA is concerned that the prohibition on "speculative" information about the institution's future operations is subject to interpretation. The bill is also unclear about what type of information would "distort the impact of conversion," another prohibited item in notices. Similarly, the prohibition on "information attributable to the Board" could be interpreted to prevent the inclusion of NCUA-suggested language in notices, but another section of the bill charges NCUA with reviewing and commenting on proposed conversion notices.

Another area of uncertainty involves the conflicting standards the bill establishes for review of the conversion process. For example, one section of the bill would prohibit post-vote review unless there were "fraud or reckless disregard for fairness," but another section prohibits NCUA from requiring a new membership vote unless a communication "contains a knowingly false statement that affects the outcome of a conversion vote."

Effects of H.R. 3206 on Current Regulatory Requirements

The bill would appear to prohibit the NCUA mandated disclosure of additional critical facts of a conversion that are necessary for members to make an informed decision. Below is a discussion of NCUA's specific concerns based on our experience with the current conversion rule.

A. Higher loan rates or lower savings rates

NCUA's rule requires that the disclosures include verbiage that members may experience higher loan rates or lower savings rates. This requirement has been criticized as speculative or uncertain. NCUA disagrees. NCUA engaged the services of Datatrac Corporation to gather and analyze data on historic loan and savings rates and verify the possible adverse changes in post-conversion rates. [10] Datatrac provided NCUA data on over 20 distinct loan and savings products offered by thousands of banks and credit unions. [11] Datatrac broke each of these products down into average rates for all institutions over several years. Datatrac data for 2002-2005 is attached as appendix A. The data is clear: the historic consumer loan and savings rates offered by credit unions are more favorable for members than those same rates offered by banks of all types, including savings banks.

Recently, researchers at the Fiscal and Economic Research Center at the University of Wisconsin - Whitewater also examined the differences in loan and savings rates between credit unions and banks.[12] That study considered loans and savings rate data from 175 credit unions and banks, including some banks that had converted from credit unions. The study's findings were consistent with NCUA's analysis of the Datatrac data, including that "[c]redit unions offer significantly higher interest rates on all savings products examined and charge lower interest rates on three of four loans

[10] Datatrac is a market research, information technology company specializing in the financial services industry. It has been an independent source of deposit and lending product information for more than 15 years, specializing in the banking and credit union industries and representing that it provides its services to over 17,000 financial institutions nationwide.

[11] These products included automobile loans; fixed and variable rate mortgage products; credit cards; and savings products, such as short and long-term certificates of deposit, savings, checking, and money market accounts.

[12] J. Heinrich and R. Kashian, *Credit Union to Mutual Conversion: Do Rates Diverge?*, February 22, 2006 (hereinafter the Heinrich study). A copy of the study is attached as Appendix B.

products compared to converted credit unions after accounting for all other variables."[13]

NCUA respectfully submits that a disclosure about the consequences on loan and savings rates is crucial to a member's informed decision and vote on changing from a credit union to another financial institution charter.

B. Distribution of Owner Equity

The conversion rule requires that the disclosure include language that conversion to an MSB is often a prelude to a stock conversion in which insiders realize financial gain far in excess of that available to average members. The history of the 29 former credit unions that converted to mutual savings banks provides a useful guide to what happens to former member equity after a conversion occurs.

Of those 29 mutual savings banks, 21 have converted to stock institutions. A mutual-to-stock conversion permits directors and officers to obtain significant financial benefits from the conversion, in part through the acquisition and control of stock. The directors and officers obtain ownership and control of stock in several different ways. While other members of the converting MSB have access to stock, none of them have the same access as the directors and officers.

After a stock conversion, a converted bank may establish an Employee Stock Ownership Plan (ESOP), funded by the bank, as well as additional stock benefit plans for directors and officers, such as a management stock benefit plan and a stock option plan. Members of the credit union-turned-MSB who are not employees or directors cannot participate in these stock plans.

NCUA is not suggesting that there is anything improper about the management and the compensated directors of a corporation having a vested interest in the company's financial performance. However, using a simple example to illustrate the point, if a credit union with $100 million in net worth converts to a mutual and then to a stock bank, and the officers, directors, and employees exercise their rights through the IPO, ESOP, stock option plan, and management stock benefit plan, they may own 25% or more of the total stock. This represents, among other compensation, a transfer of $25 million to those individuals that was previously member-owner equity in the credit union. Members who own the credit union and its net worth have a right to know when they vote on a proposed conversion that the officials who are recommending the conversion stand to benefit from this kind of transfer of member equity.

Distribution of member equity in the form of stock is an important facet in the conversion process. Even though all members of the converting institution technically have equal subscription rights during the initial public offering (IPO) of stock, directors and officers are able to use their position to gain greater understanding of and access to the IPO

[13] Id. at 1.

subscription than other members. Rules governing federally chartered mutual savings banks (FMSB) to stock conversions were specifically written to "enhance the ability of officers, directors, and employees of an institution to acquire stock when their institution converts, through various types of employee stock benefit vehicles . . . [so as to] . . . provide a means for officials and employees of converting institutions to acquire larger ownership stakes in their institutions upon conversion . . . ."[14]

These rules permit the MSB directors, officers, employees, and the benefit plans created for those persons to obtain a substantial portion of the shares and the associated net worth of the institution. This fact is not lost on those who advocate conversion. Consultants who advise credit unions to pursue conversions make specific claims about the magnitude and extent of the financial benefits available to the directors and officers at converting credit unions. One newsletter article prepared by such a consultant states:

- Bank CEOs typically receive much greater compensation than credit unions CEOs, with the bank CEOs receiving from 20% to 57% more for institutions of similar assets size.[15]

- Bank directors typically earn between $2,500 to over $50,000 annually, in addition to travel and expense allowances, while credit union directors are uncompensated in almost every instance.[16]

- The gap in pay can be much wider at individual banking institutions that utilize stock compensation programs. For example, assuming a credit union with $50 million in capital converts to a stock bank with an IPO amount of $100 million, directors would share a $2 million grant of stock and management would receive an equal grant. Each member of a five-director board would get $400,000 in stock, vested over five years, at the IPO value.[17]

This article continues by detailing various other opportunities for a credit union-turned-bank executive to accrue wealth, and concludes "[t]he reward for performance could lead to a $10 million plus, ownership stake for a capable CEO . . . . If the conversion is not made during the current tenure, the next CEO in charge may very well realize the value."[18]

The financial trade press has reported on the specific benefits that directors and officers of credit unions obtain from their access to stock following a mutual to stock conversion.

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[14] 51 Fed. Reg. 40127 (November 5, 1986)(Preamble to final Federal Home Loan Bank Board rule on federal mutual savings bank stock conversions).
[15] Theriault, Alan D., *CEO & Directors: Salary Imbalance is Corrected by Converting to a Bank*, CONVERTING FROM A CREDIT UNION FAX UPDATE, Sept. 16, 2002, *available at* http://www.cufinancial.com/pdfs/NL2002.pdf.
[16] *Id*.
[17] *Id*.
[18] *Id.* at 2-3.

In one converted credit union, the officers and directors made $7 million in profit on the IPO increase in value, commonly called an "IPO pop,"[19] and set aside another $5 million in free stock for themselves through stock benefit plans.[20] At another converted credit union, the officers and directors amassed more than $14 million in stock and cash benefits during the three-year period following stock conversion, with the CEO alone receiving $4 million in cash compensation and $3 million in stock.[21] At still another converted credit union, the officers and directors made about $1 million in profits at the time of the IPO and set aside another $3.5 million that was later distributed to those officers and directors.[22] At another converted credit union, the CEO made $600,000 on the IPO, received rights to another $1 million in stock, and received additional stock option benefits.[23]

NCUA maintains there is ample evidence to support the conclusion, as set forth in the required disclosures, that "[i]n a typical conversion to the stock form of ownership, the executives of the institution profit by obtaining stock far in excess of that available to the institution's members." [24] If the potential benefits that may accrue to the credit union officials are accurately disclosed, and there is transparency in the process, NCUA has no concern with the transfer of member-owner equity. Experience has shown us that in the absence of regulatory oversight, these disclosures are not accurately or prominently made.

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[19] *See Credit Union Journal Daily*, February 22, 2003, located at www.cujournal.com (discussing the conversion of Rainier Pacific Credit Union).

[20] "On Feb. 17, directors of [Rainier Pacific Financial Group, the parent of Rainier Pacific Savings Bank], known until 2000 as Rainier Pacific CU, approved a lucrative post-conversion compensation for both themselves and managers. Under the plan, disclosed in documents filed with the Securities and Exchange Commission, top executives and directors of Rainier Pacific will be granted a total of 288,500 shares of stock valued at almost $5 million, to be vested over the next five years. The largest recipients will be [the President and CEO], who will receive 60,000 shares valued at almost $1 million, and [the Senior Vice President], who will receive 40,000 shares valued at more than $650,000. But directors also voted themselves a share in the so-called management recognition stock plan, with each of the eight non-employee directors in line for 10,000 shares valued at $165,000 over the next five years. That's on top of the $13,750 each of the once-volunteer directors now earns each year to serve on the board. But that's not all. The group, as well as other employees will share in a pool of options to buy 680,000 bank shares at a discount over the next five years. Officials of Rainier Pacific did not return phone calls last week to comment." "Taking It to the Bank; Filings Show How CEOs, Boards at Converts Have Cashed In," *Credit Union Journal*, March 29, 2004, p.1 (hereinafter Taking it to the Bank).

[21] *See* "Excessive Compensation Charged at Convert CU," *Credit Union Journal Daily*, February 6, 2006 (Discussing SEC proxy filings involving the converted Synergy Federal Credit Union).

[22] "The biggest winners at Kaiser [Federal Credit Union] were [the CEO] who bought the maximum allowable 30,000 shares, netting her $108,000 in IPO profits. Four directors and two other top execs also subscribed to the maximum 30,000 allotment. In all, the four top managers and six non-management directors earned $918,000 of profits on their 265,000 shares in last week's IPO. The ex-CU has also set aside another 255,000 shares, worth $3.5 million, as free stock grants to be awarded to the same individuals over the next five years." Credit Union Journal, April 5, 2004, p.1.

[23] See Taking it to The Bank, *supra* note 23 (Discussing the conversion of Pacific Trust Credit Union); *Credit Union Journal*, February 25, 2004. Four years after the IPO, the CEO had received stock grants and stock options of a total value of about $3.8 million. *Credit Union Journal*, April 14, 2006.

[24] 12 C.F.R. §708a.4(e).

C. Voting Rights

NCUA's conversion rule requires converting credit unions explain to members how the conversion from a credit union to an MSB will affect members' voting rights and whether the MSB will base voting rights on account balances. Voting rights in credit unions and MSBs are in fact different in two important ways: (1) the use of proxy voting and (2) how many votes each member gets.

Proxy voting is not allowed in Federal credit unions, meaning that credit union members cannot delegate their voting rights to the credit union's board of directors. Federal mutual savings banks, in contrast, are allowed to use proxy voting, and they typically collect these proxies from their account holders at the time of account opening. With the exception of the vote to convert to a stock charter, these proxies may be "running," meaning that the MSB's board of directors will vote the proxies indefinitely unless the account holder takes action to affirmatively revoke the proxy. [25] Also, credit unions are purely democratic. Every member gets one vote, regardless of account balances. Federal MSBs may choose to dilute the voting power of lower balance depositors by allotting each customer one vote per $100 on deposit, up to 1000 votes. [26] Recently converted credit unions have elected this account balance voting option. One result is that directors, officers and other customers of greater means have increased voting power in determining whether to convert to a stock institution.

D. Regulatory Consistency

Section 205 of the Act, as amended by CUMAA, requires that NCUA's conversion rules be consistent with the rules of other financial regulators, including OTS and the Office of the Comptroller of the Currency and that NCUA's rules be "no more or less restrictive" than the rules applicable to charter conversions by other financial institutions.[27]

Clearly, NCUA's rule cannot and should not be identical to those of the other regulators. The other regulators' rules are not identical to one another, making cross-uniformity impossible for NCUA. More importantly, the rules address different transactions, with different statutory requirements, requiring different regulatory approaches. NCUA interprets the consistency requirement as a mandate that NCUA's rules be compatible with and adhere to the same principles as the conversion rules of other regulators. Similarly, NCUA interprets the "no more or less restrictive" requirement to mean that, consistent with underlying principles of informed member choice, NCUA should adopt

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[25] "In practice, members delegate voting rights and the operation of federal mutual savings associations through the granting of proxies typically given to the board of directors (trustees) or a committee appointed by a majority of the board." OTS Thrift Activities Regulatory Handbook, Section 110.2 (December 2003).

[26] An FMSB may adopt a range of voting rights, from one-person one-vote to one vote per $100 account balance up to 1000 votes. NCUA believes, however, that all credit unions that have converted to FMSBs to-date have made a conscious decision to abandon the one-person one-vote concept.

[27] 12 USC 1785(b)(2)(G)(i).

restrictions of other regulators that make sense for credit union conversions, while not confining a credit union's choices more significantly than the regulatory options of other institutions.

By comparison to NCUA's rules, OTS maintains significant authority over the conversion approval process from mutual associations to stock associations and remains involved throughout the entire process.[28] The rules of both OTS and NCUA have different requirements at different stages of a conversion; some of these requirements are more detailed than that of the other agency, given that the conversions governed by each agency differ.

For example, OTS's involvement in the conversion process is mandatory even before the board of the mutual association passes a conversion plan; the board of the converting mutual bank must meet with OTS prior to passing the conversion plan and provide OTS with a written strategic plan that outlines the objectives of the proposed conversion and the intended use of the conversion proceeds.[29] NCUA's rules by comparison do not require a mandatory meeting prior to the board of the credit union passing a conversion plan or a business plan. OTS also requires that a converting MSB adopt a plan of conversion that contains specific information.[30] NCUA's rules merely require that the converting credit union "approve a proposal to convert," but do not dictate what must be in that proposal.[31]

The notice requirements differ between OTS and NCUA because MSBs and credit unions are structurally different. The difference is highlighted by the individuals they may serve or with whom they can transact business. Any member of the public may utilize an MSB. Thus, the MSB must notify the public-at-large of the potential conversion. OTS's notice requirements mandate that the converting MSB publish a notice of its application and post the notice in the bank's home office and at all branch offices; the converting MSB must also send notice of the plan's approval either by mailing a letter to each member or by publishing a notice in the local newspaper in every local community where the bank has an office.[32]

Credit unions, on the other hand, do not serve the public-at-large, but serve a defined group of members.[33] By statute, those members must each receive notice "on the matter of" the credit union's intent to convert at the prescribed 30-day intervals.[34] The fact that NCUA requires certain information in its notice that OTS does not similarly require does not render NCUA's notice provision in violation of the statute. Both agencies essentially prohibit their converting entities from omitting any material facts in

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[28] *See* 12 C.F.R. part 563b.
[29] *See* 12 C.F.R. §§ 563b.100, 563b.105 (outlines required information to be included in business plan).
[30] *See* 12 C.F.R. §§ 536b.125, 536.130.
[31] *See* 12 C.F.R. § 708a.3.
[32] *Supra* note 53; 12 C.F.R. §§ 536b.135, 563b.180.
[33] *See* 12 U.S.C. 1759.
[34] 12 U.S.C. 1785(2)(C).

their notices.[35] NCUA requires that converting credit unions include certain disclosures in its notices, precluding them from omitting these material facts. NCUA maintains that the provisions of its current conversion rule do not exceed NCUA's statutory authority, are consistent with other financial regulators and are no more or less restrictive than rules applicable to charter conversion by other financial institutions.

E. Management Communication with Members

NCUA's conversion rule does not prevent a converting credit union from communicating with its members to refute or correct misinformation supplied by groups opposed to the conversion. The disclosures required by §708a.4(e) of NCUA's regulations provide important, factual information to make members aware of the potential effects of converting to a bank so they can make an informed decision. Any credit union that has a concern about the disclosures can contact the appropriate NCUA Regional Director to request that the disclosures be modified to address those concerns.[36]

While §708a.4(e) requires a converting credit union to include NCUA's disclosures with written conversion-related communications to its members, there are communications to which the requirement does not apply. NCUA has advised the attorneys who have represented most converting credit unions that conversion-related press releases and advertisements, not directly mailed to members, are not written communications to members contemplated by §708a.4(e).

Additionally, the form disclosures are not required until after the board of directors vote to approve a plan of conversion. Therefore, a credit union is free to communicate with its members in any way it deems appropriate, before the board's vote on the plan of conversion, to provide its members with earlier notice that conversion is under consideration without including the NCUA disclosure. Indeed, many who have opposed recent credit union conversions have complained that they learned of the board's intention to convert only when they received the first (90-day) notice and ballot.

Finally, communications with individual members, in response to specific questions posed by these members, are not required to be accompanied by the NCUA disclosures under §708a.4(e).

Possible Changes to the Conversion Rule

NCUA believes that certain changes can and should be made to clarify and improve its conversion rule. NCUA recognizes and fully supports the rights of credit union members to convert their credit union to a bank charter. This charter change, however, is a fundamental shift in the institution's structure, which in turn changes the rights of the

[35] *See*, *e.g.*, 12 C.F.R. § 563b.285.
[36] 12 C.F.R. §708a.4(e).

owner-members. The services supplied to the members, and the cost of those services to the members, are also likely to change.

The decision to change to a bank charter ultimately belongs to the credit union members. It belongs directly to the members in the sense that the member vote decides the conversion issue. It also belongs to the members because the directors, when adopting a proposal to convert to a bank and advocating that position to the members, have a fiduciary duty to act in the best interests of the members.

With these fundamental issues at stake, and with NCUA's statutory obligation, it is imperative that the voting process be transparent and fair. Inherent to the process is the right of members to be fully informed as to the reasons for the proposed conversion. They must also have time to consider the pros and cons of the proposed conversion and should have an opportunity to discuss the proposal with other members and to communicate their views to the credit union's directors. This is not possible under the procedures currently used by converting credit unions, where members first receive notice at the time the ballot is mailed. The current conversion process can be improved to facilitate the quality and flow of information about the conversion between and among members and directors.

One possible regulatory change NCUA is considering would require a converting credit union to give advance notice to members that the credit union's board intends to vote on a conversion proposal. This notice would provide members, whether they are initially for or against the conversion, an opportunity to express their opinions to the credit union's board before the board has expended significant resources on the conversion process. NCUA has determined that some states have adopted similar early notice laws and regulations for their state-charted credit unions considering conversion to banks. [37]

Another change under consideration would further enhance member involvement and communication. OTS regulations require a thrift to forward information from one customer to all the thrift's customers if the requesting customer agrees to reimburse the thrift for its expenses. No such system currently exists in NCUA regulations for credit union members to communicate with each other about a pending conversion, and we believe it may be a valuable tool to improve the member decision process in conversions.

NCUA is considering whether the disclosures that a credit union must provide to its members as part of the conversion process should be simplified. NCUA's required disclosures have been characterized by some as inhibiting a credit union board's ability to communicate with their members outside the formal notice process. While NCUA respectfully disagrees with this characterization, NCUA is considering modifying the

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[37] See, e.g., Mich. Comp. Laws 490.373(1)(a) and (1)(b)(ii) and 8 Vt. Stat. Ann. Tit. 8, §35102 (2006).

current requirement that certain disclosures be delivered with all written communications, and, instead, only require that those disclosures be delivered with the formal notices of member vote.

NCUA will continue to refine the proposed rule prior to Board issuance for public comment. The actual proposed rule may include all or some of the ideas under consideration, as well as additional suggestions from commenters. Of course, NCUA will carefully consider all comments it receives before issuing final amendments to the conversion rule. NCUA believes that such a rulemaking is timely and will provide for a clearer, more efficient and effective conversion rule.

Conclusions and Recommendations

Credit unions exist for the purpose of promoting thrift and providing a source of credit for their members. Since their inception, credit unions have been organized as democratically controlled, nonprofit cooperatives, managed by volunteer directors. Credit unions exist to provide affordable services to their members, rather than to maximize profits to outside investors or stockholders. Credit unions are unique and an important financial option for consumers.

While NCUA fully supports the ability of members to vote democratically to change the charter of their financial institution, NCUA also believes its primary role in this matter is to ensure that members receive complete, accurate, and timely disclosures regarding the conversion. Consumers have a right to expect regulatory bodies to carefully monitor the disclosures to ensure transparency and maximize the amount of control that the member-owners exercise over their credit unions. In the same vein, Congress has a valid and important oversight role in the process, and consumers derive benefits from the active interest on the part of their elected representatives. NCUA supports the provisions of H.R. 3206 that make the requirements of a secret ballot and an independent inspector of elections statutory. As discussed previously, NCUA believes other provisions of the bill would interfere with the Agency's ability to ensure that credit union members receive clear, complete and accurate information on a conversion.

NCUA believes that any changes to improve the conversion process can be accomplished through regulation. In that regard, NCUA is taking steps to enhance clarify, and improve the effectiveness of its regulation. NCUA remains concerned that, absent important regulatory refinements outlined in this statement, consumers may not have access to plainly-worded, accurate and prominent disclosures that inform them about their stake in a charter change. When member-owners are asked to vote on their credit union's future, they should have every opportunity to assess all facts and make an informed choice. Ownership, particularly of the kind conferred by membership in a financial cooperative, is a significant and important concept that should be protected by diligent regulatory oversight.

NCUA looks forward to working with Congress and the credit union industry to address these important issues.