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October 1, 2004

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

Re: National Credit Union Administration; 12 CFR Parts 708a
Conversion of Insured Credit Unions to Mutual Savings Banks;
69 Federal Register 46111 (August 2, 2004)

Dear Ms. Rupp:

The American Bankers Association ("ABA") is responding to the proposed rule published by the National Credit Union Administration ("NCUA") concerning amendments to its conversion regulations. ABA supports the mutual depository industry and its right to choose the charter appropriate for its marketplace and community. The proposed NCUA rule is yet another attempt by the agency to limit the ability of credit unions to choose the charter of their choice in contravention of the Credit Union Membership Access Act ("CUMAA") that directed the NCUA to permit insured credit unions to convert to mutual savings banks "subject to the requirements and procedures . . . governing mutual savings banks and savings associations."[1]

By proposing rules that are inconsistent, and in some instances contrary, to those governing mutual savings banks and savings associations, the NCUA is in clear violation of statutory provisions delineated by Congress. Moreover, the NCUA once again ignores the expertise and history of the other, more experienced, financial regulators. And as we have noted before, this type of proposal demonstrates NCUA's lack of support of the concept of mutuality and its ability to adapt and provide quality and innovative services at competitive rates.

The ABA brings together all categories of banking institutions to best represent the interests of this rapidly changing industry. Its membership—which includes community, regional, and money center banks and holding companies, as well as savings associations, trust companies, and savings banks—makes ABA the largest banking trade association in the country.

[1] 12 USC 1785(b)(2)(A).

Background

In 1998, CUMAA was enacted, among other items, to clarify the steps required for a credit union to convert to a mutual savings bank. Section 202 of CUMAA amended the provisions of the Federal Credit Union Act ("Act") and required NCUA to allow an insured credit union to convert to a mutual savings bank or savings association "subject to the requirements and procedures set forth in the laws and regulations governing mutual savings banks and savings associations."[2] Further, NCUA was empowered to require an insured credit union that proposed to convert to a mutual savings bank or savings association to submit a notice to the NCUA of its intent to convert during the 90-day period preceding the date of the completion of the conversion.[3] Once the conversion is completed, "the credit union shall no longer be subject to any of the provisions of the [Federal Credit Union Act]."[4]

This is the second time NCUA has sought to promulgate rules on credit union member votes and disclosures in the conversion context. The prior rulemaking required a converting credit union to provide its members with written notice of its intent to convert in accordance with CUMAA.[5] It also specified that the member notice must adequately describe the purpose and subject matter of the vote on conversion.[6] In addition, a converting credit union must notify NCUA of its intent to convert. The credit union must provide for NCUA's review a copy of the member notice, ballot, and all other written materials the credit union has provided or intends to provide to its members in connection with the conversion.[7]

The Proposal

Not content with the rulemaking finalized earlier this year, this time the NCUA proposes to further explain its prior rules on voting and disclosure requirements. These new, proposed disclosures include a "black box" or Truth-in-Lending-like box including statements on ownership and control, expenses associated with operating the institution as a mutual savings bank or association and their potential impact on services and rates, a statement on subsequent conversion to a stock institution, and the expenses associated with conversion to a mutual savings bank or association. In addition, the vote of the credit union members would be required to be conducted by secret ballot administered by an independent entity that has "experience in conducting corporate elections."

Further, the NCUA proposes to augment its application process to require the converting credit union to educate the NCUA on applicable state law highlighting any reliance on state parity statutes and whether the state regulatory agency supports the institution's ability to rely on that parity provision.

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[2] 12 USC 1785(b)(2)(A).
[3] 12 USC 1785(b)(2)(D).
[4] 12 USC 1785(b)(2)(E).
[5] 12 USC 1785(b)(2)(C).
[6] 12 CFR 708a.4.
[7] 12 CFR 708a.4.

NCUA also proposes to adopt guidelines on what the NCUA considers necessary for a "fair and legal" vote of the membership. This includes awareness of state law provisions on depositor voting, steps to ensure that the membership list for voting

purposes is "accurate and complete," and that the special meeting held for consideration of the conversion question should be convenient to the greatest number of members eligible to vote.

ABA's Position

In preparing its conversion regulations, the NCUA has consistently ignored the plain language of the CUMAA, the record of the mutual savings bank industry to be competitive even with its tax exempt mutual brethren and the extensive experience of the other federal banking regulators (and many state regulators). Instead, the NCUA has chosen to fight mightily against the most American of freedoms – the freedom to exercise free will and choice. We are reminded of the African American spiritual, "*Go Down, Moses,"* and wonder when the NCUA will allow its regulated population the freedom to make their own individual business decisions consistent with marketplace needs, rather than create even more regulatory roadblocks to the exercise of business discretion and choice.[8]

ABA is a longtime supporter of the mutual savings bank and savings association industry. Our membership rolls have long listed mutual savings banks, including the oldest mutual savings bank in active and continuous operation.[9] Mutuality is a choice that mutual savings banks make – it is a charter that reflects the values of its community and historical roots. Mutuality is not the first step on a march to stock form. It is a choice and a form that remains vigorous, competitive, and innovative.

Once again, the NCUA's proposal ignores the true facts about mutual savings associations and adds more costs and hurdles to the mutual-to-mutual conversion process in its efforts to retain its captive industry. This is an ironic position given the proposal's concerns about disclosing true costs and providing for scrupulously fair votes of a credit union's membership. We suggest allowing a converting institution also to disclose the compliance costs of conversion imposed by the regulator. In this manner, the cost of NCUA's failure to comply with the letter and spirit of the CUMAA can be documented for the membership and Congress.

Turning to the specifics of the rules, ABA has the following comments:

1. Secret Ballots and Professional Vote Solicitation Firms

Not content to allow the credit union itself to conduct the vote of the credit union membership, the NCUA now proposes to add to the cost of conversion by requiring

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[8] Particularly verses one and four: "When Israel was in Egypt's land, let my people go; oppressed so hard they could not stand, let my people go. *Go down, Moses, way down in Egypt's land; Tell old Pharaoh to let my people go.* Oh, let us all from bondage flee, let my people go; and let us all in Christ be free, let my people go. *Go down, Moses, way down in Egypt's land; Tell old Pharaoh to let my people go".*

[9] The Bank of Newport in Providence, Rhode Island, opened its doors for business in 1819.

an independent, third-party firm to tally the votes cast by "secret ballot" in order to prevent intimidation This requirement is unique to the mutual-to-mutual transaction. In other circumstances, such as a merger with another credit union or the liquidation of the credit union on a voluntary basis, there is no such requirement.

Yet in these two circumstances, the impact on the credit union member is arguably greater, or at least the likelihood of a credit union member to be potentially swayed in judgment by short-term monetary gains is a great deal larger. In the merger situation, credit union members of an acquired institution can be paid in cash for their votes through the process of equalizing share values. As the smaller institution often provides its members on a comparative basis with a higher cash value for the credit union share, the acquiring credit union pays to the members of the target or acquired institution the cash value difference. Yet, in this situation, where votes are truly paid for, no independent, third-party firm is required to tally the votes on the question of merger.[10]

NCUA has long been an advocate against over-burdening its credit unions with costly regulations without substantial risk justification. Yet, in the one instance of the mutual-to-mutual conversion, the NCUA freely adds to the administrative cost and burden and ignores other, more fraught with peril transactions. The potential for favorable votes being paid for caused the U.S. Congress to place a moratorium on the mutual-to-stock conversion process, particularly the merger/conversion approach, in the 1960s and 1970s. It was not until the regulator put in place a process to ensure fair value that the moratorium was lifted. It is ironic that in a less controversial transaction from the point of view of the credit union member, a mutual-to-mutual conversion, the NCUA is concerned about the ability of credit union members to cast their votes without undue influence. We urge the NCUA to have greater confidence in the credit union membership. If credit union members can cast votes for mergers, even in situations where there is a direct cash gain without being subject to undue influence, the less radical transaction of changing from one mutual charter to another should be able to be conducted without the cost of an independent vote tabulation firm.

2. The Mandatory, "Every Time" Disclosures.

The NCUA proposes to mandate that a mutual-to-mutual converting institution include a standard set of disclosures each time it sends (or posts on the internet) any written communications about the conversion. The new requirement is motivated by NCUA's concern that credit union members "may be overwhelmed by the volume of information and choose to ignore some or all of the information." The NCUA's solution to this dilemma is to mandate more disclosures and require their distribution every time communications are sent or made available to the credit union members on the issue of the mutual-to-mutual conversion. Further, the classification of the information as "disclosures" is suspect, as several will actually cause more confusion and foster more inaccuracies.

[10] Moreover, the NCUA does not require disclosure of hefty merger facilitator fees to senior management of acquired credit unions, for example.

The first standard disclosure states, in bold, all capital type, that in a mutual savings bank, "ACCOUNT HOLDERS WITH LARGER BALANCES USUALLY HAVE MORE VOTES AND, THUS, GREATER CONTROL." This statement is supposedly based on an Office of Thrift Supervision regulation. We urge the NCUA to grant its sister regulator greater courtesy and accurately reflect its regulation.

OTS-regulated mutual savings banks have the option to adopt a voting format anywhere on a continuum from **one vote per deposit**, no matter the dollar amount of deposit, to an upward cap of 1,000 votes per deposit based on size of deposit.[11] Notwithstanding this fact, the NCUA prefers to interpret this regulatory provision in a manner aimed to misinform the credit union member. The NCUA has no statistical basis for its mandatory statement, yet the lack of factual underpinning does not appear to stand in the way of the NCUA opining on another regulator's regulation. As such, NCUA's interpretation of OTS's rules is not subject to deference. If NCUA insists on the disclosure, the OTS should provide the language.

The second disclosure deals with expenses including the payment of directors, and compares the potential for more expense because, among other charter differences, the directors of mutual savings banks are compensated. Again, we urge the NCUA to reconsider this disclosure. Attached to this comment letter is a survey of state law listing those state statutes addressing the compensation of credit union directors. There are six states where credit union directors may be compensated today. Rather than paint those six states with a broad brush of negativity, we suggest that the NCUA open a dialogue with the state regulators in those states to understand the rationale and benefits gained by these statutes.[12]

Further, corporate governance trends favor election of sophisticated, knowledgeable directors to provide true oversight of management and direction to the institution as a whole. The other federal banking regulators have found that the safety and soundness of financial institutions is enhanced through active and informed boards. The payment of boards, chartering of audit committees, and following the spirit of the Sarbanes-Oxley reforms, even for non-stock entities such as mutually-chartered financial institutions, create a compliance environment that better serves the interests of credit union members and should be the goal of the NCUA as regulator.

Most importantly, the second standard disclosure demonstrates a remarkable lack of confidence in the management of credit unions. The NCUA assumes through this disclosure that credit unions cannot compete without the special protections from whole categories of expense. No institution will survive in the financial marketplace if it does not compete on value delivered to the customer whether that value is in attractively priced deposit instruments, loan products, or other services. The recent refinancing boon clearly shows that the nation's consumers are a savvy group who are willing to shop for the best rate on a home mortgage. Mutual savings banks compete in this environment and thrive. Converting credit unions are capable of competing with their mutual savings bank brethren or they will not be able to qualify

[11] 12 CFR 544.1.
[12] For those six states, this is an inaccurate disclosure.

for a different charter. We urge the NCUA to be less paternal in its concerns and reconsider the need for this disclosure.

The third disclosure dealing with the potential conversion to a stock institution is once again NCUA's view of another regulator's rules. This is not an area where the NCUA is the correct entity to fashion the disclosure, as it has no authority to interpret the statutes on which the mutual-to-stock conversion regulations on either

the state or federal level are based. If NCUA insists on mandating the inclusion of this disclosure, we strongly urge the NCUA to use language crafted by the OTS, a regulator with statutory authority over mutual to stock conversions. At a minimum, an OTS-drafted disclosure would be accurate.

The fourth disclosure deals with the costs of conversion. As noted previously, ABA urges the NCUA to include in the listing of costs, the costs of complying with NCUA's mutual-to-mutual conversion regulations. As part of this disclosure, the costs of seeking approval from the other regulators (OTS, FDIC, and/or state regulators) could also be separately disclosed. In this manner, the NCUA will provide to the credit union member an accurate and complete picture of the process. Otherwise, the costs of compliance are artificially hidden in legal, auditing, and other consultant fees. This will allow the NCUA to assess the cost-benefit of its rules and how they measure against "the requirements and procedures set forth in the laws and regulations governing mutual savings banks and savings associations."[13]

3. Interplay of State Law

The NCUA also proposes that mutual-to-mutual applications provide a number of informational items on state law potentially impacting the transaction. While ABA finds it heartening that the NCUA is interested in state law provisions, the main result of the required disclosure will be to increase the costs associated with the application. NCUA itself could easily research or seek the information required. There are no doubt many state commissioners who would be pleased to provide NCUA on an annual basis with the information requested and who would be more reliable sources of such information. Yet rather than take the simple steps to acquire the information itself, the NCUA prefers to burden its own regulated population. We urge NCUA to reconsider this requirement and obtain the information itself.

4. Voting Guidelines

Among the issues addressed by the proposed guidance is the need for accurate membership rolls of the converting credit union. ABA is supportive of credit unions maintaining accurate membership rolls and we urge the NCUA to exercise its supervisory obligation to audit those rolls using statistically valid samples against the approved and authorized membership criteria. Such sampling should be part of every examination of a credit union to ensure that the NCUA requirements governing fields of membership are being followed. It is interesting that in the proposal's zeal to ensure the broadest voter qualification no mention is made of the

[13] 12 USC 1785(b)(2)(A).

field of membership rules. If this is a supervisory concern in the conversion process, it clearly merits supervisory attention throughout NCUA's regulatory oversight of its regulatees.

On the issue of the conduct of the special meeting, ABA urges the NCUA to consult with recognized experts in the area of meeting governance. There are alternatives to Robert's Rules of Order. The National Association of Parliamentarians on their Internet website lists respected and more widely accepted and recommended

governance approaches. ABA encourages the NCUA to take advantage of the innovations in this field and offer more options to its credit unions.

Conclusion

ABA urges the NCUA to withdraw or substantially reconsider its proposed rule. The new disclosures and clarifications add little clarity to the process and do not contribute to understanding by credit union members. The disclosures greatly increase costs, and continue to improperly invade the jurisdiction of other financial regulators in violation of the CUMAA. In short, it is a proposal based on a desire to prevent credit unions from exercising their ability to choose their charter of choice – an authority and power denied the NCUA. It is time for the NCUA to "let [its] people go."

Thank you for the opportunity to comment. If you have any questions regarding our comment letter, please feel free to contact me.

Sincerely,

C. Dawn Causey

Attachment: Chart of State Credit Union/Director Compensation Statutes

State	Statute	Allows for Compensation
Alabama	§ 5-17-11	No
Alaska	§06.45.100	No
	§ 6-533	No
Arkansas	§ 23-35-804	Only the treasurer may be compensated
	Fin. Code § 14410	No
Colorado	§ 11-30-109	No
Connecticut	§ 36a-448a	No
	N/A	N/A
Florida	§ 657.028	Only the treasurer or CEO may be compensated
Georgia	N/A	Statute is silent
Hawaii	§ 412:10-113	Only the treasurer may be compensated
Idaho	§ 26-2122	An elected member of the board of directors may serve as a part-time treasurer and receive a salary for his services
	205 ILCS 305/23	No
Indiana	IC 28-7-1-16	Yes
Iowa	N/A	Statute is silent
Kansas	§ 17-2209	No
Kentucky	N/A	Statute is silent
Louisiana	§6:649	No
	9-B M.R.S.A. § 842	No
Maryland	§ 6-331	Yes
Mass.	171 § 20	No
Michigan	N/A	Statute is silent
Minnesota	§ 52.09	No
Mississippi	§ 81-13-29	One elected board member may be compensated
Missouri	§370.210	No
Montana	§ 32-3-406	Only the treasurer may be compensated
Nebraska	§ 21-1761	Only the treasurer may be compensated
Nevada	§678.450	No
New Hampshire	N/A	No unless the decision is made to change rule
New Jersey	§17:13-96	Yes
New Mexico	§58-11-30	No
New York	Banking Law Art. 11 § 470	No
North Carolina	§ 54-109.38	No

North Dakota	6-06-13.1	Yes but forgoing compensation in excess of $2000 confers immunity from civil liability
Ohio	§ 1733.22	No
Oklahoma	6 Okl.St.Ann. § 2010	No, but officers elected to Board of Directors may be compensated.
Oregon	§ 723.266	Only the treasurer may be compensated
Pennsylvania	17 Pa.C.S.A. § 709	Yes
Rhode Island	§ 19-5-17	Yes
South Carolina	§ 34-27-140	Only the treasurer may be compensated
South Dakota	N/A	N/A
Tennessee	§ 45-4-205	No
Texas	Finance Code § 126.252	Yes
Utah	§ 7-9-24	No
Vermont	8 V.S.A. § 2064	Only the treasurer may be compensated
Virginia	§ 6.1-225.35	No
Washington	§31.12.365	No
West Virginia	§ 31C-5-4	No
Wisconsin	§186.12	No
Wyoming	N/A	N/A