



May 28, 2010

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

Re: NASCUS Comments on Proposed Rule 708a and 708b Mergers & Conversions

Dear Ms. Rupp:

The National Association of State Credit Union Supervisors (NASCUS)<sup>1</sup> appreciates the opportunity to provide comments to the National Credit Union Administration (NCUA) concerning NCUA's proposed changes to the agency's rules regarding mergers, conversions and termination of federal share insurance, Parts 708a and 708b, Mergers and Conversions.

NASCUS' comments, discussed in detail below, focus on ensuring NCUA maintain the proper balance between state and federal authority. NASCUS shares NCUA's concerns that important decisions regarding the future governance of a credit union be handled in as fair and transparent a manner as practically effective. However, we remain convinced that NCUA's focus on members' rights and privileges is best confined to federal credit unions (FCUs). State regulators bear primary responsibility for state-chartered credit unions, and state laws and rules should primarily govern the process by which state credit unions conduct any of the activities subject to this proposed rulemaking.

General comments on NCUA rulemaking and governance of state entities

NASCUS commends NCUA for declining to pursue promulgation of fiduciary duty standards for state-chartered credit union directors. Such a rulemaking by NCUA, as suggested in 2008 by the advanced notice of proposed rulemaking (ANPR), would have improperly usurped state authority to establish governance standards as developed by the elected and/or judicial bodies of a particular state. 73 FR 5461 (2008-1-30). NCUA should extend this judicious regulatory approach to the conversions, or mergers, of state-chartered credit unions into Mutual Savings Banks (MSBs) where state law, or regulation, has established state specific guidelines. In such cases, NCUA should explicitly acknowledge the dominance of the state law or rule.

NASCUS concedes that the FCUA gives NCUA authority for rulemaking with respect to credit union to MSB conversions. However, Congress's grant of authority in this arena

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<sup>1</sup> NASCUS is the professional association of the 46 state credit union regulatory agencies that charter and supervise the nation's 3,000 state-chartered credit unions.

was intended as limiting.<sup>2</sup> NCUA deference to state laws addressing conversions or mergers into an MSB, without regard to whether that state law or regulation was *more restrictive* than NCUA's proposal, would be consistent with the dual role played by NCUA as both a chartering and a share insurance regulator. With respect to state credit unions, NCUA is only the share insurer, not the chartering authority. Vindication of the members' rights and other governance issues are properly left to the chartering regulator – in these cases, the states. This is particularly true when the only risk to the share insurance fund, reputation risk, is mitigated by the presence of the continued full faith and credit of the federal government in the form of Federal Deposit Insurance Coverage (FDIC) coverage of the continuing entity.

#### Re-organization of the rules

NCUA proposed re-organizing Parts 708a and 708b, creating three sub-parts to 708a (one part for conversions to MSB, one part for mergers into an MSB and one part reserved for future rulemaking) and amending the title of 708b (to clarify the rules apply to mergers of federally insured credit unions into each other). These organizational changes improve the functionality of the rules and ease of use by the reader. NASCUS supports these changes.

However, NASCUS recommends NCUA re-organize the rules further to consolidate in one place all of NCUA's share insurance rules. This recommendation is discussed in more detail below.

#### Definitions: independent entity and secret ballots

From a regulatory perspective, the general requirements for an independent entity to conduct the vote make sense. However, NASCUS believes the expanded definition of "conducted by an independent entity" is unnecessarily burdensome. A regulatory prohibition on the independent entity communicating a vote tally during the course of the election is sufficient to address NCUA's concerns of manipulation. The independent entity should be allowed to collect and process the ballots by whatever efficient method is available, so long as no results are communicated to the credit union.

#### Disclosures and communications to members

NASCUS supports complete and meaningful disclosures that assist credit union members in making an informed decision regarding the future of the credit union. However, NCUA's proposed §708a.104 regarding disclosures should be confined to FCUs. We reiterate our objection to NCUA extending these rules to state-chartered credit unions.

The proper authority to determine necessary disclosures is the chartering authority. For state-chartered credit unions, the states should be the ones to determine the propriety of the disclosures.

NASCUS is also troubled by proposed subparagraph (8) that seems to require converting credit unions to predict future changes to service with exacting specificity. The potential

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<sup>2</sup> See PL 105-219 The Credit Union Membership Access Act of 1998, instructing NCUA to pass regulations that are no stricter than similar regulations promulgated by the other federal banking agencies.

for the loss of a specific members' favorite ATM machine, as envisioned by NCUA, is hardly unique to the conversion to MSB. NASCUS remains concerned that the rules NCUA intends to apply only to conversions to an MSB in fact raise the likelihood that any member of a credit union can effectively impede an institution's decision making process for any activity.

NASCUS reiterates its support for meaningful disclosures. However, NCUA's proposed rules exceed NCUA's very specific statutory mandate and improperly usurp state authority.

#### Credit union merger into a bank

By requiring that credit union directors conduct due diligence to determine that the credit union's merger into a bank "is in the best interests of the members," NCUA in effect substitutes its standard of fiduciary duty for that of the states. This the agency cannot do. NASCUS supports stringent due diligence requirements, but we must oppose NCUA's attempt to dictate the fiduciary duty of state credit union directors. In this regard, NCUA's authority over state-chartered credit unions is limited to the directive Congress mandate in §205 of the FCUA, the relevant portion of which reads:

- (c) In granting or withholding approval or consent under subsection (b) of this section, the Board shall consider—
- (1) the history, financial condition, and management policies of the credit union;
  - (2) the adequacy of the credit union's reserves;
  - (3) the economic advisability of the transaction;
  - (4) the general character and fitness of the credit union's management;
  - (5) *the convenience and needs of the members to be served by the credit union; and***
  - (6) whether the credit union is a cooperative association organized for the purpose of promoting thrift among its members and creating a source of credit for provident or productive purposes.  
[emphasis added]

By insisting on the best interest standard, NCUA preempts state law, substituting NCUA's standard of owed duty for that of the states.<sup>3</sup> As noted above, NASCUS believes NCUA is exceeding its statutory mandate.

Under NCUA's proposal, as part of the merger process, credit unions are required to submit a Notice of Intent to Merge and Request for NCUA Authorization (NIMRA) to the NCUA Regional Director (RD). For state-chartered credit unions, the proposed rule

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<sup>3</sup> For one example, see Save Columbia CU Committee v. Columbia Community Credit Union, 139 P. 3d 386, 393, 394 (Wash. Ct. App. 2006). Although NCUA cites this case disapprovingly, the fact remains that state laws and regulations dictate fiduciary duties for state credit unions just as they do the purpose of a state credit union or its field of membership. NCUA's insurance authority simple conveys no such preemptive power in those matters.

states that the RD will consult with the state regulator and then make a decision. [emphasis ours]. This is insufficient. As noted throughout our comments, state regulators bear primary regulatory responsibility for state-chartered credit unions. This provision of NCUA's proposal should be amended to have the RD make a decision in consultation with the state regulator, not unilaterally after consultation. Furthermore, NCUA's rules should make clear that approval/denial of a conversion by the state regulator for a state-chartered credit union should generally be controlling.

Under NCUA's proposed rule, the RD would have final say after the membership vote to make a final determination whether to approve the merger into an MSB. See proposed §708a.308. NCUA states that the RD will make a determination if the disclosures to the members were accurate and timely, not misleading, and whether the vote was fair. In addition, NCUA's proposal calls for the RD to determine that the standards of §205 of the FCUA were met and that the vote was in the members' best interest. However, lacking from NCUA's proposal is any direction that the RD give special consideration to the will of the membership in the vote, especially if the RD determines the disclosures and election were fair. Furthermore, the proposal lacks necessary consultation with state regulators for reaching mutual consensus on the approval/disapproval in the case of state-chartered credit unions. In addition, we reiterate our concerns expressed above regarding NCUA's standard for approving the conversion of a state-chartered credit union on grounds un-enumerated in §205 of the FCUA.

Part 708b and mergers of federally insured credit unions and termination of insurance  
 NCUA is also proposing amending its rule regarding conversion to non-federal share insurance. As part of its proposal, NCUA is amending existing part 708b.201 by deleting the extended discussion of "secret ballot" to conform with the inclusion of definitions for "secret ballot" and "independent entity." NASCUS recommends NCUA also clarify the distinction between a credit union seeking to terminate all insurance coverage and a credit union seeking to operate with insurance coverage other than federal share insurance. NASCUS believes the distinction is clear in the FCUA, but less clear in NCUA's rules and regulations.

With respect to NCUA's rules regarding conversion to non-federal insurance, NASCUS notes that the FCUA expressly states the voting requirements. All of NCUA's rules beyond those which Congress mandated are discretionary. NASCUS recommends that NCUA work with state regulators of non-federally insured credit unions to craft mutually acceptable standards that would address NCUA's concerns without eviscerating the state authority that allows credit unions to choose their share insurance option.

#### Federal credit union governance

NCUA also proposed changes to Parts 701.4 and 701.33 regarding governance of FCUs. Because those proposals do not affect state-chartered credit unions, NASCUS withholds comments on those sections of the proposal.

#### Re-organization of NCUA's rules

As currently organized, NCUA's rules require state-chartered federally insured credit unions to reference Part 741 and then to reference applicable rules located in other sections of the Rules and Regulations. This is unnecessarily burdensome for state-chartered credit unions. NCUA should ease the regulatory burden for state-chartered credit unions by consolidating all applicable insurance related rules in Part 741. In addition to easing regulatory burden, such an organization would emphasize when NCUA is acting as the chartering authority (as with the proposed fiduciary duty for FCU directors) and when NCUA is engaged in rulemaking to protect the share insurance fund.

NASCUS and state regulators remain committed to working in partnership with NCUA to ensure the safety and soundness of the credit union system. Please do not hesitate to contact me to discuss our comments further.

Sincerely,

- signature redacted for electronic publication -

Brian Knight  
Senior Vice President, Regulatory Affairs