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April 27, 2010

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

**Re: Proposed Amendments to NCUA Rules and Regulations Parts 701, 708a and 708b –  
Fiduciary Duties of FCUs; Mergers and Conversions of Insured Credit Unions**

Dear Ms. Rupp:

On behalf of the board and management of Randolph-Brooks Federal Credit Union, we appreciate this opportunity to provide our official comments on the agency's proposed changes to Parts 701, 708a and 708b of NCUA Rules and Regulations. While we do not support every aspect of the proposed amendments as currently drafted, we do commend the agency for its efforts to strengthen and clarify guidance in these proposed rule changes.

It is because of the importance of these matters and the potential implications of the proposed changes on all credit unions that we offer the following comments for your review and consideration.

**A. Part 701.4: Fiduciary Duties of Federal Credit Unions**

In general, we do not agree with this proposed revision to Part 701.4 as written.

NCUA's proposed rule states that the Federal Credit Union Act (Act) already addresses the fiduciary duties of directors toward members. It also states that even though this is clear, neither the Act nor NCUA regulations provide specificity and that the Federal Credit Union (FCU) board must look to state statutory and case law to determine the scope of duties. Therefore, we do not find the NCUA's arguments in favor of more NCUA oversight in this arena to be necessary. First, the agency's proposal would seem to us to be simply another imposition of federal mandate in place of state mandate, which we find unnecessary based on the facts. Second, we believe such a change would result in treating federal credit unions (FCUs) differently than state chartered credit unions. While we understand and value the dual chartering process, we do not believe more inconsistencies between the two charters are



AMERICA'S  
CREDIT UNIONS

warranted in this case. The NCUA's stated desire that *"having a uniform regulatory standard of care for FCUs may be useful to eliminate confusion and may make it easier for FCU boards to fulfill their duties to members"* is, in our opinion, simply not persuasive in light of the fact that not all federally insured credit unions would be covered by this proposed change. The agency's own words above where it states *"may be"* and *"may make"* seem to suggest that perhaps even the agency is unsure that the intended results for what it is proposing will be achieved.

We do agree with the part of the proposed rule that will require that directors be financially literate. In fact, there should not even have to be a rule requiring this. Best practices should control this area, and we certainly see value in NCUA guidelines (perhaps through Letters to Credit Unions) that specify ways to assure this. A regulation is not viewed as necessary.

With regard to the proposed rule on indemnification, we are opposed to it as currently written. We do agree that a director should not be protected by the credit union from gross negligence, reckless conduct, or willful misconduct in the performance of their duties. However, these should meet a strict definition under state law and the NCUA should have to prove beyond a reasonable doubt in a state court of law that a person is guilty before indemnification is denied. The proposed rule does require that this be determined by a court, but the rule should require this to be a state court of law. If this can be guaranteed, then the proposed rule would be acceptable (as revised). Further, the person should not be burdened with legal costs to defend himself in a claim brought by the NCUA or other parties for violating his or her duty, unless and until the court rules against the person. We recommend that the proposed rule not be so burdensome on the director that it will discourage qualified people from serving.

#### **B. Part 708a, Subpart A: Conversion of Insured Credit Unions to Mutual Savings Banks**

We agree with the majority of this proposed rule as being reasonable in its requirements, except for Part 708A.113 regarding voting guidelines. The requirement that credit unions not use employees to solicit members to vote is unreasonable and counter-intuitive. If the credit union's board has complied with its fiduciary duties in deciding to seek a conversion to a mutual savings bank (MSB) and has decided that this is in the best interests of members, we see no valid reason to prohibit the credit union's board from asking (not requiring) employees (who are likely also members) or paying third parties to solicit member participation in the election, including encouragement of support for the proposed conversion.

We believe it is critical that the credit union's board pursue all opportunities to inform members of the importance of the decision and the criteria by which they made the decision to convert. Their failure to use any practical and legal means of providing full disclosure

information would in fact mean that they would not be fulfilling their fiduciary duty to make decisions in the best interests of the members. Further, the agency's proposed rule could make it almost impossible to obtain the required votes, thereby also preventing the directors from fulfilling their duties and the members from having their decision validated.

### **C. Part 708a, Subpart C: Merger of Insured Credit Unions into Banks**

We agree with the agency when it states that the proposed rule for this type of merger as specified in Part 708a should be similar in all practical aspects to the requirements for conversion to a MSB.

### **D. Part 708b: Mergers of Federally-Insured Credit Unions with Other Credit Unions; Voluntary Termination or Conversion of Insured Shares**

We agree with the proposed revisions to Part 708b as being reasonable, except for the definition of a material increase in compensation or benefits that any board member or senior management official of a merging credit union may receive in connection with a merger. We are not convinced that there is any public benefit in this type of management compensation disclosure and, therefore, encourage the agency to remove this provision. In fact, it is our fear as a federally insured credit union that such a provision could be costly to each of the merging credit unions if it serves as a deterrent to a viable merger when their financial position might be stronger through a merger than as individual credit unions.

If the agency's rules and interpretations discourage mergers through the imposition privacy-violating disclosure provisions, then a strong argument can be made that a safer and sounder merged credit union will not happen and, consequently, two weaker credit unions will remain that the NCUSIF may ultimately have to either save, force merge or liquidate. Recent experience reminds us that Randolph-Brooks Federal Credit Union is facing the high likelihood of having to help pay for those forced mergers and liquidations through significant special NCUSIF premiums for a number of years. We see this probable share insurance cost as much greater than the cost of management severance, buyouts or pay raises to those senior managers who work to make a viable merger happen that is ultimately to be approved by the members of the merged credit unions. If the sum of any management payments were to result in a credit union that is not financially viable, NCUA's review of the combined financials submitted with the merger application could evaluate the financial impact of all compensation and benefits that are part of the application. If there is evidence that the merged credit union cannot afford the compensation budgeted, the NCUA could deny the merger based upon safety and soundness before it is ever submitted to the members for a vote. If there are no safety and soundness concerns, we see no reason why the agency should elect to get involved in this issue.

**Ms. Mary Rupp**

**April 27, 2010**

**Page four**

**Thank you for the opportunity to comment on this proposal. We recognize the importance of these issues and appreciate the chance to contribute our thoughts during the rulemaking process. On behalf of Randolph-Brooks Federal Credit Union, please contact me if I can be a source of further information or of assistance to the agency in any way on this matter.**

**Sincerely,**

A handwritten signature in black ink that reads "Randy Smith". The signature is written in a cursive, flowing style.

**Randy M. Smith**

**President and CEO**

**cc: Chairman Matz**

**Board Member Fryzel**

**Board Member Hyland**