



**CUNA**

Credit Union National Association

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May 24, 2010

Ms. Mary Rupp  
Secretary of the Board

Alexandria, Virginia 22314

Re: Comments on NCUA's Proposed Rule on Part 742,  
Regulatory Flexibility Program

Dear Ms. Rupp:

The Credit Union National Association (CUNA) appreciates the opportunity to comment on the proposed rule issued by the National Credit Union Administration (NCUA) Board to amend certain provisions of NCUA's regulations as they apply to federal credit unions that participate in the Regulatory Flexibility Program (RegFlex credit unions). Specifically, the proposal would eliminate RegFlex authority for credit unions in regard to requirements for fixed asset investments, member business lending, stress testing of certain investments, and discretionary control of investments. By way of background, CUNA is the largest credit union trade organization in the country, representing approximately 90 percent of our nation's nearly 7,800 state and federal credit unions, which serve approximately 92 million members. This comment letter was written under the auspices of the CUNA Federal Credit Union Subcommittee.

### **General Comments Regarding CUNA's Views**

CUNA supports the agency's review of its RegFlex program, as all agency programs should be monitored and reviewed periodically to ensure they are meeting their objectives.

However, as explained below, CUNA does not support the proposal as issued for comment, and we urge that the NCUA Board not adopt it, or at least substantially revise it before it is approved in final form.



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If the Board feels changes to the RegFlex program are warranted, we urge a more targeted approach as discussed below. We believe such an approach would facilitate the agency's ability to address problem situations for individual credit unions as opposed to eliminating key aspects of the RegFlex program for all federal credit unions, regardless of whether NCUA has concerns about their activities or not.

NCUA's longstanding RegFlex program allows well-managed federal credit unions to obtain relief from certain regulatory burdens, and in our view, the program has considerable merit for credit unions as well as for the agency. The program is valuable because it not only encourages credit unions to be well-capitalized, which benefits the entire system, but also promotes regulatory relief – a very important goal considering the range of regulations under which credit unions must operate today and the increasing regulatory burdens they will face this year and into the future.

Under the RegFlex program, eligible federal credit unions must be well-capitalized with a CAMEL 1 or 2 rating in order to avoid certain regulatory requirements identified in the agency's rules on RegFlex. None of the exemptions relieve federal credit unions' statutory requirements, but they do provide relief from regulatory directives established and implemented by NCUA.

Regrettably, NCUA's proposal would undermine the RegFlex program, which our members support, by rescinding the exemptions from the following requirements:

- The limit on federal credit union investments in fixed assets, which is 5% of shares and retained earnings;
- The requirement to obtain the personal liability and guarantee of the borrower for a member business loan;
- The limit on delegating control over the purchase and sale of investments up to 100% of the credit union's net worth; and
- The stress testing of certain investments.

As the Supplementary Information accompanying the proposal points out, there have been some problems in the areas listed above, such as with fixed assets in some cases. However, as the Supplementary Information demonstrates, the number of such incidences remains relatively low in light of current economic conditions and compared to other types of financial institutions. We do not agree that the problems of a few justify undermining the RegFlex program for all federal credit unions.

Moreover, the current rule clearly addresses the loss of RegFlex status when a credit union falls below the required net worth level and no longer has a CAMEL 1 or 2 rating. More important, in addressing the individual

concerns NCUA has raised in the Supplementary Information, the current rule also allows the NCUA regional director to revoke RegFlex status in whole or in part if the agency has substantive, documented safety and soundness reasons. The regional director must provide written notice to the credit union of the revocation, which is effective upon receipt of the notice.

If the agency feels those provisions are not sufficient, rather than sweeping aside RegFlex authority for all federal credit unions in the areas identified in the proposal, NCUA should consider whether those provisions should be strengthened, without jeopardizing the program or principles of due process for credit unions.

For example, the rule could provide that when RegFlex authority is revoked for a specific safety and soundness issue, despite the credit unions' CAMEL rating or net worth, the credit union must take immediate steps to safeguard against future problems of that nature and document those steps to NCUA. This could be required regardless of whether RegFlex authority is restored or not.

The Board could also consider additional capital requirements, such as 8% net worth, and increased safety and soundness measures for credit unions that are reapplying for RegFlex status following a revocation.

The proposal notes that while RegFlex authority would be removed in the areas identified above, it would preserve the ability of a federal credit union to request a waiver from certain of requirements on a case-by-case basis. However, the current regulation is not clear on that point and should be amended to address that case-by-case waivers may be obtained and what the process is to apply for them.

Also, and more significant, it is our understanding from credit unions that the waiver process is often cumbersome and would not be feasible to use on a regular and ongoing basis as a satisfactory substitute for RegFlex exemptions.

## **Specific Concerns**

### **1. MBLs**

The proposal would rescind the exemption of RegFlex credit unions from the MBL rule that requires the personal liability and guarantee of the borrower. We believe requiring RegFlex credit unions to obtain the personal guarantee of the borrower will competitively disadvantage credit unions. That is because banks and other lenders are permitted to offer non-recourse loans that do not require the borrower's personal guarantee.

In addition, the MBL provision could unintentionally deter potential borrowers of higher credit quality from applying to credit unions for MBLs, since they would be able to obtain a similar loan elsewhere without the personal liability requirement.

As you know, the Obama Administration has strongly encouraged greater small business lending from all financial institutions, and credit unions can play a significant role in meeting the financial needs of small businesses, particularly since a number of banks are refusing to provide financing for smaller businesses. Yet, this proposed change regarding MBLs comes at the very time the credit union system is urging Congress to raise the MBL cap to allow well-run credit unions to make more business loans, and it undermines the agency's support for increasing the MBL limits. As was evident at the House Financial Services Committee hearing May 18, 2010, there is broad and growing support among policymakers for credit unions to make even more member business loans in order to help small businesses, their communities and the economy.

The Supplementary Information provides data regarding MBL delinquencies and charge offs. The data does not differentiate between RegFlex and non-RegFlex credit unions.

Even so, while delinquencies involving MBLs have risen, charge-offs in 2009 grew little from those in 2008 – only from 0.46% to 0.47%. Further, the table presented regarding MBLs concentrations reflects the data from only one credit union.

We are not suggesting that problems in the overall economy have left credit unions unscathed. There have been some problem areas, but credit unions are in general managing those problems well, particularly in comparison to their bank counterparts.

As addressed in our general comments, NCUA has authority now to direct any RegFlex credit union that is experiencing unacceptably high levels of defaults with MBLs to forfeit its RegFlex eligibility as it relates to MBLs, until such time that the credit union can demonstrate it is able to manage the risks associated with its MBL program.

In light of these facts, we believe it would be far preferable for credit unions and NCUA to address MBL concerns on an individual credit union basis, rather than eliminating RegFlex authority for all well-run credit unions making MBLs.

## **2. Fixed Assets**

We are also concerned with the proposed rescission of the RegFlex credit union exemption regarding the 5% investment limit in fixed assets. Among other concerns, the investment limit could negatively impact credit unions' planned branching activities. Expanding a credit union's branching network can be a vital component to growing its membership. Rescinding the limit could be very problematic for RegFlex credit unions that are about to begin, or have already begun, the construction phase of branch expansion. We believe the fixed assets prerogative has been helpful to credit unions and should not be removed from the RegFlex exemption list.

## **3. Investment Authority Delegation**

RegFlex allows a credit union to delegate purchase and sale authority regarding its investments to an investment advisor registered with the Securities and Exchange Commission, up to 100% of the credit union's net worth. The proposal would remove this exemption.

The Supplementary Information provides no supporting data to justify eliminating this exemption except to note that the Board is "increasingly concerned about the safety and soundness of credit unions and their investments."

We do not think this general statement provides sufficient substantiation on the record to eliminate the investment authority delegation, and we urge the agency not to adopt this provision as proposed.

If the agency feels it is essential and warranted to address the investment authority delegation provisions in RegFlex, based on specific issues and not based on generalized concerns, we urge NCUA to modify its approach. Instead of eliminating this flexibility, we encourage NCUA to share information with credit unions about its concerns in this area and seek comments on a proposal that, for example, would allow delegations up to a lower level of net worth, such as 80%, rather than 100%.

Also, with changes imminent regarding corporate credit unions' investment authority under a new corporate final rule, credit unions are going to need options to help manage their investments. In that connection, we urge the Board to consider establishing a pre-approval process for credit union investment advisors. In order to be included on NCUA's list, an investment advisor would have to be registered with the SEC and with NCUA, and be required to meet safety and soundness criteria established by NCUA.

#### **4. Stress Testing**

Federal credit union officials who commented to us on this issue generally agree that some stress testing of the securities that a credit union is holding is reasonable, particularly given the current economic problems. However, they do not agree that NCUA should totally eliminate flexibility for well-managed credit unions regarding such testing.

The Supplementary Information states that NCUA is concerned that credit unions are purchasing investment products they do not fully understand and are incurring significant interest rate and liquidity risk. However, the proposal does not substantiate how subjecting well managed credit unions to monthly stress testing requirements will address those concerns. Well-managed credit unions by definition understand the key activities they are undertaking, such as investments, or their examiner should not have rated them as well-run.

In light of that, we oppose eliminating RegFlex authority in this area but would support some reasonable, periodic stress testing requirements for RegFlex credit unions.

#### **Conclusion**

CUNA appreciates the agency's review of RegFlex and agrees that material safety and soundness issues must be a priority for NCUA.

However, we believe the current rule generally accommodates the agency's ability to deal with such issues in a timely and reasonable manner. To the extent NCUA believes changes are justified to the RegFlex rule, we offer some recommendations, addressed above, that are much more narrowly focused than the broad-brush proposal. We believe these changes to reinforce the current rule would allow the agency to address problem areas quickly while permitting well-managed credit unions to continue operating under the important benefits of the RegFlex program.

Meanwhile, CUNA will be undertaking a major review of credit unions' regulatory burdens, with an eye toward further recommendations to address credit unions' regulatory responsibilities, without jeopardizing safety and soundness or legal requirements. We will be sharing that information with a variety of policy makers including NCUA, the National Association of State Credit Union Supervisors (NASCUS), Treasury, Congress, and others.

Thank you for the opportunity to express our views on this important rulemaking. If you have any questions about our letter, please do not hesitate to give me a call at (202) 508-6736.

Sincerely,

A handwritten signature in cursive script that reads "Mary Mitchell Dunn".

Mary Mitchell Dunn  
CUNA Senior Vice President and Deputy General Counsel

Cc: NCUA Board Chairman Debbie Matz  
NCUA Board Member Gigi Hyland  
NCUA Board Member Michael Fryzel  
NCUA Executive Director Dave Marquis  
NCUA General Counsel Bob Fenner