



California  
CREDIT UNION LEAGUE

NEVADA  
CREDIT UNION LEAGUE

VIA E-MAIL: [regcomments@ncua.gov](mailto:regcomments@ncua.gov)

May 27, 2010

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

Dear Ms. Rupp:

RE: Comments Proposed Rulemaking;  
Fiduciary Duties at Federal Credit Unions;  
Mergers and Conversions of Insured Credit Unions

On behalf of the California and Nevada Credit Union Leagues, I appreciate the opportunity to comment on NCUA's proposed changes to clarify the fiduciary duties and responsibilities of federal credit union directors. The proposal also adds new provisions establishing the procedures for insured credit unions merging into banks, and amends some of the existing regulatory procedures applicable to insured credit union mergers with other credit unions and conversions to banks. By way of background, the California and Nevada Credit Union Leagues (Leagues) are the largest state trade associations for credit unions in the United States, representing the interests of more than 400 credit unions and their 10 million members.

***Summary of the Leagues' Position***

The Leagues commend the NCUA for its efforts to strengthen and clarify these provisions. We firmly believe that credit union members have the right to receive full disclosure regarding the legal and economic aspects—and potential consequences—of a merger or conversion. We also support charter options for credit unions, especially as it relates to state versus federal options. It is our opinion that these two tenets can be effectively and fairly balanced, and feel that the proposed rules represent a reasonable example of this. However, we do have several concerns and suggestions to help strengthen and provide greater balance to the proposal.

***Fiduciary Duties of Federal Credit Union Boards of Directors***

In general, the Leagues agree with and support the proposed fiduciary duties standard found in §701.4. However, there are four areas where we believe changes should be made to this section.

First, while we certainly agree that a board member should have the “ability to understand the credit union’s balance sheet and income statement,” we are concerned

that the other elements of the requirement are overly prescriptive (e.g., that such knowledge be obtained within three months), or too vague or subjective (e.g., that board members be able to ask “substantive questions of management and the internal and external auditors”). There are several reasons why we believe this standard in its current form is unfair and unrealistic.

- One of the core rights of members is the right to elect directors of their choice. This basic, democratic right is at the core of credit union history and philosophy. The proposed requirement has the effect of muting the right of members to elect their own boards from their membership.
- Such a standard is not required for corporate stockholders. Instead, board qualifications are permitted to be established by the nominating committee. In fact, NCUA *Legal Opinion Letter 95-0207* states that federal credit union nominating committees have the discretion to set service and educational requirements for their board members.
- In California and Nevada, no such requirement is established for state-licensed/chartered credit unions. It is likely that this is the case for many other states.
- Such a requirement will serve to make recruiting federal credit union board members even more challenging, especially for smaller credit unions.

Recommendation: The Leagues believe that the proposed fiduciary standard—without including §701.4(b)(3)—is sufficient to address the concern that NCUA is attempting to focus on in this provision. If the Agency feels that a standard should be formalized in regulation, we suggest that it should be limited to language that a board member should have the ability to understand the credit union’s balance sheet and income statement, and include reference to the ability of a nominating committee to establish service and educational requirements for its board members.

Second, in order to strengthen and more clearly address liability concerns with the fiduciary duties standard, the Leagues recommend NCUA include in §7014(b) language substantively similar to the following language (derived from California Corporations Code §7231):

Recommended added language:

*A person who performs the duties of a director in accordance with [subdivisions (b)(1), (b)(2), and (b)(4)] shall have no liability based upon any alleged failure to discharge the person's obligations as a director, including, without limiting the generality of the*

*foregoing, any actions or omissions which exceed or defeat a public or charitable purpose to which assets held by a corporation are dedicated.*

Third, we have concerns regarding the provision contained in §701.4(c) which permits boards to require staff and outside consultants to report directly to the board or other such committee as appropriate. This provision introduces questionable governance issues. While we certainly understand and acknowledge that the board has ultimate fiduciary responsibility and oversight of a credit union, we believe that authority to require direct reporting is already inherent in the type of relationship described in this section (i.e., hired staff and consultants). We are hesitant to endorse regulatory language that may serve to encourage—and ultimately weaken—a credit union CEO’s ability to effectively perform their duties.

Recommendation: The Leagues ask NCUA to remove this language, as it is unnecessary and attempts to regulate a relationship dynamic best left delineated by a board and its CEO.

Fourth, the Leagues urge NCUA to amend the proposed changes to Article XVI of the Federal Credit Union Bylaws and to Article XI of the Corporate Federal Credit Union Bylaws to incorporate alternative dispute resolution proceedings.

Recommended added language (underlined):

Subject to the limitations in 12 CFR 701.33(c)(5) of the NCUA regulations, the credit union may elect to indemnify to the extent authorized by (check one) ( ) law of the state of \_\_\_\_\_ or ( ) Model Business Corporation Act the following individuals from any liability asserted against them and expenses reasonably incurred by them in connection with judicial or administrative proceedings, including any alternative dispute resolution proceedings, to which they are or may become parties by reason of the performance of their official duties: (Check as appropriate) ( ) current officials, ( ) former officials, ( ) current employees, ( ) former employees.

***Definition of “Conducted by an Independent Entity”***

Prior to this proposal, NCUA required a converting credit union to secure the services of an “independent entity” (experienced in conducting corporate elections) to collect, tabulate, and certify the results of the required membership vote. The proposal adds a new requirement that the results of the voting not be communicated to the converting credit union until after the special meeting of the members regarding the conversion/merger proposition is held.

The Leagues are concerned that in situations involving a credit union's conversion from federal to private insurance, such a requirement would unfairly increase costs of the conversion and interfere with a converting credit union operating under its state-approved bylaws or regulations. The prohibition on tabulating any ballots before the conclusion of the special meeting places an unrealistic time constraint on the independent entity to provide certification of the voting results to NCUA within 10 days of the special meeting date. In addition, such a requirement hampers a credit union's ability to satisfy the requirement that at least 20 percent of the total membership participate in the voting. Interim vote tally information is very helpful in determining whether additional mailings are needed to ensure the entire membership receives the required information and that the 20 percent member participation requirement is met. A restriction on the independent entity from providing vote tally information will make the costs of conversion far less manageable for a credit union.

Recommendation: We urge NCUA to remove this requirement until the Agency can provide relevant and meaningful statistics—as opposed to isolated narratives not involving insurance conversions—as to why it is needed.

***Definition of “Merger-Related Financial Arrangements”***

The Leagues support meaningful disclosure of merger-related financial arrangements of any officials or senior managers of a merging credit union. Given past concerns over the financial motivation behind some credit union-to-bank conversions, we understand and appreciate NCUA's consideration of this issue. However, in situations with respect to credit union-to-credit union mergers, we do not believe that a “material increase in compensation” should be considered to be one that exceeds the greater of 15 percent or \$10,000. For many reasons, strong senior management can play an instrumental role in advancing and completing a sound merger between a healthy and a faltering credit union, which may in turn avoid losses to the NCUSIF. We believe the proposal's threshold could raise unfounded and unnecessary attention regarding a senior official's (relatively small) change in compensation, which very well may be warranted based on the size of the combined business entity.

Recommendation: The Leagues ask that NCUA consider using only the 15 percent threshold and either eliminate the \$10,000 threshold, or increase it to more accurately reflect current average total compensation at the largest credit unions. In addition, such a provision should allow for periodic changes in average total compensation at the largest credit unions.

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The Leagues thank the NCUA for the opportunity to share our views on these proposed changes. We appreciate your consideration of our comments.

Sincerely,

A handwritten signature in black ink, appearing to read "Bill Cheney", with a long horizontal flourish extending to the right.

Bill Cheney  
President/CEO  
California and Nevada Credit Union Leagues