

From: [_Regulatory Comments](#)
To: [Jordan, Sheron Y](#)
Subject: FW: Indiana Credit Union League's Comments on Proposed Rulemaking - Fiduciary Duties at Federal Credit Unions; Mergers and Conversions of Insured Credit Unions
Date: Tuesday, June 01, 2010 10:59:00 AM

From: John McKenzie
Sent: Friday, May 28, 2010 2:54 PM
To: _Regulatory Comments
Subject: Indiana Credit Union League's Comments on Proposed Rulemaking - Fiduciary Duties at Federal Credit Unions; Mergers and Conversions of Insured Credit Unions

May 28, 2010

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

Via email: regcomments@ncua.gov

Re: Comments on Notice of Proposed Rulemaking - Fiduciary Duties at Federal Credit Unions; Mergers and Conversions of Insured Credit Unions

Dear Ms. Rupp:

The Indiana Credit Union League (ICUL) appreciates the opportunity to comment on the NCUA Proposed Rule addressing Fiduciary Duties at Federal Credit Unions; Mergers and Conversions of Insured Credit Unions. The ICUL represents 177 of Indiana's 197 credit unions with those credit unions' memberships totaling more than two million members.

The proposed rule addresses a variety of issues including fiduciary duties of boards of directors, indemnification of directors and officers, mergers between credit unions, share insurance conversions, and conversions to banks. The proposals addressing conversions to banks in forms that are not currently in the regulations appear reasonable as they track existing regulations for similar conversions to mutual savings banks (MSB). We do not believe those proposals that address insurance conversions are necessary and reasonable and believe they will only increase the cost and complexity of the share insurance conversion process. We do not agree with the proposed addition of regulations specifying the fiduciary duties of directors or attempting to limit the indemnification of directors and officers. It appears that the proposed rules are intended to limit the options for share insurance and alternative structures by making the process more difficult, and implying that these particular decisions could result in greater personal liability to directors.

As stated in NCUA's write-up on the proposed regulations "the Federal Credit Union Act has numerous references to the duty to act in the best interest of the credit union's members..." The written information further states that, "Currently, an FCU's board must look to state statutory and case law to determine the scope of its fiduciary duties to members and the

standard of care required as articulated by its state location.” The main justification for having a uniform fiduciary standard is that it “may be useful to eliminate confusion and may make it easier for FCU boards to fulfill their duties to members.” The proposal does not provide sufficient examples that demonstrate a major problem with credit union boards not fulfilling their fiduciary duties, or where current state statute and case law is insufficient to properly define what the fiduciary duties of the board are.

We also believe that the proposed rules addressing fiduciary duties, as written, create a distinct difference between the federal and state charters, to the detriment of the federal charter. This proposal places federal credit unions at a distinct disadvantage relative to state-chartered credit unions and appears to be an attempt to preempt state rights relative to this area.

Proposed paragraph 701.4(b)(3) establishing an expectation that a director will, within three months of appointment or election, “have at least a working familiarity with basic finance and accounting practices, including the ability to read and understand the federal credit union’s balance sheet and income statement and to ask, as appropriate, substantive questions of management and the internal and external auditors;” seems unreasonable. Credit union directors are volunteers that come from all walks of life, levels of education, and financial literacy backgrounds. While we agree that members of boards need to understand the finances and operations of the credit union, we do not agree that it is necessary that it be included in a regulation. This can be addressed through best practices, or other means. We also do not believe that three months is a reasonable amount of time to apply to all directors regardless of their background. We also have had numerous complaints from credit unions that when challenged to cut expenses, training expenses are one of the first areas the examiner points to for reduction. It is difficult to maintain the level of knowledge expected by directors when funding for continued education is not a high priority.

Proposed paragraph 701.33 (5) attempts to limit the indemnification of directors by the credit union for personal liability “related to any decision made by that individual on a matter significantly affecting the fundamental rights and interest of the FCU’s members...” This paragraph further states that “matters affecting the fundamental rights of members includes charter and share insurance conversions and terminations.” Since, as proposed, the conduct will have to have been determined by a court to have constituted gross negligence, reckless or willful misconduct, why is it necessary to include language in a regulation that basically usurps the authority of the state courts that are making the initial determination per the regulation? We believe that existing regulations and state statutes are sufficient to address this area. Adding an increased risk of personal liability to federal credit union officers and directors creates another negative, distinct difference between the federal and state charters, to the detriment of the federal charter. Implementing this proposed language would result in a declining pool of individuals willing to “risk” serving on a federal credit union board. Many of those individuals declining to serve would likely be among the best and brightest available because they would understand the risk. We strongly disagree with this proposed paragraph being added.

We do not agree with NCUA’s conclusions that greater regulation is needed in the area of credit union mergers and conversions of insured credit unions. NCUA already has the most difficult regulations for credit union conversions to private share insurance or to another type of charter (state credit union, MSB, etc.).

In particular, we are concerned with section of the proposed rule that prohibits the "independent entity" ultimately responsible for collecting, tabulating and certifying the final membership vote on the credit union's proposal to convert to, or merge with, a privately insured credit union from communicating interim voting results to the converting credit union during the short 30-day voting period. We believe this change interferes with and usurps the authority of a state-chartered credit union to operate under its state-approved bylaws; inhibits a converting credit union's ability to secure the required 20% membership participation in the vote; adds unnecessary costs to an already expensive regulatory process; and impedes the independent entity's ability to accurately and timely report the results of the membership vote. Currently, under 12 CFR Part 708b.203 (f), the independent entity/tabulator must certify the results of the membership vote to the NCUA within 10 days of the special membership meeting required by rule. If the independent entity is prohibited from counting and validating tens of thousands of votes until after the special meeting, the 10-day turnaround may not be feasible.

The information provided supporting the proposed rules in this area does not provide evidence of any significant problems that are occurring under the current regulations. For the handful of instances where NCUA does not feel the credit union has acted properly under the existing regulations, solutions should be addressed individually with those credit unions. Adding regulations that impact all federally insured credit unions and add additional expense to an already expensive process to comply with existing regulations can only be construed as an effort to further deter these credit unions from even considering legal alternatives that are available to them. This is a further example of overregulation of credit unions by NCUA. During this time when most credit unions are challenged by the expenses associated with the corporate credit union losses and the NCUSIF assessments, NCUA should be focusing on how to reduce the cost of compliance through regulatory relief, and not increasing the costs through additional regulation. Federally insured credit unions are considered to be the most regulated financial institution sector in America.

We do not agree with NCUA's proposal requiring additional disclosures associated with mergers between credit unions. Additional disclosures on any share adjustments for credit unions with higher net worth ratios and material merger-related financial compensation may discourage viable credit union mergers, are not necessary, and add to confusion for credit union members. In such mergers the total net worth of the two credit unions combined is neither increased nor decreased. Further, simply having a higher net worth does not necessarily equate with improved member services or value, as the proposed disclosure implies. These additional requirements could result in mergers not being completed that otherwise would have benefited the members of both credit unions through economies of scale that typically lead to lower loan interest rates, better rates on savings, and a wider range of services available to members.

NCUA's definition of "material merger-related financial arrangements" as the greater of either \$15,000 or 10 percent of the manager's annual compensation seems arbitrarily low, and we do not believe that this disclosure is even necessary. If included in the final rule, the definition of "material" should have higher dollar and percentage amounts. State credit unions are required to disclose the compensation details for executives to the IRS and NCUA's regulation allowing federal credit union members to examine the institution's books and records provides members with access to this same information, so putting it in the proposed rule is unnecessary.

We encourage NCUA to reconsider implementing these proposed rules. Credit unions continue to support NCUA in front of Congress as an independent regulator that should remain independent. Now is the time for NCUA to support credit unions through regulatory reform and reducing the compliance burden, not increasing the burden and resulting costs.

Sincerely,

A handwritten signature in black ink that reads "John McKenzie". The signature is written in a cursive style with a large, sweeping initial "J".

John McKenzie
President
Indiana Credit Union League