

**From:** [\\_Regulatory Comments](#)  
**To:** [Jordan, Sheron Y](#)  
**Subject:** FW: TCUL Comments on Proposed 12 CFR Parts 701, 708a, and 708b Fiduciary Duties at Federal Credit Unions; Mergers and Conversions of Insured Credit Unions  
**Date:** Tuesday, June 01, 2010 10:54:28 AM

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**From:** Suzanne Yashewski  
**Sent:** Friday, May 28, 2010 3:15 PM  
**To:** \_Regulatory Comments  
**Cc:** Dick Ensweiler; Buddy Gill  
**Subject:** TCUL Comments on Proposed 12 CFR Parts 701, 708a, and 708b Fiduciary Duties at Federal Credit Unions; Mergers and Conversions of Insured Credit Unions

May 28, 2010

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

Sent via e-mail to: [regcomments@ncua.gov](mailto:regcomments@ncua.gov)

Re: TCUL Comments on Proposed 12 CFR Parts 701, 708a, and 708b Fiduciary Duties at Federal Credit Unions; Mergers and Conversions of Insured Credit Unions

Dear Ms. Rupp:

This comment letter represents the views of the Texas Credit Union League [TCUL] regarding the National Credit Union Administration Board's proposal for comments regarding clarifications the fiduciary duties and responsibilities of federal credit union directors, and adding new provisions for insured credit union conversions and mergers. By way of background, TCUL is the official trade association serving approximately 560 federal and state credit unions and more than 7.4 million credit union members in Texas.

TCUL appreciates NCUA's efforts to clarify the fiduciary duties of federal credit union directors, and to protect the rights of credit union members during a conversion or merger. However, based on feedback from credit unions and our analysis, TCUL has a number of significant concerns with the proposed rules.

#### Fiduciary Duties and Indemnification

Regarding fiduciary duties, in place of the current proposal, TCUL suggests that NCUA issue a regulation clarifying in what ways state corporate law applies to federal credit unions, as the Office of the Comptroller of the Currency has done for national banks. This approach would clarify not only directors' existing fiduciary duties but also how other areas of state corporate law apply to federal credit unions on issues not

addressed by the Federal Credit Union Act and NCUA regulations, and would also protect member rights without having negative operational consequences. Further, a state law approach would be consistent with current NCUA policies as well as the legislative history and judicial interpretation of the FIRREA provisions on which the proposed rule is premised.

In general, the requirements that directors should act in good faith in the best interest of their members, and administer the affairs of the credit union fairly and impartially, are consistent with existing state law fiduciary duty standards. We recognize the value of federal credit union directors having their existing fiduciary duties clarified. However, the proposed approach—issuing a regulation applicable to federal credit unions primarily premised on deposit insurance provisions of the FCUA established by FIRREA—would be redundant with existing state law fiduciary duties.

We therefore ask the Board to consider adopting an approach to state fiduciary duty law similar with the OCC's policy regarding state corporate law's application to national banks. Under 12 C.F.R. § 7.2000, OCC has clarified that a national bank's corporate governance is controlled by "applicable Federal banking statutes and regulations, and safe and sound" operation but is otherwise controlled by state corporate law. The OCC regulation permits a national bank to adopt a bylaw which specifies one of three sources of state corporate law: (1) the corporate law of the state of its home office; (2) the corporate law of Delaware; or (3) the Model Business Corporations Act.

We recognize that state law does not always specifically address corporate governance questions about credit unions per se. However, we believe that it would be reasonable for NCUA to specify by rule that a state's law for governance of stock corporations applies to federal credit unions to the extent that the state law does not conflict with the FCUA or NCUA rules. State fiduciary duty and other laws applicable to corporations are usually well delineated, especially in the case of Delaware. This approach would be consistent with the Agency's goal of better defining federal credit union directors' fiduciary duties.

Even though the concept, purposes, and culture of not-for-profit credit unions are highly distinct from those of most for-profit stock corporations, an NCUA regulation similar to 12 C.F.R. § 7.2000 which specifically references state laws for stock corporations would be reasonable because Congress borrowed liberally from the law of stock corporations in providing standards for credit union governance. For instance, federal credit union members are shareholders in the federal credit union and, like common stock, these shares represent equity ownership interests. See 12 U.S.C. § 1757(6). Also like corporate shareholders, federal credit union shareholders elect the institution's board, are paid dividends on their shares, and have other rights analogous to those of corporate shareholders, such as the right to examine the institution's books and records.

We recognize that not all aspects of state corporate law for stock corporations make sense for federal credit unions. Some of the differences between credit unions and stock corporations might need to be specifically addressed in any NCUA rule so as

not to have unintended consequences, especially since federal credit unions are not-for-profit enterprises whereas most stock corporations operate for profit. Nevertheless, we believe that state corporate laws are the appropriate place to start any rulemaking on the fiduciary duties of credit unions boards of directors. Such a rule would enable NCUA to take prompt enforcement action against breaches of fiduciary duty by making violations of state corporate law standards violation of a federal rule as well. In addition, in many situations, state corporate law provisions which conflict with the FCUA or NCUA rules would be preempted, as is the case for national banks pursuant to 12 C.F.R. § 7.2000.

Adopting a regulation for federal credit unions similar to 12 C.F.R. § 7.2000 would help clarify not only the fiduciary duties of directors, but also many other areas of federal credit union governance not addressed by the FCUA or NCUA regulations. Such a regulation would be generally consistent with NCUA's current policies holding the state law of a federal credit union's home office controls on corporate governance matters not addressed by federal law, but would make NCUA's policy clearer for federal credit unions, for their members, and for any court.

The approach suggested here would also minimize the creation by this rule of additional regulatory burdens for credit unions, since we believe that credit unions (including federal credit unions) are already subject to most of the state standards that we are suggesting for incorporation into federal law.

#### Indemnification

TCUL has concerns that the proposed prohibition on director indemnification may have the unintended consequence of making it difficult for federal credit unions to find qualified, volunteer board members because of concern for personal liability. The proposed rule prohibiting indemnification is punitive and exceeds the rules of other financial regulators. Instead, we should look to state law for the scope of indemnification for a director's fiduciary duties.

The proposed indemnification prohibition also appears to be inconsistent with the FCUA in some respects because FCUA section 207(h) expressly limits the statutory indemnification prohibition in the Act to matters where the NCUA Board is a party.

The proposed rule exceeds the scope of Section 207(h) of the FCUA, which only applies to actions between the NCUA and a credit union under conservatorship or in receivership. While we recognize that Section 207(h) expressly allows NCUA to recover notwithstanding any indemnification agreement, it seems inconsistent with the plain language of the statute and congressional intent to extend this prohibition on director indemnification to situations where NCUA is not a party.

In addition, the proposed rule would further disadvantage the federal credit union charter compared to the state charter. These rules mean federal credit union directors would face an even higher burden compared to compensated bank directors and state credit union directors.

#### Voting in Mergers and Conversions

While we support adequate due diligence and integrity in the voting process, the proposed rules would increase the complexity and time, especially for credit union to credit union mergers.

#### An Independent Entity for Voting: A Credit Union Conversion into a Mutual Savings Bank

We support an independent entity that is intended to improve the fairness and integrity of the voting process. This rule would also add some additional costs and complexity to credit union conversions and mergers.

#### A Credit Union Merger with a Bank

We support adequate and independent due diligence requirements for a credit union merger into a bank. In the proposed rule, there would be a broader merger definition which includes a transfer of "substantially all" its assets. There are additional proposed related due diligence requirements for directors to obtain an independent valuation of the credit union; determine any compensation for the diminished or loss of ownership rights for credit union members; disclose other pertinent merger-related information; and use the proposed independent entity for the voting process.

#### A Credit Union Merger with another Credit Union

These proposed rules would impose additional costs and complexity to a significant number of credit unions that are interested in a merger with another credit union for further growth or consolidation. There will be a significant impact because there were over 200 credit union mergers in 2009. Unlike conversions or mergers between a bank and a credit union, mergers between two federally-insured credit unions do not result in fundamental changes to members' rights or to the insurance status of their deposits.

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, is not necessary, and will 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. A post-merger, combined credit union may provide many benefits to its members that are greater than those the members of either credit union enjoyed prior to the merger. This is because economies of scale 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. The definition of "material" should have higher dollar and percentage amounts. Additional compensation disclosures may not even be necessary. 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 information.

### The Termination of Federal Share Insurance

We do not oppose more direct disclosure for a conversion from federal share insurance, which will provide greater notice to credit union members.

In the proposed rules, for a conversion of federal share insurance to nonfederal insurance, NCUA's approval is contingent on a six month period to complete the conversion and merger. For the termination of federal share insurance for state credit unions, the proposed disclosure explicitly lists the name of the private share insurer.

### Regulatory Relief and Conclusion

In general, the proposed regulations should be tailored to avoid adding significant costs and regulatory burden to credit unions.

Thank you for the opportunity to comment on the proposed revisions to the National Credit Union Administration's rule regarding fiduciary duties as well as mergers and conversions. If you or other Board Staff have questions about our comments, please give me a call at (800) 442-5762 x 8516.

Sincerely,

Suzanne Yashewski  
VP Regulatory Compliance & Legal Affairs  
Texas Credit Union League  
(512) 853-8516

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