

February 18, 2000

The Honorable Norman E. D'Amours
The Honorable Dennis Dollar
The Honorable Yolanda Wheat
National Credit Union Administration Board
1775 Duke Street
Alexandria, VA 22314

Dear Members of the Board:

I am writing on behalf of the National Association of Federal Credit Unions (NAFCU), the only trade association that exclusively represents the interests of our nation's federal credit unions, to urge NCUA to consider reviewing IRPS 99-1 now that more than one year has passed since its implementation.

IRPS 99-1 was by far the most important document issued by the agency in the past year. Now that the agency, credit unions and NAFCU have had ample time to monitor the implementation of that regulation, NAFCU believes that it is time for the agency to take steps to modify either the regulation itself, or the manner in which it has been applied. We also remind the agency that NCUA staff at the December 1998 open meeting recommended exactly this type of review. In the Board Action Memorandum requesting action on the final Chartering and Field of Membership Manual, staff recommended that "the Field of Membership Task Force report back to the NCUA Board in December 1999 on whether the Chartering Manual needs to be amended to address any significant issues that arose during the year." NAFCU looks forward to working with the agency on this issue to ensure that federal credit unions are able to remain competitive in what is an increasingly sophisticated financial marketplace.

Field of Membership Charter Amendments

Numerical Limitations

Standing far above any other concern that NAFCU has with respect to IRPS 99-1 is the process that the agency has decided to implement in order for credit unions to add select groups to their fields of membership. NAFCU hopes that, based on the experience it has gained over the past year, the agency is now able to articulate a more conclusive position on when it is "practicable" for a select group to form its own credit union.

Section 102(f) of the Credit Union Membership Access Act (CUMAA) (Public Law No. 105-219) clearly sets forth the criteria for approval of expansion of the fields of membership of multiple common-bond credit unions.¹ Under this section, the NCUA Board is required to “encourage the formation of separately chartered credit unions instead of approving an application to include an additional group within the field of membership of an existing credit union *whenever practicable* and consistent *with reasonable standards* for the safe and sound operation of the credit union.”² NCUA has needlessly taken this directive and turned it into a burdensome test that each select group must be put to before the agency will approve the addition of the group into the field of membership of an existing credit union.

The burdensome test to which NAFCU refers was not articulated in IRPS 99-1, and therefore was never put out for public comment. Instead, the agency issued Letter to Federal Credit Unions 99-FCU-2. This LFCU intended to formalize a procedure for adding select groups that was already being instituted by the various NCUA Regional Directors. Prior to its articulation in the LFCU, credit unions were virtually uninformed as to the necessary requirements for adding select groups.

Buried in the middle of 99-FCU-2, at Question 34, are the factors that NCUA will consider prior to adding a group (with more than 200 but fewer than 3,000 primary potential members) to the field of membership of an existing credit union. These factors include:

- Member location
- Demographics
- Market competition
- Desired services and products
- Sponsor subsidies
- Employee interest
- Evidence of past failure
- Administrative capacity to provide services³

While this list would appear to be exhaustive, NCUA Regions continue to tinker with it without providing credit unions the benefit of a public comment period.⁴

¹ 12 U.S.C. § 1759(f)

² *Id.* at § 1759(f)(1)(A) (emphasis added).

³ National Credit Union Administration, *Letter to Federal Credit Unions 99-FCU-2* 10 (1999).

⁴ As recently as December 1999 it was brought to the attention of NAFCU staff that Region III required select groups to provide a more explicit discussion of the test of “reasonable proximity.”

Even more disturbing than NCUA's practice of amending its procedures without adequate notification to federal credit unions is that, under current regulation and policy, there is little, if any, differentiation between the addition of a group with primary potential members of fewer than 3,000 and one with 3,000 or greater. Question 35 of 99-FCU-2 asks "[a]re there special requirements for processing expansion requests involving groups of 3000 or more members?"⁵ Ironically, the answer indicates that there are, in fact, no "special requirements" since the procedure is nothing more than a review (although presumably heightened) of the same circumstances that were listed under Question 34.⁶

While NAFCU understands that the pressures of ongoing litigation are a source of great concern to the agency, we believe that the agency has shifted too much of its own burden onto the backs of federally-chartered credit unions. This has resulted in long delays in the application process, numerous returns of applications to credit unions for more information, the contacting of select groups by the agency without the knowledge of credit unions and a sense of utter frustration with the agency on behalf of many credit unions and select groups alike.

Although it is true that NCUA is under a general directive to discern the practicability of a group to form its own credit union, the policy that NCUA is currently working from gives no meaning to Congress' careful efforts to limit (with exception) the size of a group eligible for addition within the field of membership of an existing credit union. NAFCU would like to begin work immediately with the agency to help create a policy that will restore meaning to the 3,000 primary potential member distinction and alleviate the concern that select groups and credit unions share over the procedures that NCUA has put in place for the determination of adding select groups.

Application Process

Assuming that a select group does not address all of the factors that NCUA would like to review when determining its ability to form a separately chartered credit union, different Regions have different procedures for obtaining that information. In some cases, an NCUA representative will call the group directly in order to elicit additional information. In others, a representative will merely send back the credit union's application with a checklist indicating what else the representative would like to review.

NAFCU believes that calling the select group directly, without providing prior notice to the credit union, can be detrimental to the credit union's ability to form a firm business relationship with the potential select group. NAFCU urges NCUA to cease this

⁵ *Letter*, supra note 3 at 10.

⁶ *Letter*, supra note 3 at 10.

practice, and instead work with the credit union in an effort to meet the agency's statutory responsibilities. Because of a tendency on the part of the Regions to implement policy positions in different ways, NAFCU would urge the agency, if it were to adopt NAFCU's suggestion, to issue formal procedures that each Region must follow when dealing with select group additions.

In cases where a checklist is sent back to the credit union, there is an apprehension that the credit union's request will be placed on the "bottom of the pile" once it has been returned to the agency. As with our above suggestion, NAFCU would encourage NCUA to articulate specific procedures for the treatment of applications that are not quite complete. Clearly, this should include a requirement that credit unions be contacted promptly in the event that any necessary information is missing from the packet. NAFCU also believes that any incomplete applications should not be placed behind newly acquired applications for consideration. Speed and efficiency in the select group addition process are essential to some federal credit union's ability to add groups.

Voluntary Mergers

The Chartering and Field of Membership Manual states that a "voluntary merger of two or more federal credit unions is permissible as long as each select group in the merging credit union's field of membership has less than 3,000 primary potential members."⁷ Judge Colleen Kollar-Kotelly in her memorandum opinion denying the bankers' request for a preliminary injunction has indicated that the bankers' may succeed on the merits of their claim that the voluntary merger rule noted above violates the intent of CUMAA. Kollar-Kotelly notes:

During a voluntary merger, . . . groups from one credit union will invariably be added to the field of membership of an existing credit union For the NCUA to approve applications to merge groups consisting of fewer than 3000 primary potential members into existing credit unions without evaluating whether any of these groups might possess the ability to charter their own credit unions violates the unambiguous intent of Congress.⁸

In light of the precarious nature of NCUA's interpretation of voluntary mergers with credit unions containing select groups with less than 3,000 primary potential members, the agency is discouraging those credit unions that would like to enter into this type of merger from doing so. NAFCU, however, does not believe that such a drastic course of action is necessary.

⁷ National Credit Union Administration, *Chartering and Field of Membership Manual* 2-35 (1999).

⁸ *American Bankers Ass'n v. NCUA*, No. 99-00042(CKK), 1999 at 40-41 (D.C. Cir. Mar. 10, 1999) (memorandum opinion).

NAFCU believes that, by merely requiring that all voluntary mergers (regardless of the size of the select groups constituting the merging credit union's field of membership) be subject to the same regulatory scrutiny, NCUA should be able to inoculate the transaction from a potential unwinding by the courts.

NAFCU also anticipates that NCUA will place a bias against voluntary mergers because it is clear that the group or groups already have the ability to operate their own, separately chartered credit union. In light of the numerous conversations that NAFCU staff has had with smaller credit unions looking to merge into larger credit unions, we believe that NCUA must not rely on this presumption and should take a close look at the future viability of the credit union before presuming that a merger would violate CUMAA. In many cases, NAFCU has found that smaller credit unions are finding themselves incapable of meeting the electronic needs of their members, are finding their penetration rates decreasing or remaining flat and generally believe that they are faltering in a highly competitive market. NAFCU believes that credit unions should not be pushed to the verge of liquidation or conservatorship before they can make a business decision to provide their members with the most efficient and modern services.

When is a group a separate group?

Multiple Common Bond Credit Union

NAFCU strongly urges NCUA to reconsider its decision to require that all additions to a multiple common bond credit union, whether or not the individuals to be served share a common bond with a group currently being served, jump through the hoops of the select group addition process. NAFCU believes that this requirement is unnecessary, burdensome to the multiple common bond charter and, most importantly, not required by the law.

CUMAA defines multiple common-bond credit unions as being a credit union serving "[m]ore than one group—' . . . each of which has (within the group) a common bond of occupation or association[.]'"⁹ The question that needs to be asked is: what is the proper timing to determine how many distinct groups a credit union is serving? NCUA would answer this question by saying that a group is formed at the point in time when it requests to be included in the field of membership of an existing multiple common bond credit union.¹⁰ NAFCU would answer this by saying that groups should be examined by their ability to be integrated into an existing sponsor or select group. For those groups

⁹ 12 U.S.C. § 1759.

¹⁰ The same rationale is NOT used for single common bond credit unions. Prior to adding additional individuals to be served in a single common bond credit union a group is examined for its ability to be integrated into the sponsor.

that can be integrated, NAFCU argues that the credit union is not seeking to add a separate group, but rather extend services to additional people sharing a common bond with its existing field of membership.

NCUA's current procedure ignores the common bond relationship entirely in the context of the multiple common bond charter. By doing so, NCUA has actually created a situation where all groups must be examined in a vacuum. NAFCU hopes that NCUA will take this suggestion seriously and will amend its policy in a way that adds value to the multiple common bond charter.

Single Common Bond Credit Union

NAFCU also urges NCUA to provide some protection to those single common bond credit unions that are in jeopardy of being classified as multiple common bond by virtue of corporate restructuring by their sponsor companies. NAFCU believes that if the following conditions are present, a single common bond credit union's charter designation should not be reclassified:

1. The credit union services only employees of companies or members or associations that are successors to the original company or association sponsoring the credit union;
2. The credit union does not seek to add any group that does not share a common bond with the credit union's *original* company or association; and,
3. The credit union took no action to include in its field of membership any group that did not share a common bond with the original company or association sponsoring the credit union.

NAFCU believes that this approach serves two purposes. First, it allows credit unions that, through no action of their own, have discovered themselves with a diverse field of membership to continue to retain good relationships with their sponsor company. Second, it allows the credit union to retain its identity and purpose as a single common bond credit union. NAFCU believes that this approach is one that is cognizant of the integrated business environment in which credit unions operates, and allows credit unions the flexibility they need to compete in this environment.

Overlaps

NAFCU is concerned about Chairman Norman D'Amours' practice of requesting the views of credit unions that are to be overlapped by a proposed community charter.

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While we respect the Chairman's concern over the increasingly competitive environment that credit unions find themselves, the Chairman's request seems to be having an unintended effect. Even while the Chairman is asking that credit unions share with him their perspective on the impending charter change, he informs them that these views will have no effect on the Board's decision to approve or deny the application. Credit unions finding themselves to be beneficiaries of these requests are left with a sense of futility, confusion and sometimes hostility. NAFCU urges the Chairman to avoid this situation by refraining from making his request in the future.

NAFCU hopes that these suggestions are helpful, and we would like to thank you for this opportunity to share our views. Should you have any questions or require additional information please call me or Suzanne Garwood, NAFCU's Director of Regulatory Affairs, at (703) 522-4770 or (800) 336-4644 ext. 266.

Sincerely,

Fred R. Becker
President and CEO

cc: Michael McKenna, Esq.
J. Leonard Skiles, Regional Director, Region V