exemptions may be waived on a case by case basis.

A notice of system of records for the Department's ICE Pattern Analysis and Information Collection (ICEPIC) System is also published in this issue of the **Federal Register**.

List of Subjects in 6 CFR Part 5

Freedom of information, Privacy.

For the reasons stated in the preamble, DHS proposes to amend Chapter I of Title 6, Code of Federal Regulations, as follows:

PART 5—DISCLOSURE OF RECORDS AND INFORMATION

1. The authority citation for part 5 continues to read as follows:

Authority: Pub. L. 107–296, 116 Stat. 2135, 6 U.S.C. 101 et seq.; 5 U.S.C. 301. Subpart A also issued under 5 U.S.C. 552. Subpart B also issued under 5 U.S.C. 552a.

2. Add at the end of Appendix C to part 5 a new paragraph 6 to read as follows:

Appendix C to Part 5—DHS Systems of Records Exempt From the Privacy Act

* * * * *

6. The Immigration and Customs Enforcement (ICE) Pattern Analysis and Information Collection (ICEPIC) System consists of electronic and paper records and will be used by DHS and its components. ICEPIC is a repository of information held by DHS in connection with its several and varied missions and functions, including, but not limited to: the enforcement of civil and criminal laws (including the immigration law); investigations, inquiries, and proceedings there under; and national security and intelligence activities. ICEPIC contains information that is collected by, on behalf of, in support of, or in cooperation with DHS and its components and may contain personally identifiable information collected by other Federal, State, local, tribal, foreign, or international government agencies.

Pursuant to exemption 5 U.S.C. 552a(j)(2) of the Privacy Act, portions of this system are exempt from 5 U.S.C. 552a(c)(3) and (4); (d); (e)(1), (e)(2), (e)(3), (e)(4)(G), (e)(4)(H), (e)(5) and (e)(8); (f), and (g). Pursuant to 5 U.S.C. 552a(k)(2), this system is exempt from the following provisions of the Privacy Act, subject to the limitations set forth in those subsections: 5 U.S.C. 552a (c)(3), (d), (e)(1), (e)(4)(G), (e)(4)(H), and (f). Exemptions from these particular subsections are justified, on a case-by-case basis to be determined at the time a request is made, for the following reasons:

(a) From subsection (c)(3) and (4) (Accounting for Disclosures) because release of the accounting of disclosures could alert the subject of an investigation of an actual or potential criminal, civil, or regulatory violation to the existence of the investigation, and reveal investigative interest on the part of DHS as well as the recipient agency. Disclosure of the accounting would therefore present a serious impediment to law enforcement efforts and/or efforts to preserve national security. Disclosure of the accounting would also permit the individual who is the subject of a record to impede the investigation, to tamper with witnesses or evidence, and to avoid detection or apprehension, which would undermine the entire investigative process.

(b) From subsection (d) (Access to Records) because access to the records contained in this system of records could inform the subject of an investigation of an actual or potential criminal, civil, or regulatory violation, to the existence of the investigation, and reveal investigative interest on the part of DHS or another agency. Access to the records could permit the individual who is the subject of a record to impede the investigation, to tamper with witnesses or evidence, and to avoid detection or apprehension. Amendment of the records could interfere with ongoing investigations and law enforcement activities and would impose an impossible administrative burden by requiring investigations to be continuously reinvestigated. In addition, permitting access and amendment to such information could disclose security-sensitive information that could be detrimental to homeland security.

(c) From subsection (e)(1) (Relevancy and Necessity of Information) because in the course of investigations into potential violations of Federal law, the accuracy of information obtained or introduced occasionally may be unclear or the information may not be strictly relevant or necessary to a specific investigation. In the interests of effective law enforcement, it is appropriate to retain all information that may aid in establishing patterns of unlawful activity.

(d) From subsection (e)(2) (Collection of Information from Individuals) because requiring that information be collected from the subject of an investigation would alert the subject to the nature or existence of an investigation, thereby interfering with the related investigation and law enforcement activities.

(e) From subsection (e)(3) (Notice to Subjects) because providing such detailed information would impede law enforcement in that it could compromise investigations by: revealing the existence of an otherwise confidential investigation and thereby provide an opportunity for the subject of an investigation to conceal evidence, alter patterns of behavior, or take other actions that could thwart investigative efforts; reveal the identity of witnesses in investigations, thereby providing an opportunity for the subjects of the investigations or others to harass, intimidate, or otherwise interfere with the collection of evidence or other information from such witnesses; or reveal the identity of confidential informants, which would negatively affect the informant's usefulness in any ongoing or future investigations and discourage members of the public from cooperating as confidential informants in any future investigations.

(f) From subsections (e)(4)(G) and (H) (Agency Requirements), and (f) (Agency Rules) because portions of this system are exempt from the individual access provisions of subsection (d) for the reasons noted above, and therefore DHS is not required to establish requirements, rules, or procedures with respect to such access. Providing notice to individuals with respect to existence of records pertaining to them in the system of records or otherwise setting up procedures pursuant to which individuals may access and view records pertaining to themselves in the system would undermine investigative efforts and reveal the identities of witnesses, and potential witnesses, and confidential informants.

(g) From subsection (e)(5) (Collection of Information) because in the collection of information for law enforcement purposes it is impossible to determine in advance what information is accurate, relevant, timely, and complete. Compliance with (e)(5) would preclude DHS agents from using their investigative training and exercise of good judgment to both conduct and report on investigations.

(h) From subsection (e)(8) (Notice on Individuals) because compliance would interfere with DHS' ability to obtain, serve, and issue subpoenas, warrants, and other law enforcement mechanisms that may be filed under seal, and could result in disclosure of investigative techniques, procedures, and evidence.

(i) From subsection (g) to the extent that the system is exempt from other specific subsections of the Privacy Act relating to individuals' rights to access and amend their records contained in the system. Therefore DHS is not required to establish rules or procedures pursuant to which individuals may seek a civil remedy for the agency's: Refusal to amend a record; refusal to comply with a request for access to records; failure to maintain accurate, relevant timely and complete records; or failure to otherwise comply with an individual's right to access or amend records.

Hugo Teufel III,

Chief Privacy Officer, Department of Homeland Security.

[FR Doc. E8–1554 Filed 1–29–08; 8:45 am]

BILLING CODE 4410–10–P

NATIONAL CREDIT UNION ADMINISTRATION

12 CFR Parts 708a and 708b

RIN 3133–AD40

Mergers, Conversion From Credit Union Charter, and Account Insurance Termination

AGENCY: National Credit Union Administration (NCUA).

ACTION: Advance notice of proposed rulemaking and request for comment (ANPR).

SUMMARY: NCUA is considering whether to issue regulations to govern merger of a federally insured credit union (FICU)

into or a FICU's conversion to a financial institution other than a mutual savings bank (MSB). NCUA currently does not have regulations governing these transactions. Also, NCUA is considering amending its regulations regarding mergers, charter conversions, and changes in account insurance to address various issues these transactions present that affect member rights and ownership interests. These issues include accuracy of communications to members, voting integrity, fiduciary duty obligations for insiders, and member interest in credit union equity, for example, through merger dividends. NCUA seeks comment on the necessity of amending its current regulations to address these issues, any additional issues relevant to these transactions not noted in this ANPR, and, if commenters believe regulatory amendments are needed, suggestions on how to address these issues.

DATES: Comments must be received on or before March 31, 2008.

ADDRESSES: You may submit comments by any of the following methods (Please send comments by one method only):

- *Federal eRulemaking Portal: http://www.regulations.gov*. Follow the instructions for submitting comments.
- *NCUA Web Site: http://www.ncua.gov/RegulationsOpinionsLaws/proposed_regs/proposed_regs.html*. Follow the instructions for submitting comments.
- *E-mail:* Address to *regcomments@ncua.gov*. Include ''[Your name]—Comments on Advanced Notice of Proposed Rulemaking for Parts 708a and 708b'' in the e-mail subject line.
- *Fax:* (703) 518–6319. Use the subject line described above for e-mail.
- *Mail:* Address to Mary Rupp, Secretary of the Board, National Credit Union Administration, 1775 Duke Street, Alexandria, Virginia 22314–3428.
- *Hand Delivery/Courier:* Same as mail address.

FOR FURTHER INFORMATION CONTACT: Frank Kressman, Staff Attorney, Office of General Counsel, at the above address or telephone: (703) 518–6540.

SUPPLEMENTARY INFORMATION:

A. Background

The primary focus of this ANPR is protection of member interests in transactions where members have a great deal at stake because the transactions involve fundamental changes in their ownership or the structure of their credit union, including, in some cases, termination of a credit union charter or termination of federal account insurance. This ANPR concerns six types of transactions: Merger of a FICU into a FICU; merger of a FICU into a privately insured credit union (PICU); conversion of a federally-insured state credit union (FISCU) into a PICU; conversion of a FICU to an MSB; merger of a FICU into a financial institution other than an MSB; and conversion of a FICU into a financial institution other than an MSB.

While these transactions are legally permissible, member ownership can be extinguished or diluted and members may have lesser voting rights or be deprived of the security of federal share insurance. These transactions raise various issues, as discussed below, that NCUA believes its current regulations may not adequately address. NCUA is considering amendments to make certain member interests are adequately protected, including helping members understand the risks and rewards associated with these transactions. In addition, NCUA has not promulgated rules on the merger of a FICU or conversion of a FICU into a financial institution other than an MSB and NCUA is considering the necessity of issuing rules to govern these transactions. As in all rulemaking it undertakes, NCUA's focus is on providing flexibility and fairness, imposing minimal regulatory burden on credit unions whose members choose to pursue any of these transactions, and protecting the National Credit Union Share Insurance Fund (NCUSIF).

NCUA's legal authority to regulate these transactions derives from the Federal Credit Union Act (Act). The Act specifically authorizes the NCUA Board to prescribe rules governing mergers of FICUs, including mergers or consolidations with any noninsured credit union or institution. 12 U.S.C. 1766(a), 1785(b), 1785(c), and 1789(a). By definition, ''noninsured'' means not insured by the NCUSIF, 12 U.S.C. 1752(7), and, therefore, NCUA may prescribe rules governing mergers, conversions, or consolidations with PICUs or other financial institutions, for example, banks or thrifts insured by the Federal Deposit Insurance Corporation.

Part 708b of NCUA's regulations, which is limited to ''credit union into credit union'' mergers, generally requires: (1) Approval of a merger plan by the boards of directors of each credit union; (2) submission of a written plan and other documents to NCUA; and (3) approval of a plan or proposal by NCUA and, for federal credit unions, by members. 12 CFR Part 708b. If a federal credit union is in danger of insolvency, member approval is not required. 12 CFR 708b.105(b). NCUA considers various factors in approving or disapproving a merger including protecting member interests and effects on the NCUSIF.

Similar to FICU to FICU mergers, NCUA broadly regulates the procedures and substance of FICU to PICU mergers including: (1) Approval of a merger plan by the boards of directors of each credit union; (2) submission of a written plan and other documents to NCUA; and (3) approval of plan or proposal by NCUA and, for federal credit unions, by members. NCUA imposes additional notice, voting, and approval requirements on this type of transaction, including the use of form documents. 12 CFR Part 708b, Subpart B–Voluntary Termination or Conversion of Insured Status, and Subpart C–Forms. These requirements apply as well where a FISCU converts to a PICU.

The Act specifically addresses FICU to MSB conversions. 12 U.S.C. 1785(b)(2). While a FICU may convert to an MSB without the prior approval of the NCUA Board, 12 U.S.C. 1785(b)(2)(A), it must provide notice to each of its members who is eligible to vote on the matter of its intent to convert 90, 60, and 30 days before the date of the member vote on the conversion. 12 U.S.C. 1785(b)(2)(C). In this context, the Act requires NCUA's regulations to be consistent with rules promulgated by other federal financial regulators and must be no more or less restrictive than those applicable to charter conversions by other financial institutions. 12 U.S.C. 1785(b)(2)(G)(i). NCUA administers the member vote, which is verified by the federal or state regulatory agency that would have jurisdiction over the institution after the conversion. If either NCUA or that regulatory agency disapproves of the methods by which the member vote was taken or procedures applicable to the member vote, the member vote shall be taken again, as directed by NCUA or the other agency. 12 U.S.C. 1785 (b)(2)(G)(ii). Additionally, the Act specifically provides that no director or senior management official may receive any economic benefit in connection with a conversion of the credit union other than director fees and other compensation and benefits paid in the ordinary course of business. 12 U.S.C. 1785(b)(2)(F).

NCUA has implemented its statutory authority to administer FICU to MSB conversions. 12 CFR Part 708a. While the decision to convert belongs to members, to make this decision, members must be fully informed as to the reasons for the conversion and be

able to consider the advantages and disadvantages.

In 2006, NCUA revised Part 708a to improve the information available to members and the board of directors as they consider a possible conversion. 71 FR 77150 (December 22, 2006). The revisions included amended disclosures, revised voting procedures, procedures to facilitate communications among members, and procedures for members to provide their comments to directors before the credit union board votes on a conversion plan.

NCUA has not issued regulations regarding the merger or conversion of a FICU into a financial institution other than an MSB. The NCUA Board has statutory authority to approve or disapprove these two kinds of transactions and authority to promulgate rules to regulate the substance and procedures of them. 12 U.S.C. 1766(a), 1785(b)(1)(A), 1785(b)(1)(D), 1789(a)(11). In approving or disapproving these transactions, the NCUA Board must consider a number of criteria including: (1) The history, financial condition, and management policies of the credit union; (2) the adequacy of the credit union's reserves; (3) the economic advisability of the transaction; (4) the general character and fitness of the credit union's management; (5) the convenience and needs of the members to be served by the credit union; and (6) whether the credit union is a cooperative association organized for the purpose of promoting thrift among its members and creating a source of credit for provident or productive purposes. 12 U.S.C. 1785(c). NCUA has not issued regulations regarding these transactions because there have been only a handful of these transactions; in those instances, credit unions sought Board approval by petition, fashioning a submission and following procedures generally in line with the requirements of Part 708a.

B. Discussion

1. Credit Union Merger or Conversion Into a Financial Institution Other Than an MSB

NCUA seeks comment on whether issuing rules to govern credit union mergers or conversions into a financial institution other than an MSB would be beneficial for credit union members. NCUA is considering establishing an administrative framework and procedures rather than the case-by-case approach that has been used. Potential downsides to issuing a rule are that, having a rule in place, might encourage these transactions and many observers believe they are, only in unusual circumstances, in the best interests of members. Nevertheless, having a rule in place, with appropriate safeguards for member interests, could assist all parties, including the NCUA Board, in protecting protect member interests in their credit unions.

If it is determined a new rule would be beneficial, NCUA believes the rule, in brief, would establish a comprehensive administrative framework to process these transactions, while including provisions to ensure the protection of member rights and interests. In addition, NCUA would consider clarifying in a rule the criteria it would apply in approving these transactions. Procedurally, a new rule could be modeled after part 708b, including the use of form documentation and, in addition to borrowing the certain provisions of part 708b, it could address the issues discussed below that the Board believes would also be present in these transactions.

Some observers have argued that direct merger or conversion of a FICU into a stock issuing bank may have potential advantages. For example, it would enable a FICU that anticipates the need to eventually issue stock as a bank to accomplish this goal in a more efficient one-step process as opposed to the typical two-step process (FICU to MSB then MSB to stock bank) that has been the pattern in recent years in the FICU to MSB conversion scenario. Another advantage of a rule permitting these types of transactions is that it could be structured in a manner to give economic protection to members by making certain they share in the distribution of cash, free stock, or transferable stock subscription rights as compensation for their equity interest in their credit union.

A potential issue with a rule for these transactions is that the rule would likely be complex because it would need to cover: (1) Both mergers and conversions; (2) charter changes to federal and state banks; and (3) charter changes to freestanding stock banks and those within a mutual holding company structure or stock holding company structure.

NCUA requests comment on whether it should issue a rule regulating these transactions or continue to address them under NCUA's statutory authority on an as-needed basis. If a commenter is in favor of NCUA issuing a rule, the commenter should also suggest how the rule could be structured, how NCUA should address the four issues discussed in B.2. below in the context of the rule, and what other issues should be addressed.

2. Issues

NCUA believes there are significant issues affecting member interests arising across the spectrum of the restructuring transactions contemplated in this ANPR, including those for which NCUA currently has regulations in place and those, discussed above, for which it does not. This ANPR sets out the issues for comment in four categories: Management's Duties, Member Right to Equity, Communications to Members, and Member Voting. NCUA is interested in receiving comments on how its regulations should best address these issues. A discussion of the issues follows.

(a) Management's Duties. In this category, the ANPR seeks comment on two issues: the need for a regulation to address the fiduciary duty credit union directors owe to members and the need for additional regulatory provisions to guard against insider enrichment.

(i) Fiduciary Duty

A credit union's board of directors has a fiduciary duty to act in the best interests of its members.[1] The Act makes numerous references to the NCUA Board's responsibility to act in the best interests of credit union members, including:

- The NCUA Board may act to remove or prohibit any institution-affiliated party at a FICU if that action meets certain requirements, including that the ''interests of the insured credit union's members have been or could be prejudiced.'' 12 U.S.C. 1787(g)(1)(B).
- Credit unions applying for federal account insurance must agree to maintain such special reserves as the NCUA Board may require ''for protecting the interests of the members.'' 12 U.S.C. 1781(b)(6).
- The NCUA Board must review the application of any individual to become a director or senior manager at a newly chartered or troubled FICU, and disapprove that application, if acceptance of the applicant would not be in the best interests of the depositors (members). 12 U.S.C. 1790a.
- When acting as the conservator or liquidating agent of a FICU, the NCUA Board may take any action it determines is in the best interests of the credit union's account holders (members). 12 U.S.C. 1787(b)(2)(J)(2).

As discussed in a previous rulemaking, although referring

[1] This duty is based on the relationship of trust and confidence between the members and directors and arises because members' property is entrusted to the entity to be managed for the members benefit. Jean E. Maess, J.D., Corpus Juris Secundum 47 (2007).

specifically to the NCUA Board, these provisions support the conclusion that credit union directors have a fiduciary obligation to credit union members. 71 FR 77150 (December 22, 2006).

A closer look at how the cited provisions function, however, connects them to the [credit union's board of] directors. Specifically, the best interests of the members will dictate the [NCUA] Board's actions when removing or prohibiting a director, approving the appointment of a director, operating a conserved credit union in the role of the board of directors, and reviewing the propriety of a board of directors' decision to pursue a voluntary liquidation. If the best interests of the members standard guides the conduct of the [NCUA] Board, it must also guide the conduct of [the credit union's board of] directors.

Id.

While it is important for a credit union's board of directors to understand its duty to act in the best interests of the members in the ordinary course of business, NCUA believes it is especially important when the board is considering a proposal to change the credit union's charter or insurance status. These extraordinary transactions not only result in a fundamental shift in the credit union, but tend to present more conflicts between member interests and the personal financial interests of credit union management.

While the existence of a fiduciary duty owed by directors to members is clear, neither the Act nor NCUA regulations establish or provide any guidance as to what that standard of care is for directors. NCUA is considering establishing a regulatory standard of care for directors that will help ensure they meet their fiduciary duty to their members when directors are making decisions in connection with the transactions discussed in this ANPR.

NCUA has considered the standards of care that have developed in this area of the law, which, to a great extent, have developed in case law, applying fiduciary principles not only to situations involving trusts, but also in the corporate context. The result is that a credit union board currently must look to state law and case law to understand the scope of its fiduciary duties to members and the standard of care required as articulated by its particular state. Unfortunately, case law and state law can vary widely from jurisdiction to jurisdiction causing confusion for credit unions and a lack of uniformity between credit unions in one state and others in other states. As a result, the standard of care applying to these transactions can span a broad spectrum ranging from only requiring a board of directors to have a rational basis for making a decision to requiring the board to demonstrate that its decisions are made in the best interests of its members and based on a full consideration and documented analysis of all the alternatives.

Considering the unique interests, concerns, and structure of credit unions as financial cooperatives, NCUA believes having a uniform federal standard may be useful to eliminate confusion resulting from differences in state law and may make it easier for credit union boards to fulfill their duties to members. NCUA solicits comment on whether it should establish, by regulation, a uniform federal standard of care for the transactions discussed in this ANPR, including specific suggestions on the standard that should be applied and if there should be a separate standard of care for transactions where the credit union member will no longer be a member of a credit union.

(ii) Insider Enrichment

NCUA's experience with FICU to MSB conversions suggests that in some cases credit union officials have pursued personal enrichment to the detriment of members, and NCUA has issued disclosure requirements to make members aware of the potential for this. NCUA is aware of conversion transactions where family members of credit union officials had joined the credit union in noticeable numbers prior to the conversion. These new members, who may be motivated to share in the profits from an eventual sale of stock, can also skew the member vote on conversion in some instances, especially in a close vote.

NCUA is considering specific regulatory requirements regarding the record date for members voting on a conversion proposal or other transaction to prevent this problem. NCUA is interested in comments on any aspect of this issue.

(b) Member Right to Equity.

NCUA is broadly considering the issue of how to deal with unequal net worth ratios among merging credit unions. This imbalance may result in unfair treatment of members of a credit union with a higher net worth. One method NCUA is considering to address this issue is to require a merger dividend. Another option could be to simply require the board of directors of a merging credit union to consider this issue as part of its due diligence, come to its own conclusion, and then justify that decision to its members.

Generally, federal credit unions may only return net worth to members in the form of dividends or a return of interest. 12 U.S.C. 1761b, 1763. Dividends must be based on an account balance as of a specific date or calculated over a period of time, whether a month, a quarter, or several years. 12 CFR 707.7(a), Appendix B (b). Often, credit unions undertake a calculation of a dividend going back for a period of years to permit a credit union to reward long-time members.

As noted, a merging credit union often has a higher net worth ratio than the continuing credit union. Also, a merging credit union may have other valuable characteristics for which the continuing credit union is willing to pay a premium, such as a complementary field of membership, thus increasing the net worth of the merging credit union in the context of the merger. In recent merger transactions, issues about merger dividends, also sometimes called a ''share adjustment'' and ''capital equalization,'' have arisen because of the nature of dividends in credit unions. NCUA's Office of General Counsel has addressed this issue and concluded that so-called ''per capita'' dividends (a flat amount paid to all members) are legally impermissible. OGC Op. 07–0410 (April 13, 2007), OGC Op. 97–0813 (September 29, 1997).

NCUA recognizes that requiring a merger dividend or other return of interest in certain circumstances could include the following advantages: (1) Rewarding the merging credit union's members; (2) equalizing an imbalance in net worth between the credit unions, although this could lessen the merging credit union's value to the continuing credit union; and (3) establishing a consistent approach (e.g., setting a record date or dividend period, identifying the kinds of accounts to receive the merger dividend, and so forth).

On the other hand, NCUA recognizes that not imposing a merger dividend requirement in this area allows credit unions the flexibility to decide for themselves whether to include a merger dividend as part of their due diligence and negotiations and leaves calculation of any dividend to the merging credit unions, essentially allowing market forces and the wishes of the members to determine if a dividend is appropriate.

The Board notes that, in a recent FICU to stock bank merger, the merging FICU returned to its members their equity interest in the credit union plus a premium, and the Board believes a return of equity can be a fair way to compensate members for the loss of the credit union they own. In other transactions, such as FICU to MSB conversions, NCUA has noticed that

many of the converting credit unions seek to convert at a time when their net worth is high. In some instances, the conversion appears timed to occur after a period where the credit union has purposefully acted to increase its net worth. NCUA believes that, in those instances where excess equity has been built up, fairness to members may dictate payment of some equity to members of a merging or converting credit union instead of transferring it to a new institution where the credit union members will have less control and have diluted or no ownership interests.

NCUA seeks comment on all possible options for dealing with this issue either as an amendment to current regulations or by issuing a new regulation.

(c) Communications to Members: Improper or Misleading Communications to Members.

NCUA fully supports members' rights to vote, in accordance with the Act, to make changes to their charter or account insurance but believes the linchpin in these transactions is that communications to members regarding the risks and benefits of the transactions must be accurate, sufficiently comprehensive, and not misleading.

NCUA encourages a FICU converting to an MSB to communicate freely with its members. There are no limits or restrictions on the number or kind of communications, provided the communications are accurate and not misleading and otherwise comply with NCUA's rules for written member communications. An example of an improper, conversion-related communication is one that implies NCUA endorses the conversion or conversion-related materials. In a recent conversion transaction, NCUA discovered a credit union made this kind of improper communication to its members. Although the instances in which this issue has been most prevalent are FICU to MSB conversions, it also could arise in any transaction in which a credit union sends materials to its members, such as federal to private insurance conversions and FICU to bank mergers.

NCUA is considering the need for a regulatory provision that specifically prohibits communications from credit union officials that state or imply that NCUA has endorsed the charter change transaction or accompanying credit union materials. NCUA is also considering requiring a credit union to include a statement in its materials to that effect, namely, that NCUA has not endorsed the transaction. NCUA requests comment in this regard.

In a charter change transaction, a credit union may communicate with its members about the kind and quality of services it will provide after completion of the transaction. For example, a credit union may close or move branch offices or modify other services available to members, such as ATM services. It may choose to do this as a cost savings measure, to achieve better compatibility with the continuing financial institution, or for other reasons. In the FICU to MSB conversion context, a converting credit union may be legally required to close or move a branch located in a federal building that has been provided by a federal agency on a rent-free and utility-free basis.[2] Under any of these circumstances, members may face the diminution of services or have less convenient access to them.

An issue in a past FICU to MSB conversion was whether the credit union would be legally required to close or move a number of its rent-free branches located in federal buildings. In that transaction, the credit union made what appeared to be potentially inaccurate statements about its ability to continue to operate the branches in the same locations following conversion to an MSB.

In another FICU to MSB conversion, the credit union made arguably misleading statements to members about its ability to continue to participate in a shared branch/shared service center network after conversion. In that transaction, the credit union told its members it was seeking approval to obtain post-conversion access to the network but failed to disclose that its request could be denied resulting in the members not having access to the network.

Members need full and accurate information about a conversion to cast an informed vote, including if the transaction will result in the credit union closing or moving branches, losing access to shared branch/shared service center networks, or modifying other services available to members. NCUA is considering requiring converting credit unions to research this aspect of a transaction and disclose their findings to members. Alternatively, NCUA could issue a more general rule to address the need for full and accurate information. NCUA solicits comments on all aspects of this issue.

Another communications issue, which NCUA's rules do not specifically address, is the so-called ''hostile takeover'' scenario, where an institution communicates directly with the members of a target credit union to encourage a merger or other consolidation.[3] In the credit union context, the term ''hostile takeover'' may be a misnomer because there is no saleable stock. Generally, a hostile takeover refers to a takeover of a target company against the wishes of the target's management and board of directors through the purchase of a controlling interest in the target's stock. Failed merger negotiations between two federal credit unions recently resulted in the potential acquiring credit union communicating directly with the potentially merging credit union's members in a fashion that was deemed hostile by the management of the target credit union.

NCUA could consider addressing third party merger communications by relying on current regulations or issuing a new regulation. As noted above, NCUA regulations do not directly address this situation, although part 740 prohibits a FICU from using any advertising or making any representation that is inaccurate or deceptive or in any way misrepresents its services, contracts, or financial condition. 12 CFR Part 740. The limitations of current regulations such as Part 708b and Part 740 are also, in part, that they only extend to insured credit unions. While a new regulation addressing mergers by a hostile institution may be more effective than the *status quo,* it would not be without its own limitations. Specifically, NCUA has no direct jurisdiction over communications by non-credit union institutions with credit union members. Alternatively, an approach could be to establish communication standards that would have to be met as a condition of NCUA approval of a merger.

NCUA seeks comment on this topic in general and regulatory approaches to

[2] The Act authorizes federal agencies to provide federal credit unions space in federal buildings on a rent-free and utility-free basis if certain conditions are met. 12 U.S.C. 1770. The key condition is that ''at least 95 percent of the membership of the credit union to be served by the allotment of space * * * is composed of persons who either are presently federal employees or were federal employees at the time of their admission into the credit union, and members of their families * * *'' See also 41 CFR 102–79.40. MSBs do not have any similar authority, although it appears that, under General Service Administration regulations, commercial entities, including banks, can lease space on a rental basis in publicly-accessible areas of federal buildings.

[3] Outside of the credit union context, where there is a tender offer for stock of a public company (the mechanism by which a hostile bidder solicits the stockholders of the target), it triggers the provisions of the Securities Exchange Act of 1934 and Securities and Exchange Commission (SEC) rules. These provisions address communications by third parties to stockholders and, as noted in OGC Op 07–0342 (April 6, 2007), those SEC provisions provide detailed requirements regarding disclosures, tender offers, and other matters. SEC oversight in this regard helps protect stockholders by ensuring they are informed with accurate information about the transaction.

protecting the interests of credit union members in this context.

(d) *Member Voting: Right to Request a Recount and Use of Interim Tallies.*

For the transactions that are the subject of this ANPR, NCUA is considering permitting any member of a credit union to request a formal recount of the vote in any situation in which the margin of decision is less than a certain percentage of the total votes cast. NCUA has not determined the appropriate margin for triggering recount rights and believes examining state law on political vote recounts in this regard could be appropriate and useful. NCUA is also considering a recount provision if sufficient evidence exists that the original vote tabulation is unreliable.

NCUA has reviewed the voting procedures of a number of close votes in recent years. In those cases, NCUA found irregularities and improprieties that called into question the reliability of the vote. Examples of problems found include the credit union or its agent: Failing to compile a proper membership list thereby excluding some members from the vote; improperly excluding members from voting for causing a loss to the credit union; allowing individuals not fully qualified as members to vote; improperly handling mail ballots returned as undeliverable; employing poor internal controls in securing, counting, and recording votes; using inconsistent procedures for determining if a vote cast was invalid; and being generally unable to reconcile the tally.

An unreliable voting process, whether intentionally manipulated or the result of incompetence, deprives members of their right to choose the fate of their credit union. NCUA requests comment on providing members the right to request a recount, under what circumstances and criteria a recount should be undertaken, and procedures for exercising such a right.

The use by management of an interim vote tally presently is primarily an issue in the FICU to MSB conversion context but could be an issue anytime management has an interest in influencing the outcome of a membership vote. NCUA has observed in the voting procedures in some FICU to MSB conversions that credit union management seek periodic running tallies from the election teller as to how many members have voted yes and no and which members have not voted. Credit union management has justified this practice by stating they only use the information for the purpose of encouraging members to vote. In investigations of recent conversions, NCUA has discovered that, in practice, some credit unions use this information only for encouraging votes in favor of the conversion. This violates both Part 708a and typical credit union policies aimed at neutrality in this regard. For example, some credit unions have pressured, required, or paid employees to encourage members to vote in favor of conversion even where the employees did not wish to do so or did not believe conversion was in the members' best interests. NCUA has learned that some credit unions have targeted likely ''yes'' voters in an attempt to sway the vote in favor of conversion. Other tactics include determining how a member voted in violation of the voting secrecy requirement, using periodic voting tallies to management's advantage and to the disadvantage of those members opposed to the conversion by not sharing that information with members, and improperly handling ballots for members instead of having members mail them directly to the independent election teller.

NCUA is considering: (1) Prohibiting credit union management from obtaining interim voting tallies from the election teller; (2) prohibiting credit union management from obtaining lists of members who have not voted from the election teller; (3) prohibiting credit union employees from soliciting members to vote; and (4) prohibiting credit union employees from completing member ballots or otherwise handling ballots. NCUA would appreciate comments on these means for ensuring the integrity of the voting process.

Request for Comments

The NCUA Board invites comment on any of the issues discussed above including: (1) If NCUA's regulations should be amended to address the issues discussed in this ANPR; (2) if NCUA should promulgate new regulations for credit union merger or conversion into a financial institution other than an MSB and, if so, what those regulations should cover; and (3) any other relevant issues NCUA has not considered.

By the National Credit Union Administration Board on January 24, 2008.

Mary F. Rupp,

Secretary of the Board.

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LIBRARY OF CONGRESS

Copyright Royalty Board

37 CFR Part 384

[Docket No. 2007–1 CRB DTRA–BE]

Determination of Rates and Terms for Business Establishment Services

AGENCY: Copyright Royalty Board, Library of Congress.

ACTION: Notice of proposed rulemaking.

SUMMARY: The Copyright Royalty Judges are publishing for comment proposed regulations that set the rates and terms for the making of an ephemeral recording of a sound recording by a business establishment service for the period 2009–2013.

DATES: Comments and objections, if any, are due no later than February 29, 2008.

ADDRESSES: Comments and objections may be sent electronically to *crb@loc.gov.* In the alternative, send an original, five copies and an electronic copy on a CD either by mail or hand delivery. Please do not use multiple means of transmission. Comments and objections may not be delivered by an overnight delivery service other than the U.S. Postal Service Express Mail. If by mail (including overnight delivery), comments and objections must be addressed to: Copyright Royalty Board, P.O. Box 70977, Washington, DC 20024–0977. If hand delivered by a private party, comments and objections must be brought to the Copyright Office Public Information Office, Library of Congress, James Madison Memorial Building, Room LM–401, 101 Independence Avenue, SE., Washington, DC 20559–6000. If delivered by a commercial courier, comments and objections must be delivered between 8:30 a.m. and 4 p.m. to the Congressional Courier Acceptance Site located at 2nd and D Street, NE., Washington, DC, and the envelope must be addressed to: Copyright Royalty Board, Library of Congress, James Madison Memorial Building, LM–403, 101 Independence Avenue, SE., Washington, DC 20559–6000.

FOR FURTHER INFORMATION CONTACT: Richard Strasser, Senior Attorney, or Gina Giuffreda, Attorney-Advisor, by telephone at (202) 707–7658 or e-mail at *crb@loc.gov.*

SUPPLEMENTARY INFORMATION:

Background

In 1995, Congress enacted the Digital Performance in Sound Recordings Act, Public Law No. 104–39, which created an exclusive right for copyright owners