LUSE GORMAN

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LEGAL UPDATES AND NEWS

Preserving Your Credit Union's Equity Capital Through The Mutual Savings Bank Charter

Over the past several months, there has been increased discussion among credit unions regarding the need to assess the threat to their institution and equity capital base posed by the current (and future) TCCUSF assessments and the failure of natural person credit unions. One option currently being explored by credit unions to address the threat to their capital (and in order to retain their independence) is a conversion to a mutual savings bank charter.

Many credit unions, including a number of credit unions working with this firm, are conducting extensive due diligence on the mutual savings bank charter. Our attorneys are assisting credit unions in making an informed decision as to whether the institution can best serve the interests of the members by merging with another credit union (and losing its independence) or converting to a mutual savings bank (and remaining independent). With regard to future assessments, currently available information from independent sources provides quite a contrast to the information previously disseminated to credit unions by the "Credit Union Movement" and relied upon by credit unions.

Compare Deposit Insurance Funds

Under the credit union deposit insurance system, all institutions are assessed at the same rate regardless of their risk profile. FDIC insured institutions, however, pay insurance premiums based on risk; and good performing institutions do not subsidize the poor performers. Ironically, successful credit unions are further penalized since they must shoulder more of the assessment as they grow. Moreover, to the extent that credit unions fail or convert to a bank charter, the remaining credit unions share more of the burden. In comparing the two insurance funds you should consider the following:

- Over the past two years, credit unions have paid about 40 basis points in assessments and are likely to pay 25 basis points this year for the TCCUSF. That is far in excess of the FDIC premiums paid by healthy banks.
- The assets held by "troubled" credit unions as a percentage of total credit union assets is nearly three times the ratio for FDIC insured institutions.
- The funds currently available to cover estimated failure costs to be incurred by the NCUSIF and the TCCUSF is less than 50% while the coverage ratio for bank failures is almost 200%.
- The FDIC has resolved the bulk of the large bank failures as the average size of failing institutions continues to decline while many years of assessments for the TCCUSF and unresolved large problem credit unions remain.

Due Diligence

To conduct effective due diligence, a credit union must not only investigate the financial impact of a charter conversion, but the legal consequences as well. In order to fulfill a Board of Directors' **fiduciary duty** and protect its decision making process, Boards should consult with a law firm with extensive experience on these issues. The NCUA's recent regulation on fiduciary duty makes it clear that reliance on inexperienced advisors is not consistent with the Board's fiduciary duty mandate. Further, as the NCUA noted, the Board's fiduciary duty is to the members, not the industry.

There are any number of firms and advisors that are attempting to advise credit unions in this area and who do not have the necessary qualifications and experience. Before hiring any firm, whether legal or otherwise, Boards should ascertain their qualifications. **How many transactions have they completed? Who are their references? What failures have they had in the past?** Hiring a firm without experience in this area is not only more costly, but also it puts your Board at risk and can lead to unwelcome results. Luse Gorman actively represents banks, thrifts and credit unions and knows well the legal and regulatory environment for all institutions, especially with regard to these highly unique charter conversion transactions. Our experience includes the following:

- Luse Gorman is the only firm to complete a charter conversion under the revised NCUA rules.
- Luse Gorman, unlike other firms, has never had a vote invalidated by the NCUA, or had a voting solicitation process terminated or a final vote against a conversion.
- Luse Gorman attorneys have completed more credit union conversions (16) as well as mergers with savings banks than any other law firm.
- Luse Gorman is the leading firm in raising capital for former credit unions.

Coastway Credit Union

Our client, *Coastway Credit Union*, based in Cranston, Rhode Island, converted from a Rhode Island chartered credit union to a Rhode Island mutual savings bank in July 2009. This conversion was prompted by *Coastway's* highly successful member business lending program. *Coastway* is **the first and only credit union** to successfully navigate the NCUA's revised conversion rules and obtain a thrift charter. As a result of its conversion, *Coastway* is no longer subject to the special assessments and is free to pursue the full potential of its charter.

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If you would like to learn more about the mutual savings bank charter or assistance in your due diligence efforts, please contact one of the following attorneys of our firm. We are available to meet with you and can provide management and the Board with the information necessary to make an informed decision and ensure that your Board's decision is consistent with its fiduciary duty to the members.

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