New York State
Credit Union League, Inc.
and Affiliates

"Serving and supporting credit unions since 1917."

June 21, 2007

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

RE: RIN 3133-AD33
Member Inspection of Credit Union
Books, Records, and Minutes

Dear Ms. Rupp:

On behalf of the 503 credit unions represented by the New York State Credit Union League, I would like to take this opportunity to comment on the National Credit Union Administration's (NCUA's) proposed regulation which would amend 12 CFR Part 701 to add a new Part 701.3 giving members of federally chartered credit unions a right to inspect the books, records, and minutes of their credit union.

Like the NCUA, NYSCUL believes that as member cooperatives, it is essential that the maximum amount of information be available to members so that they are in the best position possible to assess the effectiveness of a credit union and management team. Likewise, NYSCUL believes that uniformity is a worthwhile goal so long as uniformity doesn't come at the expense of other competing concerns. However, as laudable as the ends that NCUA is seeking to foster are, I am concerned that this proposed regulation will ultimately result in the imposition of a counterproductive administrative burden. The existing State law framework for dealing with issues relating to member access to books, records and minutes is more than adequate. In addition, aspects of this proposed regulation are so broad that credit unions will be forced to provide and retain information that is not related to board records or minutes in any meaningful way.

Background

NCUA has long recognized that credit union member inspection rights are analogous to the rights of corporate shareholders and are to be governed by State law. (See e.g. NCUA Opinion Letter February 6, 2006). Consequently, to understand the concerns NYSCUL has with this proposed regulation, it is useful to examine how New York State already appropriately regulates the issues in this area. Many of the concepts described below are found in statutes across the country.

Section 624(a) of New York State's Business Corporation Law details the inspection rights of corporate shareholders.[1] This provision mandates that each corporation keep a complete copy of books, records of account and minutes of proceedings of its shareholders, boards and executive committees.

[1] Similar provisions are contained in §621 of New York's Not-For-Profit Law.

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Section 624(b) of the BCL provides "any person who shall have been a shareholder of record for a corporation upon at least five days' written demand shall have the right to examine in person or by agent or attorney...its minutes of the proceedings of its shareholders and record of shareholders and to make extracts therefrom for any purpose reasonably related to such person's interest as a shareholder."

Section 624(d) provides that upon the refusal "by the corporation...to permit the inspection of the minutes of the proceedings of its shareholders or of the record of the shareholders...the person making the demand for inspection may apply to the Supreme Court in the judicial district where the office of the corporation is located...for an order directing the corporation to show cause why an owner shall not be granted permitting such an inspection...if it appears that the applicant is qualified and entitled to the inspection, the court shall grant an order compelling inspection and awarding such further relief as to the court may seem just and proper."

This statute, as well as its counterpart in New York's Not-For-Profit Corporation Law, is to be liberally construed so as to facilitate communication among shareholders. See Application of Huber, 210 N.Y.S. 2d 211 (1960). The burden is on a corporation to justify its refusal to allow an inspection of records and minutes as opposed to placing the burden on a person to show why he or she is acting in good faith. The courts are given broad discretion to interpret this statute so as to maximize the interest of shareholders. See In re Bohrer v. International Banknote Company, 540 N.Y.S.2d 445 (1st Dep't 1989). For example, a "good faith" basis for seeking the inspection of records includes reasons that are "reasonably related to the shareholder's interest in the corporation". See Tatko v. Tatko Brothers Slate Company, Inc., 173 A.D.2d 917 (3d Dep't 1991).

In addition, this statute is a supplement to and not a replacement for the common law right of a shareholder to inspect board minutes, records, and proceedings. See Rockwell v. SCM Corporation, 496 F. Supp. 1123 (S.D.N.Y. 1980). As a result, where a shareholder's request is not covered under the statute, he may still be able to gain redress via the courts.

The Proposed Regulation is Duplicative of State Law

Since the proposed regulation does not preempt but would rather complement existing State statutes in the area of shareholder review, the regulations would duplicate State law. As can be seen from the above analysis, New York State law adequately provides extensive review in this area, including in the areas which appear to be of most concern to the NCUA.

For example, the good faith reasons shareholders may review a corporation's records include examining executive salaries and expenses;[2] encouraging shareholders to vote against the existing board of directors who have engaged in financial mismanagement;[3] and opposing a merger plan encouraged by management.[4] As can be seen from even this small sample, State Law already addresses the precise issues covered by this regulation, so absent a compelling reason for doing so, there is little justification for regulating in this area.

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[2] See Harington v. Milton C . Johnson Co., 283 A.D. 865 (1st Dep't 1954).
[3] See In re S. & S. Realty Corp. v Kleer-Vu Industries, Inc., 384 N.Y.S.2d 796 (1st Dep't 1976).
[4] See Huber.

A primary reason put forward by NCUA for promulgating this regulation is that implementation of a nationwide regulation would encourage uniformity, an increasingly important issue since at least some credit unions operate now in more than one state. As attractive as the idea of uniformity is, however, the reality is that this proposal would create less uniformity, not more. Under existing State law, credit unions would still be subject to challenges under both statutory law and common law, but would now also face challenges under this regulation.

Furthermore, the most contentious litigation in this area involves fact sensitive inquiries. As a result, uniform regulations, no matter how expertly drafted or implemented, would be of only limited value. The regulations would replace judges with more than 100 years of case law in this area with NCUA administrators who will effectively become arbitrators in these fact sensitive disputes. This is not a role that the agency should desire for itself; it is not a role that the agency is particularly equipped to play.

NCUA is concerned about how some State court rulings have impacted credit union management, particularly in the area of mergers and conversions. However, the answer to these concerns is to do exactly what it has already proposed to do in the context of other regulations and proposed regulations. NCUA is proposing putting the bylaws back in regulation to insure it has the right to enforce its own bylaws and has already strengthened oversight of the credit union conversion process by mandating that members have increased notice of conversion proposals. At the very least, proposals in these areas should be fully implemented and analyzed before NCUA feels the need to pass regulations in the area of member review.

There are several changes that could improve this proposal by clarifying its scope

If the NCUA feels the need to go forward with these regulations, there are several steps it could take to mitigate the potential abuses of this proposal. Under New York State law, when a corporation refuses to provide information that a shareholder feels he or she is entitled to, that person has the right to take the corporation to court. As part of that proceeding, the party seeking the information must provide an affidavit stating the reasons why in good faith he or she feels entitled to this information. Under this proposed regulation, where either party seeks to bring these disputes to the regional directors, it should be specified that the lead petitioner must make a similar attestation.

Under the proposal, petitioners would have to state a reason why they wish to receive the information that is related to the "business of the credit union." This standard is too open-ended. Any information related to the credit union relates to the business of the credit union. The definition should be narrowed to include business relating to the credit union that the members have a good faith basis for believing directly affects the proper management and administration of the credit union.

NCUA intends that "minutes" be interpreted to include the proceedings of all meetings of the directors, which include all documents, reports, studies and visual aides. This proposed definition is also too expansive. For instance, a notepad on which a guest speaker jotted notes would have to be kept indefinitely by credit unions to have it at the ready should a member one day request the minutes of specific meetings.

Furthermore, a requirement that includes all documents, even if they don't reflect decisions ultimately passed by the board but were nonetheless considered at a meeting, could have a chilling affect on the open discourse of directors. For example, under this proposal if a credit union considered A, B and C, but ultimately rejected A and B, all documentation supporting the rejection would also have to be included.

The board should not try to come up with a definition of what exactly constitutes minutes and records. Instead, the issue is ultimately a fact specific one, which will depend as much on the context of a given request as on the nature of why it is being requested. As a result, like judges in New York State, regional directors should be given maximum flexibility to define on a case-by-case basis precisely what constitutes a minute and record appropriate for distribution in a given situation.

Finally, to avoid forum-shopping, the regulations should specify that although a member may use either state or federal remedies to seek review of corporate records, the federal avenue would be foreclosed to those members who have already litigated the issue in court. This avoids the very real dilemma of people turning to NCUA not because they think it is the place to receive the best remedy, but because they simply don't like a court's decision.

In conclusion, while NYSCUL supports and recognizes the need to maximize openness and to ensure ultimate membership participation, this proposal represents a solution in search of a problem. It dramatically preempts 100 years of State law and does so in a manner that is likely to result in less and not more uniformity.

Sincerely,

William J. Mellin
President/CEO