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June 22, 2007

Via Email

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

Re: *Proposed Rule—Member Inspection of Credit Union Books, Records and Minutes (12 CFR Part 701)*

Dear Ms. Rupp and Members of the NCUA Board:

We appreciate the opportunity to comment on NCUA's proposal to create a new regulations regarding member inspection rights of credit union books, records and minutes (Sec. 701.3). Our law firm represents nearly one hundred federal credit unions throughout the country many of whom will be adversely affected by certain provisions of the rule as proposed.

We are very concerned about NCUA's proposal to impose new and unnecessary regulations upon a federal credit union's ("FCU") corporate governance without citing any statutory authority or reasonable need for such requirements. We believe the proposed rule exposes FCUs to new risks of member conflicts and increased legal expenses that FCUs currently do not have based upon their existing policies and practices of reasonably balancing member inspection rights with the FCU's need to protect confidential and proprietary records.

We urge NCUA to withdraw the proposed rule and allow FCUs the same ability to establish reasonable and balanced policies and practices for member rights consistent with the policies and practices that state chartered credit unions can establish and maintain under most state chartered credit union acts. We believe that the additional restrictions and risks that this proposed rule creates for FCUs unnecessarily diminishes the value of the FCU charter. Furthermore, we do not believe members of FCUs are well served by ad hoc corporate governance rules that do not strike a fair balance to protect the interests of both the members and the FCU.

1. Overregulation.

a. Lack of Statutory Authority. In the background to NCUA's proposed rule, NCUA provides no statutory authority that provides a basis for broad member inspection rights. In fact, the Federal Credit Union Act (FCUA) contains no provisions that would extend such broad records inspection rights to members. NCUA cites only three sources of legal authority, none of which provide a compelling basis for this rule.

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First, NCUA recognizes its own legal opinions that defer to state corporation law. However, NCUA is now making a major policy change to disregard state law in lieu of NCUA's own rule. Second, NCUA cites the Washington Appellate case of *Save Columbia Credit Union Committee v. Columbia Credit Union* as an incorrect legal decision regarding state corporation law. We do not believe NCUA's characterization of the validity of this Washington decision is accurate or an appropriate justification to empower itself with the exclusive authority over FCU/member dispute resolutions over member access rights and to preclude both FCUs and their members from relying upon the judicial system for resolution of such disputes. Last, NCUA has identified an isolated OTS rule that individual shareholders or groups of shareholders of a thrift institution have rights to inspect the thrift institution's books and records (the "OTS Rule"). While an analogy between members of FCUs and shareholders of a thrift institution can be made, the differences between credit union members and thrift shareholders far exceed the similarities. The OTS Rule represents an inapplicable authority for and ineffective provision for FCUs and their members to establish fair access rights to FCU records.

b. Lack of Abuse or Need for Rule. In its proposed rule, NCUA has not cited or articulated any cases or examples of lack of member inspection rights or improper actions of FCUs denying member information necessary to make informed decisions that compel such broad new records requirements. It appears NCUA is proposing this rule as another provision in a series of anti-conversion rules. Unfortunately, the broad scope of this rule goes far beyond preventing charter conversions and adversely affects all FCUs, the vast majority of whom have absolutely no intention of considering a charter conversion.

2. Problem Areas of Proposed Rule.

The proposed rule establishes sweeping new rights for members to inspect and copy nonconfidential portions of any FCU books and records along with five procedural requirements to implement and support the inspection right. We believe there are significant problems in the proposed rule which largely stem from the inadequately drafted OTS Rule that NCUA used to draft this proposed rule.

a. Overbroad Scope of Records Access. The scope of credit union records accessible under the proposed rule is practically limitless. While NCUA states that the "inspection rights are limited to nonconfidential portions of the credit union's books, records and minutes," NCUA provides an unreasonably narrow definition of what is "confidential" in proposed paragraph (d).

NCUA provides for three narrow sets of records that could be protected under this confidentiality exclusion. The three exclusions basically address records, the disclosure of which would violate other state or federal laws. The proposed rule includes no provisions that afford an FCU Board discretion to determine and protect other credit union "confidential records" the disclosure of which could cause great harm to the FCU, its volunteers, employees and members. In contrast, the OTS Rule does provide thrifts with such discretion and does not unfairly limit a thrift institution's reasonable discretion to protect itself from overbroad records requests for confidential or proprietary records.

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To the extent an FCU's Board discussions, notes, information and proprietary records on sensitive and strategic matters have no confidentiality protection, this proposed rule will have a seriously adverse chilling effect on all FCU Board's deliberations, not just those related to matters subject to a potential member vote. Such lack of protection will definitely undermine a FCU Board's ability to make informed business decisions and otherwise exercise their fiduciary responsibilities. This will only lead to less Board discussion and certainly higher legal costs.

Based on the narrow confidentiality provisions in paragraph (d), members will now have the ability to inspect, copy and ultimately distribute critical and sensitive credit union documents and records including: business plans, marketing strategies, branching strategies, competitive products and services analyses, employment agreements, deferred compensation plans and retirement benefit plans, and employment applications, resumes and reference letters, etc.

These documents may contain sensitive and/or proprietary information about the FCU, its business and competitive strategies as well as private employee information or private member information not otherwise protected under NCUA's Privacy Rule (Part 716) the disclosure of which could cause great harm to a FCU, its employees and members. Furthermore, many of these documents may contain confidentiality or nondisclosure obligations of the FCU, which will immediately force an FCU to breach such legal obligations in an effort to comply with NCUA's proposed rule. With respect to this type of risk, the NCUA rule should provide for grandfather protection for existing documents, records or agreements the disclosure of which would or could cause liability to the FCU.

We believe paragraph (d) should be revised to include an exclusion that would afford an FCU Board the ability to protect records and information or portions of records the Board reasonably believes to be of a confidential and proprietary nature that in the best interest of the FCU should remain confidential unless disclosure is otherwise required by law. This policy and practice is currently followed by many FCUs and state chartered credit unions effectively and without unfairness to or disputes by members. NCUA's proposed rule removes an FCU's ability to reasonably work with its members to keep them informed while protecting private and sensitive information of the credit union, its employees and members.

b. Inadequate Proper Purpose Standard. Typically any request for corporate records from a credit union or private corporation must be founded upon a "proper purpose." However in the proposed rule, NCUA has provided a much lower and less reasonable standard. NCUA simply requires that "a purpose" be stated and then basically copies the OTS Rule that requires the record request to disclaim that the purpose(s) relate to an outside business interest or sale of member information. This provision provides a meaningless if not dangerous standard of protection. As drafted, a member can petition for inspection of an FCU's records with an improper purpose such as to discredit or defame a Board candidate in a director election campaign, etc. and would have an unrestricted right of access to the FCU's records to carry out such an action. So long as the information will not be "sold" or the requesting group has not sold similar information in the past, the FCU has no discretion to prevent the access for any impermissible or improper purpose.

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This proposed provision provides unreasonable protection to the FCU and could be easily revised to better balance the interests of members and the FCU. First, we believe the Rule should be revised to require that the record request purpose be based upon a "proper purpose." Second, the references to the petition disclaimers for undesired purposes (e.g. sale of member information) are ineffective, unnecessary and should be removed. Last, the Rule should afford the FCU Board the reasonable discretion to prevent records access in situations where the purpose is not proper or would not be in the best interests of the FCU or its members. Both the FCU and members would be far better protected under a revised paragraph (d) that gave some reasonable discretion to the FCU Board in protecting the confidentiality of records containing proprietary and private information about the FCU, its volunteers, employees and members.

c. Lack of Protection for Records Accessed by Members. The proposed NCUA rule provides absolutely no protection to the FCU once a particular document or record is accessed and disclosed. The rule is totally void of any restrictions upon members from freely disclosing or distributing FCU records to other members and nonmembers, or posting such records or information on a website for the entire public to read. The only protection the proposed rule establishes is that such information cannot be sold. Such a standard provides no protection to the FCU and could cause substantial harm to the FCU when business plans, branch strategies, competitive analysis, product pricing information, trade secrets, compensation information and similar records are distributed to the public. A FCU should not be forced to obtain a restraining order on improper records distribution or wait through a drawn out appeal to an NCUA Regional Director office in order to protect the FCU from such damage. Rather, the proposed rule should provide that the FCU can, prior to records access, require petitioners to sign a reasonable confidentiality agreement to protect proprietary information of the FCU. Such a provision provides a far better balance of the interests of both the FCU and members.

d. Lack of Independent Dispute Resolution. We do not believe the proposed rule provides for a reasonable, fair or independent dispute resolution process. The OTS Rule, from which NCUA's rule tracks, contains no such provision requiring the thrift regulator, OTS, be the sole and exclusive body to which records challenges are resolved. Rather, the OTS rule would allow dispute resolutions be conducted by an independent body including local federal or state courts. Under NCUA's proposed rule, NCUA empowers itself though its Regional Director Offices to have the total authority and discretion in resolving a dispute without any time requirements or appellate process. Such a structure would carry no independence if the matter related to the records request was also a matter requiring NCUA's approval such as a merger or similar corporate action. Such lack of independence or legal due process is not fair or reasonable for either an FCU or its members. The proposed dispute resolution process should be deleted so an independent body and an established and experienced appellate process are afforded to all parties.

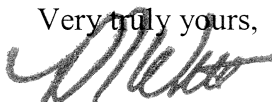
Given the significant problems of the draft proposal and the lack of a compelling need for new regulations, we respectfully request that NCUA consider withdrawing the rule and allow FCUs and

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their members to follow existing reasonable policies and practices that would achieve a more effective balance of their interests. Alternatively we request NCUA consider the risks created by the proposed rule and undertake revisions to minimize such risks to FCUs.

Very truly yours,



Brian R. Witt

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