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1120 Connecticut Avenue, NW
Washington, DC 20036

1-800-BANKERS
www.aba.com

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C. Dawn Causey
General Counsel
Phone: 202-663-5434
dcausey@aba.com

June 22, 2007

By Electronic Delivery

Mary Rupp, Secretary to the Board
National Credit Union Administration
1775 Duke Street
Alexandria, Virginia 22314-3428
regcomments@ncua.gov

Re: **NCUA** -- 12 CFR Part 701; "Member Inspection of Credit Union Books, Records, and Minutes;" 72 Federal Register 20061, April 23, 2007.

Dear Ms. Rupp:

The National Credit Union Administration (NCUA) proposes to amend its current rules by adding a new regulation that provides for credit union member inspection rights of books and records of the credit union. This rule will eliminate the Board's prior reliance on state corporation law and set a "consistent standard" for federally chartered credit unions.

The American Bankers Association (ABA) appreciates the opportunity to comment on this proposal on behalf of the more than two million men and women who work in the nation's financial services industry. ABA brings together all categories of banking institutions to best represent the interests of this rapidly changing industry. Its membership--which includes community, regional, and money center banks and holding companies, as well as savings associations, trust companies, savings banks, and bankers banks--makes ABA the largest banking trade association in the country.

ABA supports the NCUA's efforts at increasing transparency at federal credit unions and supports the NCUA's adoption of rules similar to those of the Office of Thrift Supervision (OTS). ABA suggests that NCUA consider adopting the OTS rules more completely in order to address situations not covered by NCUA's proposal and to balance the information needs of credit union members with the efficient operation of the credit union.

The OTS has three regulations on the issue of member or shareholder inspection of books and records of savings associations – 12 CFR § 544.5(b)(7); 12 CFR § 544.8; and 12 CFR § 552.11. The NCUA proposal only borrows from 12 CFR § 552.11, equating shareholders with credit union members. ABA suggests that because neither credit unions nor mutual savings associations have the breadth of case law or regulations governing access to company financial books and records

as exist in the securities laws, there is a gap in determining what is or is not a proper communication or purpose for access to those books and records. The OTS has filled this gap with 12 CFR § 544.8(c). Among the items addressed in that section are issues dealing with false or misleading statements, personal grievances, personal or business gain or advantage, "hate speech" of any kind, and "statements impugning the stability and soundness" of the mutual institution (12 CFR § 544.8(c)(4)(iii)). ABA urges NCUA to add a similar provision as credit union members should be as protected as members in federal mutual savings associations.

In addition, 12 CFR § 544.8(b)(7) provides an informal dispute resolution process by copying the OTS Regional Director with all of the documents surrounding the request of the mutual member. There are set timelines in order to provide timely consideration by the Regional Director. This less formal process has worked for the OTS and ABA urges its consideration by the NCUA. Inherent in the OTS Regional Director consideration is the ability to negotiate a settlement between the parties. This is similar to the procedure the NCUA proposes at 12 CFR § 701.3(f); however, NCUA did not adopt the time frames present in 12 CFR § 544.8(b)(7). ABA encourages the NCUA to adopt similar timeframes in order to provide greater predictability to the process.

While not present in the language of the proposal, the preamble to the proposed rule discusses a number of issues that cause concern. The first concerns confidential information about the business of the credit union. Contrary to the preamble's statements that "credit unions do not generally have trade secrets," (72 Fed. Reg. 20061, 20065; April 23, 2007) ABA respectfully suggests that all businesses, whether cooperatively or shareholder owned, have business plans and activities that would qualify as trade secrets that they would not care to have others, whether competitors or not, be made aware. These might include branching plans, new activities, or marketing plans under development.

Similarly, credit unions for a variety of reasons may have confidential information subject to attorney-client or other privilege that should not be made available to credit union members. These may include potential lawsuits against members for failure to repay loans or evaluations of experts of the credit union such as real estate appraisers. The NCUA's statement that the OTS rules do not contain a privilege exception is technically correct – the OTS rules are silent; however, the OTS's practice is not to make privileged materials available to mutual members. Privileged materials are not available to shareholders in stock institutions as a matter of case law. ABA encourages the NCUA to consult with the OTS on its rules before making the proposal final particularly on issue of long standing judicial notice.

Further, NCUA may wish to consult with the Department of Justice (DOJ) on the attorney-client and work product privileges. As stated in the Memorandum from Deputy Attorney General Paul J. McNulty entitled "Principles of Federal Prosecution of Business Organizations" (December 2006) (superseding and replacing guidance contained in the Memorandum from Deputy Attorney General Larry D. Thompson entitled "Principles of Federal Prosecution of Business Organizations" (January 2003)):

> Prosecutors may only request waiver of attorney-client or work product protections when there is a legitimate need for the privileged information to fulfill their law enforcement obligations. A legitimate need for the information is not established by concluding it is merely desirable or convenient to obtain privileged information. The test requires a careful balancing of important policy considerations underlying the attorney-client privilege and work product doctrine and the law enforcement needs of then government's investigation.

(McNulty Memorandum, pp. 9 & 10). If DOJ must weigh carefully the sensitivity of privileged materials, NCUA has a high burden to demonstrate why it may make privileged materials available to credit union members.

ABA also urges the NCUA to be sensitive to the unintended consequences of an expansive books and records inspection right. Credit union board members are volunteers and should not feel compelled to constantly second guess themselves as to the possible use or misuse of their decisions or deliberations. This may have a chilling effect on the willingness of volunteers to serve on credit union boards. Who can predict with any degree of certainty what will provide the basis for a lawsuit? The Public Securities Litigation Reform Act of 1995 was enacted as a check against abusive litigation in private securities fraud actions. Credit unions have no such protection.

Because the OTS rules for mutual members' access to books and records seek to balance the proper interests of members and the mutual savings association, there are compromises in the OTS rule that are absent in the NCUA proposal. These include recognizing common privileges and confidentiality. They also include requiring a minimum of number of shareholders who have held their shares for at least six months. This latter requirement avoids the opportunistic shareholder seeking a quick return or advantage from accessing books and records and grants the savings association some predictability and stability in its operations. ABA urges the NCUA to include a similar minimum membership time period to its proposed rule.

ABA also encourages NCUA to follow the OTS example requiring a minimum percentage of members in order to access books and records. Such a requirement encourages credit unions to maintain their membership rolls accurately and will assist the NCUA in its efforts to supervise in this area. NCUA's cited reason for the floor of 20 and a ceiling of 250 is that the standard bylaws for federal credit unions use this measure for petitions for nominations to the board. As the standard bylaws are able to be customized, the analogy may not be correct for any number of federal credit unions. ABA urges adoption of the simple percentage approach of the OTS. To do otherwise suggests that federal credit unions may not maintain accurate lists of their members.

Conclusion

ABA supports the NCUA's efforts at increasing transparency at federal credit unions and encourages the NCUA to consider amending the final rule to reflect the items noted above. Thank you for considering our views.

Sincerely,

C. Dawn Causey