

campaign funds to the Commission. Therefore, the attached final rule does not have a significant economic impact on a substantial number of small entities.

#### List of Subjects in 11 CFR Part 113

Campaign funds.

#### PART 113—USE OF CAMPAIGN ACCOUNTS FOR NON-CAMPAIGN PURPOSES

■ For the reasons set out in the preamble, the Federal Election Commission is amending Subchapter A of Chapter I of Title 11 of the *Code of Federal Regulations* as follows:

■ 1. The authority citation for Part 113 continues to read as follows:

**Authority:** 2 U.S.C. 432(h), 438(a)(8), 439a, 441a.

■ 2. Section 113.2 is amended by:

■ a. Adding paragraph (d);

■ b. Redesignating paragraphs (e) and (f) as paragraphs (f) and (g);

■ c. Adding new paragraph (e) ;

■ d. Amending newly redesignated paragraph (f)(1) introductory text by removing the reference “paragraph (e)(5)” and inserting in its place, the reference “paragraph (f)(5)”;

■ e. Amending newly redesignated paragraph (f)(1) introductory text by removing the reference “paragraph (e)(1)(i)” and inserting in its place, the reference “paragraph (f)(1)(i)”;

■ f. Amending newly redesignated paragraph (f)(1)(ii)(A) by removing the reference “paragraph (e)(1)(i)” and inserting in its place, the reference “paragraph (f)(1)(i)”.

#### § 113.2 Permissible non-campaign use of funds (2 U.S.C. 439a).

\* \* \* \* \*

(d) May be donated to State and local candidates subject to the provisions of State law; or

(e) May be used for any other lawful purpose, unless such use is personal use under 11 CFR 113.1(g).

\* \* \* \* \*

Dated: September 24, 2007.

**Robert D. Lenhard,**

*Chairman, Federal Election Commission.*

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**BILLING CODE 6715-01-P**

#### NATIONAL CREDIT UNION ADMINISTRATION

#### 12 CFR Part 701

RIN 3133-AD33

#### Member Inspection of Credit Union Books, Records, and Minutes

**AGENCY:** National Credit Union Administration.

**ACTION:** Final rule.

**SUMMARY:** The National Credit Union Administration (NCUA) is issuing a final rule on member inspection of federal credit union (FCU) books, records, and minutes. The rule provides that a group of members representing approximately one percent of the membership, with a proper purpose and upon petition, may inspect and copy nonconfidential portions of the credit union's books, records, and minutes. This rule standardizes and clarifies existing member inspection rights.

**DATES:** This rule is effective November 2, 2007.

**FOR FURTHER INFORMATION CONTACT:** Paul Peterson, Staff Attorney, Division of Operations, Office of General Counsel, at the National Credit Union Administration, 1775 Duke Street, Alexandria, Virginia 22314-3428 or telephone (703) 518-6540.

#### SUPPLEMENTARY INFORMATION:

##### A. Background

In April 2007, the NCUA Board published a proposed rule on member inspection of FCU books, records, and minutes. 72 FR 20061 (April 23, 2007). The proposal provided that a group of members representing approximately one percent of an FCU's membership, upon petition and with a proper purpose, may obtain access to the nonconfidential portions of the FCU's books, records, and minutes. As stated in the preamble to the proposal, the NCUA Board intended it to replace existing NCUA legal opinions stating FCU members may inspect an FCU's books and records under the same terms and conditions that state corporation law where the FCU is located permits shareholder inspection of corporate records. The NCUA Board believes regulating member inspection of FCU records is preferable to reliance on state corporation law because corporation law on shareholder inspection varies from state to state and all FCUs should have the same standard regardless of an FCU's location. In addition, some courts may refuse to apply their state corporation law to inspection requests by FCU members or may incorrectly

analogize the financial interests of credit union members to those of depositors in a mutual savings bank and deny members inspection on those grounds. In fashioning the proposed rule, the Board identified an existing Office of Thrift Supervision (OTS) rule governing the right of shareholders to inspect the books, records, and minutes of federal stock savings associations. 12 CFR 552.11 (OTS Rule). The proposal tracked the OTS Rule in large part.

The public comment period closed on June 22, 2007. NCUA received 37 comments on the proposal. After consideration of the comments, NCUA has prepared this final rule on member inspection of FCU books, records, and minutes.

##### B. Public Comments

Several commenters believed the rule and its petition process were unnecessary. Some of these commenters suggested that member access to FCU information should be limited to information the FCU, in its discretion, determined to release to its members. Other commenters stated the existing member access process, that is, reliance on state corporation law to determine member rights, was adequate.

The NCUA Board disagrees with these commenters. Permitting members access to FCU information at the discretion of the FCU would limit FCU transparency and treat FCU members as something less than the true owners of the FCU. Also, as discussed in the preamble to the proposed rule, reliance on State law and State courts to apply State law to FCUs has not worked well in the context of member access to FCU records. 72 FR 20061, 20062 (April 23, 2007). Accordingly, this final rule retains the proposed process for members to obtain access to FCU records by petition.

Many commenters stated that, if the NCUA retained the proposed petition process, it should provide additional protection for credit unions and credit union records. Some of these commenters argued the proposed rule would make it too easy for competitor credit unions and banks to acquire sensitive financial information. Some of these commenters also felt special interests could use the petition process in a repetitive fashion to paralyze a credit union. Many commenters also believed that the proposal went too far in making the information related to the compensation, benefits, and qualifications of senior management available to members.

Upon consideration of the public comments the NCUA Board has made several changes in the member petition

process. The various specific comments and NCUA's responses are discussed in the following section-by-section analysis.

#### *Section 701.3(a) Member Inspection Rights*

This proposed paragraph established the right of a group of members, upon submission of a proper petition, to inspect and copy nonconfidential portions of books and records of account and minutes of the proceedings of the credit union's members, board of directors, and committees of directors.

A few commenters stated that, if the phrase "books and records of account" meant "accounting records," the rule should say so more specifically. The Board concurs with these commenters and has changed the rule to more clearly reflect this. One commenter asked if "books and records of account" included only "high-level" records, such as consolidated financial statements or income statements, or also included records with more detail, such as general ledger postings. The scope of books and records covered by the rule includes all financial documents, including those with detailed information, subject to the confidentiality provisions in § 701.3(d) as discussed below.

A few commenters stated that, if the credit union's minutes are available to others, the credit union would likely be more circumspect in the details in its minutes causing off the record decision-making and making NCUA examination and review more difficult. Another commenter, however, felt that the rule would encourage FCUs to be overly detailed in their minutes to avoid the prospect of litigation. Several commenters also felt members should only have access to written minutes, and not other recordings or documents, reports, studies, or visual aids considered by the meeting participants.

The NCUA Board believes that directors have an obligation to make informed decisions and to record the basis for those decisions. Further, members have a right to information that will help them understand how directors made their decisions. NCUA and its examiners may also need to know how directors and members reached particular decisions and so expect that the records created by the FCU will be complete in this regard. Accordingly, for purposes of this rule "minutes of the proceedings at all meetings of its members, board of directors, and committees of directors" includes not only the information contained in the formal summary of the proceedings, but also any recordings,

documents, reports, studies, visual aids, or other information considered by the meeting participants.

A few commenters suggested that access to older records should be limited because of the difficulty in locating older documents. The Board notes that, if an FCU maintains older records, it must make them available for inspection and copying upon receipt of a proper petition. Although a credit union may find it more difficult to locate older records, the costs of search and duplication are born by the petitioners as provided for in § 701.3(e) of the rule, discussed below.

A few commenters wondered if the proposed rule created new records retention requirements or otherwise affected a credit union's ability to "purge" records. One of these commenters asked if the rule required a credit union, for example, to retain indefinitely the documents considered by a credit union's board. This same commenter asked if the retention requirement extended to information related to documents associated with courses of action the credit union board rejected, in addition to those the credit union decided to pursue.

An FCU must have records retention policies that are reasonable and that meet its operational requirements and the requirements of the law. This final rule on member inspection of FCU records, however, is not a records retention rule and imposes no retention requirements on FCUs. Accordingly, an FCU that receives an inspection petition need not reconstitute responsive records it may have had at one point but destroyed before the date it received the petition. Also, an FCU need not create new records to respond to a member request.

Accordingly, and except as discussed above, the Board adopts § 701.3(a) as proposed.

#### *Section 701.3(b) Petition for Inspection*

This proposed paragraph set forth the petition requirements. The proposal stated that at least one percent of the credit union's members, with a minimum of 20 members and a maximum of 250 members, must sign the petition. The petition must describe the particular records to be inspected and state a purpose for the inspection related to the business of the credit union. The petition must state that the petitioners as a whole, or certain named petitioners, agree to pay the direct and reasonable costs associated with search and duplication of requested material. The petition must also state that the inspection is not desired for any purpose in the interest of a business or

object other than the business of the credit union and that the petitioners have not in the past, and do not intend now, to sell or offer for sale any information obtained from the credit union. The petition must name one or more members who will represent the petitioners on issues such as inspection procedures, costs, and potential disputes.

Several commenters thought the required petition language that the information requested "is not desired for any purpose in the interest of a business or object other than the business of the credit union" should be clarified. Other commenters thought the rule should include a more specific reference to a proper purpose. One commenter suggested a proper purpose be defined as a purpose related to the "proper management and administration of the credit union."

As noted in the preamble to the proposed rule, a proper purpose for an inspection petition is a purpose that relates to the protection of the members' financial interests in the credit union. 72 FR 20061, 20062 (April 23, 2007). The Board has amended the final rule text to include this definition. Member financial interests in the credit union include the types of financial products offered by a credit union, the fees and rates charged by the credit union for those services, and how those services are delivered to the members. The members also have a financial interest in how the FCU builds and manages the net worth of the FCU.

There were many comments about the minimum number of required petition signatures.

Several commenters thought the proposal's base requirement of one percent of the members was too restrictive. A few of these commenters stated any one member who wanted to see nonconfidential books or records should be allowed to do so without a petition. One commenter stated that, if the rule did not grant inspection rights to any one member, NCUA should adopt a petition standard of half of one percent of the members, or the lesser of one percent or ten members.

The majority of the commenters, however, thought the proposal made it too easy for members to obtain records. Some of these commenters felt there should be no upper limit on the number of necessary signatures. Several of these commenters suggested the upper limit should be 500, not 250, signatures. One commenter suggested a "sliding scale flat cap" based on the size of the credit union. One commenter suggested a minimum of 250 members for smaller credit unions and no upper limit for

larger credit unions. A few commenters expressed concern that a group of 250 or fewer members could make multiple and repetitive inspection requests and keep the credit union from focusing on providing services to its members. A few commenters thought only members who have been members for awhile, such as at least six months, should be permitted to sign the petition.

The requirement that a minimum number of members sign an inspection petition ensures that member ownership rights are protected while also protecting the FCU from improper access requests. The petition requirement strikes a balance between the members' right to know and understand how the directors are executing their responsibilities on behalf of the members and an FCU's right to be free from requests with illegitimate aims, such as harassment or the desire by the FCU's competitors to obtain information from the FCU. In attempting to strike this balance, NCUA looked to the OTS rule on access by shareholders at stock savings associations, which generally requires inspection upon the request of shareholders owning one percent of the outstanding stock. The NCUA also looked to member signature requirements in other FCU petition contexts.

After considering the public comments, the Board has made some changes to the petition signature requirement in the final rule.

The Board recognized the concern that, for very large FCUs, the 250 signature cap was only a fraction of a percent of their membership and, perhaps, would make it too easy for the petition process to be used in a manner not reflective of the desires of the majority of the membership. The Board determined, however, that removing the cap on the maximum number of signatures entirely would, in cases involving very large FCUs, make it almost impossible for members to obtain timely inspection of records. Accordingly, the Board has determined to raise the maximum number of required signatures from 250 to 500. For very large credit unions, a cap of 500 signatures is a closer approximation to one percent of the membership. Also, this particular range, one percent of the members with no fewer than 20 and no greater than 500, is consistent with other uses of the petition process, such as a petition seeking nomination for an FCU's board of directors. See Standard FCU Bylaws, Art. V (April 2006).

In addition, the Board has determined to require that members who sign the petition must have been members for at

least 180 days at the time the petition is submitted to the FCU. This lessens the likelihood that individuals might join solely to sign a petition for some pending and improper purpose. The 180-day membership requirement is also consistent with the requirement in the OTS Rule that inspecting shareholders have owned their stock for at least six months.

A few commenters were unsure what the phrase "[a]t least one percent of the credit union's members, with a minimum of 20 members and a maximum of 250 members" meant. These commenters asked for clarification or examples. As discussed above, the final rule changes the maximum number of signatures from 250 to 500. Here are some examples illustrating this petition requirement, using FCUs of different sizes:

*Example One:* Assume Main Street FCU has 800 members. One percent of 800 members is eight members. Since eight is less than the minimum of 20 signatures required by this final rule, any petition by Main Street FCU's members for inspection of its records must be signed by at least 20 of its members.

*Example Two:* Assume Widget Company FCU has 5,000 members. One percent of 5,000 members is 50 members. Since 50 is between the minimum of 20 signatures required by the rule and the maximum of 500, any inspection petition by Widget Company FCU's members must be signed by at least 50 of its members.

*Example Three:* Assume Arlandia Community FCU has 75,000 members. One percent of 75,000 members is 750 members. Since 750 is greater than the maximum of 500 signatures required by the rule, any inspection petition by Arlandia Community FCU's members must be signed by at least 500 of its members.

The proposed rule required the petition state the petitioners "do not intend now, to sell or offer for sale any information obtained from the credit union." A few commenters thought this should be changed to emphasize that petitioners affirmatively agree not to sell the information or use it other than for the business of the credit union. The Board agrees with the suggested change and has modified the final rule accordingly.

One commenter suggested the member representatives named on the petition should be limited in number so an FCU would know more precisely with whom to deal on petition issues. The Board agrees and has amended the final rule to require the petitioners name one representative and one alternate.

Many commenters stated a petition should not be used for certain purposes, such as questioning a director's qualifications or why a credit union raised a fee, made an unpopular rate

change, closed a branch, or stopped offering a certain product. These commenters generally thought a proper purpose should be limited to a significant, pending corporate event, such as a conversion, merger, change in account insurance, or voluntary termination, and some thought member inspection rights should be limited only to charter conversion issues. A few of these commenters thought the decisions of a board of directors could be too easily scrutinized and challenged publicly, and this would hamper board operations and might make it difficult to find volunteers.

The Board has considered these comments carefully. As the owners of the credit union, members have the right to vote in connection with significant corporate events and the right to inspect records in connection with those events. But members also have the right to elect and remove directors. Dissatisfaction with directors could stem from actions taken by directors affecting the members' financial interests in the FCU, including the various actions commenters mentioned, although falling short of being significant, pending corporate events. Accordingly, the Board declines to limit the inspection rights of members to significant, pending corporate events.

NCUA received a few other comments on this proposed paragraph. One commenter suggested members who have caused the credit union a loss or employees who have been terminated should not be permitted to sign the petition. The Board disagrees. All members are owners and so have the right, if they can find enough other members willing to sign a petition, to inspect records. Another commenter stated the petition should indicate with whom or what the petitioners plan to share the information. The Board disagrees. If an FCU has concerns about how its member-owners might use that information it can discuss this issue with the petitioners and, if necessary, raise the issue to the regional directors as described in the dispute resolution process.

Accordingly, and except as discussed above, the Board adopts § 701.3(b) as proposed.

#### *Section 701.3(c) Inspection Procedures*

The proposed paragraph stated that, within 14 days of receipt of a petition, the FCU must either allow inspection and copying of all requested material or inform the petitioning members in writing why it is not able to do so. Inspection may be made in person or by agent or attorney and at any reasonable

time or times. Member inspection rights under this paragraph are in addition to any other member inspection rights afforded by law, regulation, or the credit union's bylaws.

Several commenters asked for clarification of the statement that "Member inspection rights under this paragraph are in addition to any other member inspection rights afforded by law, regulation, or the credit union's bylaws." One of these commenters interprets the quoted language as meaning, for example, that if the Model Business Corporation Act (MBCA) or the Model Nonprofit Corporation Act (MNCA), as adopted in a particular state, provide greater access rights than § 701.3, then the FCU must follow the MBCA or MNCA instead of the petition requirements in § 701.3. Most of these commenters suggest the rule should preempt state law such as the MBCA or MNCA for FCU member inspection rights.

The Board has amended the final rule to clarify that the rule's inspection rights are in addition to any other member inspection rights afforded by the credit union's charter or bylaws or other Federal law or Federal regulation. When this rule becomes effective, State law will no longer apply to member inspection of FCU records.

A few commenters suggested members only be allowed to inspect records and take notes and not be allowed to copy records. One commenter stated that, instead of making the information available for inspection at a branch location convenient to petitioners as indicated in the proposed preamble, a credit union should be allowed to determine where documents should be made available.

The Board disagrees with these comments. Note taking may not be sufficient for the member to communicate the gist of documents to other members. Also, it should not be too difficult for an FCU to transfer documents, or copies of documents, between branches so as to accommodate petitioners.

One commenter stated that, in lieu of physical inspection followed by copying, a credit union should have the option of copying and delivering documents without a physical inspection. The Board agrees and has amended the final rule accordingly.

A few commenters stated FCUs might have difficulty locating requested records and making them available to the petitioners within 14 days. These commenters believe a credit union should have more than the proposed 14 days to respond to a petition request. Some of these commenters suggested 30

days, while one commenter suggested 60 days.

These commenters misinterpret the requirements of the proposed rule. The proposal does not require an FCU allow inspection and copying of requested material within 14 days of receipt of a petition. The proposal stated only that the FCU must either allow inspection and copying of all requested material within 14 days or, in the alternative, inform the petitioning members in writing why the FCU is not able to do so.

The purpose of this 14-day response requirement is to ensure that petitioning members can obtain timely inspection of relevant records. The Board intends that an FCU attempt to orchestrate inspection and copying with 14 days but recognizes this may not be possible because, for example, some requested records may be confidential, voluminous, or difficult to find. If an FCU cannot complete inspection within 14 days, it must act within 14 days to inform the petitioners about the status of the FCU's response. To clarify the Board's intent, the Board has reworded this part of § 701.3(c) to read as follows:

A federal credit union must respond to petitioners within 14 days of receiving a petition. In its response, a credit union must inform petitioners either that it will provide inspection of the requested material and, if so, when, or, if a credit union is going to withhold all or part of the requested material, it must inform petitioners what part of the requested material it intends to withhold and the reasons for withholding the requested material. As soon as possible after receiving a petition, a credit union must schedule inspection and copying of nonconfidential requested material it determines petitioners may inspect and copy.

If the petitioners do not get some response from the FCU in 14 days that is satisfactory to them, they have the option of pursuing their dispute resolution rights in § 701.3(f).

In addition to the modification of rule text discussed above, the Board has reorganized § 701.3(c) into subparagraphs to make it easier to read.

Accordingly, and except as discussed above, the Board adopts § 701.3(c) as proposed.

*Section 701.3(d) Confidential Books, Records, and Minutes*

The proposed paragraph stated that members do not have the right to inspect any portion of an FCU's books, records, or minutes if Federal law or regulation prohibits disclosure of that portion, the portion contains nonpublic personal information as defined in § 716.3 (dealing with member privacy); or the portion contains information

about credit union employees or officials the disclosure of which would constitute a clearly unwarranted invasion of personal privacy. The proposal did permit members, however, to inspect materials describing the compensation and benefits provided by the credit union to its senior executive officers, and the qualifications of the senior executive officers.

Several commenters objected to the proposed requirement that an FCU permit member inspection of compensation and benefits of senior executive officers, contending variously that:

- Absent compelling justification, individual rights to financial privacy and privacy concerns should prevail;
- Publicizing compensation of senior management out of context could be used to facilitate involuntary mergers and to portray the credit union industry in a negative way;
- Disclosures would "enrage" members;
- Disclosures would be detrimental to employee relations; and
- Disclosures would clash with confidentiality provisions in employee contracts.

Some commenters suggest disclosure of senior executive compensation be phased-in or existing records excluded through a grandfather provision. One commenter suggested that disclosure should be limited to a statement of the compensation level as a percentage of CU peer averages. A few commenters stated that this disclosure issue should not be addressed as part of a general member inspection rule but as a separate rulemaking with further study by NCUA. One commenter suggested that the disclosure of "qualifications" be limited to a resume or similar summary and not include performance evaluations or personnel files.

At this time, the Board has decided to continue to study the issue of member and public access to information about senior executive compensation and benefits. Accordingly, the final rule does not include any member inspection rights specific to this information and information about senior FCU executives will be subject to the employee confidentiality rule: members may, if they have a proper petition, inspect employee information except for information the disclosure of which would constitute a clearly unwarranted invasion of personal privacy. Credit unions, in consultation with affected employees, have reasonable discretion in determining which employee information should be kept confidential under this standard.

Some commenters also expressed concern that the rule does not adequately protect the confidentiality of various other credit union records. The records mentioned included: Personnel records; mid- and low-level staff salaries and bonuses; board discussions of personnel matters, relations with partners and public officials, and comments on member behavior and financial information; trade secrets; business, marketing, strategic, and disaster recovery plans; product pricing information and analysis; management and board succession plans; vendor contracts; member surveys and demographic studies; member and business correspondence; physical security plans and building schematics; risk assessments; and attorney-client privileged documents. Several commenters suggested that confidential records should include any proprietary records or information the premature release of which could cause the credit union financial harm. Other commenters suggested that board minutes taken in "confidential" or "executive" session should be protected from member inspection.

While the proposed rule was intended to provide an FCU's member-owners with meaningful access to the books, records, and minutes of the credit union, the proposal did contain both procedural and substantive protections for records the release of which could harm the credit union or its members or employees. As noted in the preamble to the proposal, those protections included a minimum number of required petition signatures; limitations on the scope of the term "books and records of account"; the requirement that the petitioners state a proper purpose; specific confidentiality provisions for information related to members and FCU employees; and the authority of the regional director to impose restrictions on the inspection and copying of records.

These protections remain in the final rule. In response to those commenters who thought that the rule should provide more specific protection for FCU records not related to members or employees, the Board has determined to add another explicit category of confidential information not subject to inspection or copying, that is, books, records, and minutes "the publication [of which] could cause the credit union predictable and substantial financial harm." This category will protect physical security plans, computer security plans, building schematics, risk assessments, and other, similar information where public release, or release to the FCU's competitors, could

lead to predictable and substantial financial harm to the FCU.

The Board cannot consider every possible kind of FCU record and generalize as to whether, in every case, those records would be subject to member inspection. The Board does note that internal FCU correspondence and vendor contracts not considered by an FCU's board will likely not be within the definition of "books and records of account" as that term is used in § 701.3(a) and so will be outside the scope of documents subject to member inspection unless considered at meeting of the FCU's board of directors. Most employee-related information, including personnel records, staff salaries and bonuses, and board discussion of personnel matters, will include information about individual credit union employees or officials. The disclosure of such information would constitute an unwarranted invasion of personal privacy and so would be confidential under § 701.3(d)(4) and not subject to inspection. Credit union records about particular members or that mention members by-name, including discussion of member behavior or account activity and portions of member surveys, would generally be confidential under § 701.3(d)(3).

The Board declines to distinguish between minutes of regular meetings of the board of directors and other types of meetings, such as so-called "confidential" or "executive" meetings. Members have the right to inspect nonconfidential portions of the minutes of proceedings of the credit union's board of directors and committees of directors regardless of how the directors characterize their meetings.

One commenter suggested the rule define confidential records by reference to the various exemptions available to the federal government under the Freedom of Information Act (FOIA), including the deliberative process exemption. The Board declines to analogize the access of individuals to government information under the FOIA to FCU member inspection rights. Any person, including foreign persons, may submit FOIA requests to U.S. government agencies, but the members of an FCU are its owners with direct financial interests in the FCU and inspection rights reflecting those interests. Another commenter suggested the rule determine the confidentiality of records by reference to the "common law." Since the common law varies from state-to-state, the Board believes regulating member inspection rights through a general reference to common law would fail to address some of the

concerns that the rule, as drafted, alleviates.

Accordingly, and except as discussed above, the Board adopts § 701.3(d) as proposed.

#### *Section 701.3(e) Costs*

The proposed paragraph provided that an FCU may charge petitioners the direct and reasonable costs associated with search and duplication but not other costs, including indirect costs or attorney's fees. As stated in the preamble to the proposed rule, the typical direct costs of search and duplication would include the number of hours a clerk might take to locate and duplicate the requested documents multiplied by the clerk's hourly compensation rate, plus the per page costs of duplication. 72 FR 20061, 20065 (April 23, 2007). Requesters need not, however, reimburse the credit union for indirect costs, including costs associated with the management or supervision of the person(s) conducting the search, costs to review documents, costs associated with in-person inspection of records, overhead costs, or the costs of any legal services. *Id.*

One commenter stated petitioners should be responsible for both indirect and direct costs. The Board disagrees. To require members to reimburse the credit union for indirect costs would put too much of a burden on the member-owner, in part because the credit union has significant discretion as to how much it will incur in the way of indirect costs (e.g., the costs of review).

One commenter noted the proposed rule permitted petitioners to put a limit on how much they were willing to pay and asked how an FCU should respond if the petitioner's limit was less than the FCU's estimate of the direct and reasonable costs associated with search and duplication. If an FCU believes the petitioners' estimate is too low, it should inform the petitioners what its estimated cost is and ask the petitioners if they want to raise the dollar amount they are willing to pay or, in the alternative, if they want the FCU to continue with its search and reproduction with the understanding that the petitioners might not receive everything sought from the FCU.

One commenter asked how an FCU could collect its costs from the petitioners if they refused to pay. The petition is a form of unilateral contract offer from the named petitioners that the FCU accepts by performance, that is, the production of the requested

documents.<sup>1</sup> If the named petitioners refuse to reimburse the FCU for the direct and reasonable costs of search and duplication actually incurred, the FCU may proceed against the named petitioners for breach of contract.

Accordingly, the Board adopts § 701.3(e) as proposed.

#### *Section 701.3(f) Dispute Resolution*

The proposed paragraph provided that, in the event of a dispute between an FCU and its members concerning a petition for inspection or the associated costs, either party may submit the dispute to the regional director. The regional director, after obtaining the views of both parties, will direct the credit union either to withhold the disputed materials or to make them available for member inspection and copying. The regional director may place conditions upon release, if appropriate. The regional director's decision is a final agency decision and is not appealable to the Board.

Several commenters stated NCUA should not be involved in dispute resolution because NCUA would be biased or unqualified to resolve disputes. One commenter stated that NCUA would not be independent if the records request was related to a matter requiring NCUA's approval such as a merger or similar corporate action.

NCUA disagrees with those commenters who suggest the regional director is an inappropriate adjudicator of inspection-related disputes. In handling a dispute, the regional director is bound to follow the law with full consideration for the safe and sound operation of the FCU and the protection of members' legal rights. The regional director's knowledge of FCU organization and operations makes him or her ideally qualified to determine, for example, which FCU records need protection from competitors or from potential release to the public. The regional director offers timely resolution of inspection disputes, particularly where the inspection request relates to pending member vote subject to a statutory or regulatory timeline.

A few commenters thought an FCU's supervisory committee should have a role in resolution of disputes related to member petitions for inspection of records because the supervisory committee, among other responsibilities, addresses member complaints. The preamble to the proposed rule specifically noted that

petitioners have the option to submit a dispute to their supervisory committee rather than the regional director. 72 FR 20061, 20066 (April 23, 2007). The Board reiterates here that petitioners have the option of submitting a dispute to their supervisory committee rather than the regional director. If petitioners are dissatisfied with the response of their supervisory committee, they will still be able to submit the dispute to the regional director. Additionally, the Board believes there may be circumstances where a regional director believes a supervisory committee can or should be able to resolve a dispute over member access to records, and the final rule now provides that a regional director has the discretion to refer a dispute to the supervisory committee. If a regional director refers a dispute to the supervisory committee, the rule states petitioners who are dissatisfied with a supervisory committee response can resubmit the dispute to the regional director for a final agency decision.

Several commenters thought the rule should include a timetable for the regional director to act on a dispute. The Board declines to impose a timetable or other deadline for dispute resolution. If one or both of the parties to a dispute desire a rapid dispute resolution, they should inform the regional director and, in appropriate cases, the regional director will move forward quickly to resolve the dispute. The amount of information in dispute and the resources needed by the regional director to resolve the dispute may vary from case-to-case; in some cases, there may be no need for any sort of rapid dispute resolution. Accordingly, artificial regulatory deadlines are impracticable.

A few commenters sought clarification about whether an FCU could withhold information pending the regional director's decision on a dispute. The Board's intent with this rule is that an FCU may withhold information that is in dispute pending the regional director's decision.

Some commenters thought the regional director's decision on a dispute should be appealable to the NCUA Board. After careful consideration, the Board declines to grant any administrative appeal rights. The regional director's decision will be NCUA's final agency decision, and any party that believes itself injured by that decision may, if it desires, pursue judicial action.

Accordingly, and except as discussed above, the Board adopts § 701.3(f) as proposed.

### **C. Regulatory Procedures**

#### *Regulatory Flexibility Act*

The Regulatory Flexibility Act requires NCUA to prepare an analysis to describe any significant economic impact a rule may have on a substantial number of small credit unions, defined as those under ten million dollars in assets. This final rule standardizes and clarifies the rights of members to inspect FCU records. The rule is not a significant departure from existing practice that FCUs must permit inspection under the same terms and conditions that state law requires for shareholders to inspect corporation records. The rule requires that a minimum of one percent of the FCU's members sign a petition to obtain access. In some states, this burden on the members might exceed the burden on shareholders to obtain access and so reduces the likelihood of an FCU having to grant access. Accordingly, the Board has determined and certifies that this rule will not have a significant economic impact on a substantial number of small credit unions.

#### *Paperwork Reduction Act*

Section 701.3 contains information collection requirements. As required by the Paperwork Reduction Act of 1995 (44 U.S.C. 3507(d)), NCUA submitted a copy of the proposed § 701.3 as part of an information collection package to the Office of Management and Budget (OMB) for its review and approval of a new collection of information. On July 13, 2007, the OMB approved the collection and assigned it Control Number 3133-0176.

#### *Executive Order 13132*

Executive Order 13132 encourages independent regulatory agencies to consider the impact of their actions on state and local interests. In adherence to fundamental federalism principles, NCUA, an independent regulatory agency as defined in 44 U.S.C. 3502(5), voluntarily complies with the executive order. The rule would not have substantial direct effects on the states, on the connection between the national government and the states, or on the distribution of power and responsibilities among the various levels of government. NCUA has determined that this rule does not constitute a policy that has federalism implications for purposes of the executive order.

<sup>1</sup> "A contract is also said to be 'unilateral' when there is a promise on one side only, the consideration on the other side being executed." Black's Law Dictionary 294 (5th ed. 1979).

*The Treasury and General Government Appropriations Act, 1999—Assessment of Federal Regulations and Policies on Families*

The NCUA has determined that this proposed rule would not affect family well-being within the meaning of section 654 of the Treasury and General Government Appropriations Act, 1999, Public Law 105-277, 112 Stat. 2681 (1998).

*Small Business Regulatory Enforcement Fairness Act*

The Small Business Regulatory Enforcement Act of 1996 (Pub. L. 104-121) provides generally for congressional review of agency rules. A reporting requirement is triggered in instances where NCUA issues a final rule as defined by section 551 of the Administrative Procedure Act, 5 U.S.C. 551. The Office of Management and Budget has determined that this rule is not a major rule for purposes of the Small Business Regulatory Enforcement Fairness Act of 1996.

**List of Subjects in 12 CFR Part 701**

Credit unions, Records.

By the National Credit Union Administration Board on September 27, 2007.

**Mary F. Rupp,**

*Secretary of the Board.*

■ The NCUA Board amends 12 CFR part 701 as follows:

**PART 701—ORGANIZATION AND OPERATIONS OF FEDERAL CREDIT UNIONS**

■ 1. The authority citation for part 701 continues to read as follows:

**Authority:** 12 U.S.C. 1752(5), 1755, 1756, 1757, 1759, 1761a, 1761b, 1766, 1767, 1782, 1784, 1787, 1789. Section 701.6 is also authorized by 15 U.S.C. 3717. Section 701.31 is also authorized by 15 U.S.C. 1601 *et seq.*; 42 U.S.C. 1981 and 3601-3610. Section 701.35 is also authorized by 42 U.S.C. 4311-4312.

■ 2. Add § 701.3 to read as follows:

**§ 701.3 Member inspection of credit union books, records, and minutes.**

(a) *Member inspection rights.* A group of members of a Federal credit union has the right, upon submission of a petition to the credit union as described in paragraph (b) of this section, to inspect and copy nonconfidential portions of the credit union's:

(1) Accounting books and records; and

(2) Minutes of the proceedings of the credit union's members, board of directors, and committees of directors.

(b) *Petition for inspection.* The petition must describe the particular records to be inspected and state a proper purpose for the inspection, that is, a purpose related to the protection of the members' financial interests in the credit union. The petition must state that the petitioners as a whole, or certain named petitioners, agree to pay the direct and reasonable costs associated with search and duplication of requested material. The petition must also state that the inspection is not desired for any purpose other than the stated purpose; that the members signing the petition will not sell or offer for sale any information obtained from the credit union; and that the members signing the petition have not within five years preceding the signature date sold or offered for sale any information acquired from the credit union or aided or abetted any person in procuring any information from the credit union for purposes of sale. The petition must name one member, and one alternate member, who will represent the petitioners on issues such as inspection procedures, costs, and potential disputes. At least one percent of the credit union's members, with a minimum of 20 members and a maximum of 500 members, must sign the petition. Each member who signs the petition must have been a member of the credit union for at least 180 days at the time the petitioners submit the petition to the credit union.

(c) *Inspection procedures.* (1) A Federal credit union must respond to petitioners within 14 days of receiving a petition. In its response, a credit union must inform petitioners either that it will provide inspection of the requested material and, if so, when, or, if a credit union is going to withhold all or part of the requested material, it must inform petitioners what part of the requested material it intends to withhold and the reasons for withholding the requested material. As soon as possible after receiving a petition, a credit union must schedule inspection and copying of nonconfidential requested material it determines petitioners may inspect and copy.

(2) Inspection may be made in person or by agent or attorney and at any reasonable time or times. The credit union may, at its option, skip inspection and deliver copies of requested documents directly to the petitioners. Member inspection rights under this section are in addition to any other member inspection rights afforded by the credit union's charter or bylaws or other Federal law or Federal regulation.

(3) If the credit union denies inspection because the petitioners have

failed to obtain the minimum number of valid signatures, the credit union must inform the petitioners which signatures were not valid and why.

(d) *Confidential books, records, and minutes.* Members do not have the right to inspect any portion of the books, records, or minutes of a Federal credit union if:

(1) Federal law or regulation prohibits disclosure of that portion;

(2) The publication of that portion could cause the credit union predictable and substantial financial harm;

(3) That portion contains nonpublic personal information as defined in § 716.3 of this part; or

(4) That portion contains information about credit union employees or officials the disclosure of which would constitute a clearly unwarranted invasion of personal privacy.

(e) *Costs.* A Federal credit union may charge petitioners the direct and reasonable costs associated with search and duplication. The credit union may not charge for other costs, including indirect costs or attorney's fees.

(f) *Dispute resolution.* (1) In the event of a dispute between a federal credit union and its members concerning a petition for inspection or the associated costs, either party may submit the dispute to the regional director. The regional director, after obtaining the views of both parties, will direct the credit union either to withhold the disputed materials or to make them available for member inspection and copying. The regional director may place conditions upon release. The decision of the regional director is a final agency decision and is not appealable to the Board.

(2) The regional director has the discretion to refer any dispute to the credit union's supervisory committee for review and resolution. If petitioners are not satisfied with the supervisory committee's response, they may resubmit the dispute to the regional director.

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