



strength in members.

September 12, 2016

New York State Department of Financial Services
One State Street
New York, NY 10004-1511

Dear Superintendent Vullo:

I am writing on behalf of the New York Credit Union Association to express strong support for the request by New York State chartered credit unions for the Department of Financial Services to use its wildcard powers to preempt the oath and share purchase requirements imposed on credit union “officers” by Section 468 of the Banking Law. By granting this request, the Department would eliminate an administrative burden on state-chartered credit unions that our federal credit unions do not have to deal with, and demonstrate a commitment to the preservation of a viable state charter.

Section 468 of the Banking Law stipulates as follows:

Each director, officer and member of a committee when first appointed or elected, shall take an oath that he will, so far as the duty devolves upon him, diligently and honestly administer the affairs of the credit union, and will not knowingly violate, or willingly permit to be violated, any of the provisions of law applicable to such corporation, and that he is the owner of at least one share subscribed for by him or standing in his name on the books of the credit union and that the same is not hypothecated, or in any way pledged as security for any loan or debt, except as permitted by subdivision four of section four hundred fifty-six of this chapter. The affirmation of share ownership need not be given by any director, officer and member of a committee of a corporate credit union. Such oath shall be subscribed by the directors, officers and members of committees making it and certified by any officer authorized by law to administer oaths, and immediately transmitted to the superintendent. (*N.Y. Banking Law § 468 (McKinney)*)

This requirement has historically been interpreted as applying exclusively to board directors and board officers. This interpretation is consistent with a plain reading of the statute. New York law does not define “officer” but a typical definition is “[s]omeone who holds an office of trust, authority, or command... In corporate law, the term refers

esp. to a person elected or appointed by the board of directors to manage the daily operations of a corporation, such as a CEO, president, secretary, or treasurer.” (Black's Law Dictionary (10th ed. 2014)). Nevertheless in recent years examiners have questioned the credit union practice of not imposing these requirements on employees with “officer” titles—such as a lending officer—who don’t serve on boards. In response to a request for clarification, the Department opined in April that the term officer includes “all officers” whether or not they are board directors or officers. Since agency interpretations of their own statutes are generally afforded deference (ABN AMRO Bank N.V. v. Dinallo, 40 Misc. 3d 180, 196, 962 N.Y.S.2d 854 (Sup. Ct. 2013)), all persons with a job title of “officer” must now buy a share and take an oath. No such requirement is imposed on federal credit unions.

Against this backdrop, and as explained in greater detail in the accompanying credit union request, granting the wildcard request is wholly consistent with the criteria outlined in Section 12-a of the Banking Law.

To be approved a wildcard request must be:

- (i) consistent with the policy of the state of New York as declared in section ten of this article and thereby protects the public interest, including the interests of depositors, creditors, shareholders, stockholders and consumers; and
- (ii) necessary to achieve or maintain parity between state chartered banking institutions and their counterpart federally chartered banking institutions with respect to rights, powers, privileges, benefits, activities, loans, investments or transactions. (*N.Y. Banking Law § 12-a (McKinney)*).

Federal credit unions have no corresponding requirement for their directors or board officers, let alone their lending personnel, with officer titles.

There is no indication, that the lack of this mandate has resulted in unsafe and unsound practices or put member funds at risk. After all, a credit union’s board of directors is ultimately responsible for the credit union management and oversight of employees, regardless of any oath or share requirements. *N.Y. Banking Law § 454(26) (McKinney)*.

The request also satisfies the second criteria. No corresponding obligation is imposed on employees working in federal credit unions. The statute, as interpreted by the DFS, creates several HR anomalies. The interpretation means that a compliance officer at a federal credit union doesn’t have to take an oath or buy a credit union share while a similarly situated employee at a state charter with the same exact responsibilities does. An HR person at a federal credit union can develop job titles secure in the knowledge

that job responsibilities, not job titles, are determinative of an employee's obligations. In contrast, an HR Director working at a state charter will now be violating the law if she neglects to ensure that a longtime employee promoted to the credit union's Chief Compliance Officer Position complies with Section 468.

Finally, Section 468, particularly interpreted by the DFS, raises novel legal questions in the event that an employee refuses to comply on the grounds that it doesn't apply to her position: What are the legal rights of an employee fired not for refusing to comply with a credit union's internal policy but for failing to comply with the requirements of Section 468? Is it rational to treat two employees with similar responsibilities differently based entirely on their job titles?

Beyond the specific benefits granting this request would have for our state charters, approval of this application would be an important signal to the credit union industry that New York is committed to maintaining a state charter option for credit unions. In extending wildcard powers to credit unions, the Legislature declared that "the rapid expansion of federal banking powers requires a means to ensure parity, in a timely manner, between... credit unions and federal credit unions in order to preserve and enhance the powers of state chartered banking institutions and preserve the relevance of the state banking charter as a charter." (*POWER OF BANKS, PRIVATE BANKERS, TRUST COMPANIES, SAVINGS BANKS, SAVINGS AND LOAN ASSOCIATIONS, CREDIT UNIONS AND FOREIGN BANKING CORPORATIONS, 2007 Sess. Law News Of N.Y. Ch. 322 (S. 4392-B) (McKinney's)*).

Similarly, when the DFS was created in 2011, the consolidated Department was made responsible "To encourage, promote and assist banking, insurance and other financial services institutions to effectively and productively locate, operate, employ, grow, remain, and expand in New York State." (*N.Y. Fin. Serv. § 102 (McKinney)*).

Despite these important goals, credit union wildcard powers have atrophied. Since being extended to credit unions, not a single request has been approved. This is unfortunate. Today there are just 17 state chartered credit unions left in New York and 351 federal credit unions. While the state has taken important steps to make the state charter as competitive as possible, such as by increasing field of membership flexibility, if the number of state charters is going to stabilize and grow there must be an active wildcard process. NCUA is actively taking steps to improve the attractiveness of the federal charter. For example, it has proposed changes to its field of membership requirements with the stated goal of maximizing "competitive parity between federal and state charters, to the extent allowed by law, while respecting the national system of dual chartering "(Chartering and Field of Membership Manual, 80 FR 76748-01

Thursday, December 10, 2015). Wildcard provides an efficient means for the state to swiftly react to these changes and to provide corresponding benefits to state charters, but unless the Department is responsive to appropriate requests such as this one, this important mechanism will not be used.

For these reasons, I urge you to grant this wildcard request.

Sincerely,

A handwritten signature in black ink, appearing to read "W J Mellin". The signature is fluid and cursive, with the first letters of the first and last names being capitalized and prominent.

William J. Mellin
President/CEO
New York Credit Union Association