

STATE OF VERMONT  
DEPARTMENT OF FINANCIAL REGULATION

In the matter of )  
 )  
Vermont State Employees Credit Union, ) Docket No. \_\_\_\_\_  
Petitioner )

PETITION FOR DECLARATORY RULING

**NOW COMES** the Vermont State Employees Credit Union (“VSECU” or “Petitioner”) by and through its undersigned counsel and pursuant to 3 V.S.A. § 808 and other applicable law, including the Vermont Constitution, Ch. 1 Art. 7, the 1<sup>st</sup>, 5<sup>th</sup> and 14<sup>th</sup> Amendments to the U.S. Constitution and 42 U.S.C. §§ 1983 and 1988, petitions the Department of Financial Regulation (the “Department”) for a declaratory ruling and other available relief.

This Petition seeks to have the Commissioner declare that 8 V.S.A. § 14103 cannot be used to prevent VSECU from truthfully describing its services as banking services nor to prevent VSECU from truthfully describing itself as a banking cooperative or a banking alternative. A contrary interpretation is not required by 8 V.S.A. § 14103 and would violate VSECU’s rights under the Vermont Constitution, Ch. 1 Art. 7, the 1<sup>st</sup>, 5<sup>th</sup> and 14<sup>th</sup> Amendments to the U.S. Constitution and 42 U.S.C. §1983. Such contrary interpretation would cause illegal discrimination against VSECU; impose an unnecessary and unreasonable restriction on VSECU’s commercial speech and thereby provide competing banks with a competitive advantage over VSECU; prohibit the lawful, truthful use of words to describe VSECU’s services and VSECU itself without directly advancing important or substantial government interests; violate VSECU’s due process right to be apprised of the requirements of the law in a way that does not require it to guess at its meaning or scope or that changes over time or that is applied in

a way that is overly broad; violate the Supremacy clause and is preempted; and unnecessarily cause VSECU substantial and irreparable harm.

The Department has been under pressure presumably by Vermont banks to restrain VSECU's truthful commercial speech, including but not limited to, the speech described above. (The full extent of the pressure can only be developed through discovery and an evidentiary hearing.) VSECU has been told that the Commissioner will not exercise his discretion to permit VSECU to continue its truthful commercial speech and intends to file (or has already filed) a Notice of Intent to Issue a Cease and Desist Order seeking to silence VSECU. There is no evidence that *consumers* are confused or misled that VSECU is a bank rather than a credit union. Rather, it is the banks that would be the sole beneficiaries of a silenced VSECU.

1. VSECU is a non-profit, cooperatively owned, state-chartered credit union organized under the laws of the State of Vermont with a principal place of business at One Bailey Avenue in Montpelier, Vermont. It is the largest state-chartered credit union in Vermont with nearly \$500 million in assets and 48,000 members.

2. VSECU has been granted a state-wide "field of membership" by the Department so membership in VSECU is open to all people who live or work in Vermont. VSECU has members living in every Vermont county and virtually every Vermont city and town. Membership in VSECU entitles one to access the banking and other financial services offered by VSECU. Only members may access VSECU services (with limited exceptions not relevant here).<sup>1</sup>

---

<sup>1</sup> For example, VSECU participates in interbank agreements that permit members of other financial institutions to use its ATMs.

3. Throughout the State of Vermont, VSECU offers its members many financial services that are the same services as offered by banks<sup>2</sup> as well as by federal credit unions.

4. The core financial services offered by VSECU as a regular part of its business are soliciting, receiving or accepting money or its equivalent on deposit and the loaning of money. This same description is also found in Vermont banking law as the definition of the “business of banking” and “banking business,” 8 V.S.A. § 11101 (11).

5. In addition to its core services of accepting deposits of money and making loans to its members, VSECU offers its members: checking accounts; electronic fund transfer services; remote access to deposits through automated teller machines (ATM); “electronic banking” (sometimes referred to as Internet banking and online banking ) services; Visa® branded credit cards; Visa® branded debit cards; treasurer (certified) check services; and, for its members who operate businesses, access to banking services for their businesses including business loans. See Appendix A.

6. Banks as well as federal credit unions also provide the same services to their customers. At times, the regulation of these services stems from the same law for both banks and credit unions. See, e.g., *Electronic Fund Transfer Act*, 15 U.S.C. § 1693 et seq. and its implementing regulations 12 C.F.R. Part 205 (Regulation E) (“financial institution” means a bank, savings association, credit union or other entity holding consumer account), § 205.2 (i); *Availability of Funds and Collection of Checks* (Regulation CC), 12 C.F.R. Part 229 (“Bank’ means . . . an insured credit union as defined in section 101 of the federal credit union act. . . ;”) 12 C.F.R. § 229.2 (e)(4); *Check 21 Act*, Pub. L. 108-100 (2003) (codified at 12 U.S.C. 5001 et seq.) (banks

---

<sup>2</sup> To make this pleading more readable, the noun “bank” should be read to include state and federally chartered commercial banks, savings and loans, and cooperative banks.

and federally insured credit unions subject to law designed to expedite check clearing); 8 V.S.A. § 10505 ( “*bank product*” subchapter of title 8; limiting returned check charges).

7. Because VSECU offers the same financial services as a bank does, including “soliciting, receiving or accepting money or its equivalent on deposit and the loaning of money as a regular business,” it is engaged in the “business of banking” and the “banking business” in the same way a bank or federal credit union is.

8. VSECU is also classified as a “financial institution” under Vermont and federal law. For example, 8 V.S.A. § 19 (f) (amended Act No. 78 (Adj. Sess.), § 8, effective April 2, 2012; replacing term “banking supervision fund” with the term “financial institution supervision fund”).

9. VSECU competes directly with state and federally chartered banks and other “financial institutions,” including federal credit unions, for both deposit and loan customers.

10. When VSECU members deposit or borrow money from VSECU, they think they are “banking” with VSECU.

#### USE OF WORDS BANKING AND (TO) BANK

11. On or about February 9, 2007, VSECU received a letter from the Department’s Banking Deputy. A copy of the letter is attached and labeled Exhibit 1. The letter stated that a VSECU “advertisement citing [its] banking service is in conflict with Title 8 Section 14103. Please cease misleading the public that your credit union is a bank. How long will it take for ads like this to convince the Congress that we no longer have a credit union industry?” The VSECU advertisement cited in the letter contained the following quote from a member of VSECU: “I couldn’t imagine banking with anybody else.” A copy of the advertisement attached to the letter is included as a part of Exhibit 1.

12. 8 V.S.A § 14103 provides that:

No person shall advertise or put forth any sign as a bank, banking association, or trust company, or in any way solicit or receive deposits or transact business as a bank, banking association, financial institution or trust company, or use the words "bank," "banking association," or "trust company" or other similar sounding word or name unless it is a financial institution reporting to and under the supervision of the commissioner or is authorized to conduct such business in this state under federal law, or unless the commissioner approves the activity or word or name used in writing after giving due consideration for whether the activity, word or name will confuse or mislead the public as to the nature of the business of the entity.

13. On or about August 6, 2007, VSECU sent a letter to the Department in response to the February 9, 2007 letter. In its response letter, VSECU informed the Department that VSECU planned to continue to describe its services using the short hand “banking” and (to) “bank” in its marketing and advertising, specifically, “More than banking;” “Why bank when you can VSECU?,” and “Why Bank?.” The letter also provided background information on why VSECU was entitled to describe its activities by using the word banking (and variations of the verb (to) bank) in its advertisements. A copy of the letter is attached and marked Exhibit 2.

14. The Department did not initiate any action against VSECU regarding its use of “banking” and (to) “bank” to describe its services or to characterize the activities of its customers when they do business with VSECU in its advertisements. As late as June 13, 2012, the Department has acknowledged that VSECU was permitted under Section 14103 to use the words and phrases described in VSECU’s 2007, letter.

15. Since 2007, some of VSECU’s radio, print, Internet, and television advertisements have included the term “banking” or (to) “bank” to describe its services but in none of the advertisements does VSECU state it is a bank. Rather, in many if not most instances, VSECU uses the term “bank” in its marketing in an effort to distinguish itself from banks. For example:

- *Narration:* When a bank leaves Vermont, what happens to me? VSECU is a credit union. We've served Vermonters around the state for over 60 years. Our home, like yours, is right here in Vermont. Why bank? VSECU.com (radio text);
- *Text:* Why bank when you can VSECU  
vsecu.com  
*Narration:* If you need to dip into your home equity, don't empty the cookie jar. Some lenders might offer a lower rate, but it may risk the equity in your home. VSECU is a credit union with low rates and responsible lending. No tiered rates based on larger lines of credit and no need to draw more to earn a lower rate.  
*Text:* Home Equity Line of Credit rates as low as 4.75% APR  
APR varies base on Wall Street Journal Prime Rand & combined loan-to-value ratios. Maximum APR is 18%. The cost of a property appraisal of \$350 to \$400 maybe charged. Equal Housing Lender.  
*Narration:* So, when you need to tap into your home equity, why bank? VSECU.com.  
*Text:* 802/800 371-5162 (television advertisement)

Copies of various media advertisement are attached as Exhibit 3.

VSECU's website, micro-site and facebook pages have included the term "banking cooperative" to describe VSECU and its related services and activities. Copies of other instances where banking cooperative and banking alternative have been used are attached as Exhibit 4.

16. VSECU has never used the noun "bank" to describe itself as an entity in its marketing. Nor has VSECU ever referred to itself as a "banker" or used the word "banker" to describe itself in its advertising. VSECU has never referred to itself as a "banking association" or used the words "banking association" in its advertising. VSECU has never referred to itself as a "trust company" or used the words "trust company" in its advertising.

17. Because the Department had direct knowledge of VSECU's use of the word "banking" in its advertisements for a five year period and did not take any regulatory action against VSECU for such (truthful) use of the word "banking," VSECU had every reason to believe that it was not prohibited by § 14103 from using "banking" or (to) "bank" in its advertising to describe its services and activities for several years. That this belief was reasonable was confirmed by the Department on June 13, 2012.

18. VSECU has expended considerable sums of money to develop a marketing strategy to promote its services; that strategy includes the use of “banking” and (to) “bank” to describe its services but has often used “banking” and (to) “bank” to differentiate itself from banks and services offered by banks (“VSECU—better than banking”; “VSECU—redefining banking”; “Why bank when you can VSECU?”).

19. Other credit unions in Vermont use the word banking to advertise or describe their Internet banking, mobile banking and online banking services.

#### USE OF TERM “BANKING COOPERATIVE”

20. All credit unions are “cooperatives” owned by their members. 12 C.F.R. Part 707 Appendix C, § 707.2 (p). As a credit union, VSECU is a cooperatively owned entity. *Id.*

21. As explained above, VSECU offers its members many financial services that are the same as services offered by banks and is engaged in the business of banking and the banking business as defined by Vermont law. It is truthful and not misleading to say that the cooperatively owned VSECU offers its members banking services. Members of VSECU think they are “banking” with VSECU. Even writers for the Wall Street Journal think that members of credit unions do their banking with their credit unions. *Advantages of banking at credit unions*, Jennifer Openshaw, Wall Street Journal, Market Watch, April 10, 2012 (emphasis supplied). A copy of the article is attached and marked Exhibit 5.

22. In late 2010, VSECU began to describe itself as a “banking cooperative” as part of its branding efforts, including its website, micro-site and facebook pages. See Exhibit 4.

23. On October 18, 2011, the Department wrote to the VSECU concerning its advertisements that use the phrase “banking cooperative” to describe VSECU as an entity. A copy of the letter is attached and marked Exhibit 6. The Department asserts in its letter that the use of the term

“banking co-op” by a credit union is “misleading and, as such, a violation of 8 V.S.A. § 14103.” After the exchange of more correspondence and face-to-face discussion, the Department did not change its position. A copy of the additional correspondence is attached and is marked Exhibits 7, 8 and 9.

24. The Department has provided VSECU with a draft of its Notice of Intent to Issue a Cease and Desist Order (Notice) and has told VSECU that the Notice will be served on VSECU on June 18, 2012. A copy of the draft Notice is attached and marked Exhibit 10. In the draft Notice, the Department uses numerous partial quotes from VSECU advertisements and announcements. See Exhibits 3 and 4 for the full text of the various advertisements and announcements. The draft Notice seeks, among other things, to prevent VSECU’s use of the words “banking, banker, banking co-op, banking cooperative, and not-for-profit banking cooperative, to describe itself, its services, or its activities.” The Notice concludes that VSECU’s use of the words “‘bank,’ ‘banking association,’ or ‘trust company’ or any other similar sounding word or name, including but not limited to banking, banker, banking co-op, banking cooperative, and not-for-profit banking cooperative, to describe itself, its services, or its activities is a violation of 8 V.S.A. § 14103.”

25. VSECU has expended considerable sums to develop its messaging, including the fact that it offers banking services and is a banking cooperative. VSECU believes that its use of the words and phrases “banking, . . . banking co-op, banking cooperative, and not-for-profit banking cooperative, to describe itself, its services, or its activities” as well as (to) “bank” are truthful and that § 14103 does not expressly prohibit the use of these terms by VSECU. As recently as June 13, 2012, the Department has stated that some VSECU advertisements that include the word banking or (to) bank are permitted under § 14103.



26. As a credit union insured by the National Credit Union Administration (NCUA), VSECU is subject to *Accuracy Of Advertising and Notice of Insured Status*, 12 C.F.R. Part 740 of the regulations of the NCUA.

#### COUNT I

##### 8 V.S.A § 14103 Does Not Prohibit a Credit Union from Using the Words “Banking,” (to) “Bank” or “Banking Cooperative” to Describe its Activities or its Form of Entity.

27. Petitioner reasserts paragraphs 1 through 26 and incorporates them herein by reference.

28. The term “banking” is not defined in title 8 V.S.A., Chapter 201, the chapter that contains the definitions used in the law that regulates state chartered banks, including § 14103. As a result, the Department should apply the commonly understood or vernacular meaning of the terms “banking” or (to) “bank.”

29. “Banking” and (to) “bank” are words that are commonly understood to refer to the core services that *any* credit union, including VSECU, provides to its members. They are also words that characterize the activities of persons when they do business with a credit union or with a bank.

30. The use of the terms “banking” or (to) “bank” to describe the lawful activities of entities that are authorized to take deposits and make loans is not exclusively relegated in Vermont law to entities that are formed as banks by 8 V.S.A. § 14103 or any other Vermont law.

31. A “credit union” is “a cooperative association that offers low-interest loans and other consumer *banking services* to persons sharing a common bond — often fellow employees and their family members.” *Black’s Law Dictionary* 398 (8<sup>th</sup> ed. 2004) (emphasis supplied). A copy of the definition is attached and marked Exhibit 11.

32. Because credit unions are cooperatives that conduct a banking business, the phrases “banking co-op” and “banking cooperative” are accurate and truthful descriptions of the business of any credit union.

33. VSECU’s use of banking, (to) bank, and banking cooperative in its marketing materials is accurate and truthful and does not create a risk of confusing or misleading the public as to the nature of VSECU’s business. The plain language of 8 V.S.A. § 14103 does not prohibit VSECU from using banking, (to) bank, and banking cooperative in its advertising and marketing material.

34. The Department has acknowledged as recently as June 13, 2012 that some of VSECU’s use of banking and (to) bank in its advertisements is permitted by § 14103.

35. Other credit unions in Vermont use the word banking to advertise or describe their Internet banking, mobile banking and online banking services.

## COUNT II

Section 14103 is Preempted: The NCUA has Expressly Occupied the Field of Permissible Advertisement by Federally Insured Credit Unions Such as VSECU through its Regulation on Advertisements;

The NCUA has Determined that a Law Similar to the Vermont Law is Preempted under the NCUA Regulation on Advertisements

36. Petitioner reasserts paragraphs 1 through 35 and incorporates them herein by reference.

37. In addition to regulation by the Department, VSECU is subject to regulation by the NCUA because VSECU’s deposits are insured by the NCUA (as required by Vermont law) through NCUSIF. Among other things, VSECU is expressly made subject to the NCUA regulation entitled *Accuracy Of Advertising and Notice of Insured Status* (NCUA Advertising Rule), 12 C.F.R. Part 740 (“This part applies to all federally insured credit unions. . . it requires that all [] kinds of advertisements be accurate.”)

38. In 2004, the NCUA issued an opinion with respect to a Minnesota state law<sup>3</sup> with language similar to that found in § 14103 as to its application to a federal credit union. See NCUA Opinion letter 03-0146 from NCUA Associate General Counsel Sheila Albin, Esq. to David Kantor, Esq. March 12, 2004. A copy is attached and marked Exhibit 12. As one of the four separate bases for its opinion, the NCUA expressly found that the NCUA Advertising Rule occupied the field for permissible advertising for credit unions, without regard to chartering entity, and further found that the Minnesota law in question was preempted. It also found that “NCUA’s interpretation of its advertising regulation, as noted in Chairman Dollar’s March 19th letter, directly conflicts with Minnesota’s advertising restrictions. The Minnesota statute is, therefore, preempted.”

39. The other bases used by the NCUA in its opinion are also persuasive and should likewise be considered by the commissioner. Although the NCUA’s discussion appears to have been more circumscribed in these bases, the legal basis and logic used in each are consistent with VSECU’s position.

40. First, the NCUA states in its 2004, opinion:

“[The] Minnesota law [at issue] defines the business of “banking” in generic terms to include the acceptance of deposits of money or currency and the making of loans. MINN. STAT. ANN. §47.02 (West 2002). These activities are fundamental to the operation of a credit union, and a literal application of this language to [a federal credit union] would prohibit it from functioning.”

---

<sup>3</sup> “No . . . corporation, except as specifically authorized by the laws of this state, who does not hold an effective certificate of authority, issued by the commissioner of commerce, to engage in the business of banking and is not subject to and complying with all the provisions of law relating to banks shall engage in such business, or make use of the words “bank,” “banker,” or “banking,” or any derivative or compound of any such words . . . in any . . . advertising, or any other written or printed matter, in such manner as might indicate to any person that such . . . corporation is authorized to engage in the business of banking.” MINN. STAT. ANN. §47.03(1) (West 2002). This provision has exceptions for insurance companies authorized to engage in the insurance business under Minnesota law and holding companies and their affiliates as defined under the federal banking laws. *Id.* It provides civil penalties of up to \$100 a day. MINN. STAT. ANN. §47.03(2) (West 2002).

The same could be said for Vermont state chartered credit unions, including VSECU, if § 14103 is applied as in the Notice.

41. Next, the NCUA opinion found:

[T]he Minnesota statute would prohibit an FCU from using the term “banking” or derivative terms in its advertisements. MINN. STAT. ANN. §47.03 (West 2002). Despite the generic nature of the statutory definition of “banking,” the apparent intent of this prohibition (with some exceptions not relevant here) is to restrict usage of descriptive terms such as “banking” to entities that hold a bank charter issued by the state. While there are important differences between [federal credit unions] and commercial banks, we have previously recognized that terms such as “banking” have become generic, as reflected in the excerpt below of a letter to a state bankers association:

[t]he term “banking services” has become a generic term essentially synonymous with “financial services.” Moreover, one sees the word “bank” used as a verb in many contexts and persons without access to financial services are sometimes described as “unbanked.”

NCUA letter from Chairman Dennis Dollar to Daniel J. Forte, dated March 19, 2002.

This is precisely VSECU’s point.

40. Finally, NCUA “note[s] that the intent of the Minnesota statute appears, in part, to be to minimize public confusion as to which entities engaged in business in the state are chartered financial institutions that are subject to some type of governmental oversight and regulation [which necessarily includes credit unions].” *Id.* Again, this NCUA finding is wholly consistent with VSECU’s position. The NCUA concludes by stating: “We would, accordingly, oppose any attempt by a state regulatory authority to enforce the Minnesota statute against [a federal credit union]. Our view is that failure by [a federal credit union] to comply with the statute does not constitute a misleading or deceptive advertisement warranting enforcement action by NCUA.”

41. VSECU requests the Commissioner find that the NCUA has occupied the field of advertising for federally insured credit unions, including VSECU, and that failure by a federal or a state chartered credit union to refrain from using “banking,” (to) “bank” or “banking

cooperative” does not constitute a misleading or deceptive advertisement warranting enforcement action.

### COUNT III

#### Applying § 14103 to Prohibit VSECU from Using the Word “Banking” and Phrase “Banking Coop” Would Violate the Vermont Common Benefits Clause, Chapter 1, Article 7 of the Vermont Constitution.

42. Petitioner reasserts paragraphs 1 through 41 and incorporates them herein by reference.

43. VSECU competes directly with banks and federal credit unions to provide the same services to Vermont residents—including accepting deposits and lending money—which are commonly referred to under the vernacular and generic term “banking.”

44. An order that prohibits VSECU from using “banking” or (to) “bank” or the term “banking cooperative” would create an unfair competitive advantage for VSECU’s competitors. Such competitors would be able to use the words “banking” or (to) “bank” to describe in simple terms their services when VSECU could not, even though they are in the same business and offer the same services that VSECU offers to its members.

45. The one competitor in Vermont that is a cooperative financial institution would gain an unfair competitive advantage because it could describe itself by using two words rather than the cumbersome and vague formulation that the Department says it would permit VSECU to use, namely: VSECU is a credit union that is a cooperative that offers its members financial services.

46. The Department should not interpret or apply § 14103 in a way that treats VSECU differently from its competitors, including federal credit unions, or that favors banks and federal credit unions over state chartered credit unions in their marketing messages. To do otherwise would violate the Common Benefits Clause of Article 7 of the Vermont Constitution.

#### COUNT IV

##### Interpreting or Applying § 14103 to Prohibit VSECU from Using “Banking,” (to) “Bank” Or “Banking Coop” Would Violate VSECU’s First Amendment Right of Free Speech, Guaranteed Under the U.S. Constitution

47. Petitioner reasserts paragraphs 1 through 46 and incorporates them herein by reference.
48. VSECU’s advertisements are commercial speech protected by the First Amendment of the United States Constitution.
49. VSECU provides its members banking services as that term is commonly understood by the general public. Also, VSECU is organized as a cooperatively owned business entity. It is only logical that VSECU’s advertisements that describe its services by using “banking” or (to) “bank” and that identify VSECU as a “banking co-op” to the public are truthful and are not misleading with respect to the nature of VSECU and its business.
50. Interpreting § 14103 so as to prohibit only a state chartered credit union from using “banking,” (to) “bank” and “banking co-op” is prior restraint of future truthful speech that does not further any substantial government interest. While the Department is charged with protecting Vermont consumers, there is no risk that VSECU’s use of the generic “banking” or (to) “bank” in its advertisements would cause harm to the public because these terms accurately describe the nature of VSECU and its business.
51. Rather than avoiding public confusion, the public’s understanding that credit unions are a valuable and robust alternative to commercial banks would be hampered if the Department were to prohibit a credit union from describing its core services using the simple term “banking” or describing itself as a “banking cooperative” rather than as a “cooperative that offers (amorphous) ‘financial services.’”

52. The Department has not considered or discussed with VSECU alternate means of regulating VSECU's advertising to allow VSECU to continue using "banking," (to) "bank" and "banking coop" so as to avoid the negligible or non-existent risk of misleading the public that a credit union is chartered as a bank. Instead, the draft Notice, the terms of which the Department says VSECU must agree to and abide by in order to avoid substantial monetary penalties and other sanctions, eliminates the previously permitted uses.

53. The Department is preempted from applying § 14103 to *federal* credit unions.

54. The Department should not bow to outside pressure by applying § 14103 to prevent VSECU from advertising its services as "banking" or advertising itself as a "banking co-op" as that would unlawfully infringe on VSECU's protected commercial speech rights in violation of the First Amendment of the U.S. Constitution.

#### COUNT V

#### Section 14103 is Void for Vagueness and Overly Broad and the Department's Proposed Interpretation of It Violates VSECU's Due Process Rights Guaranteed under the 5<sup>th</sup> and 14<sup>th</sup> Amendments to the U.S. Constitution.

55. Petitioner reasserts paragraphs 1 through 54 and incorporates them herein by reference.

56. Section 14103 provides "[n]o person shall advertise . . ., or use the words 'bank,' 'banking association,' or 'trust company' or other similar sounding word or name . . . unless the commissioner approves the activity or word . . ."

57. The language "or similar sounding word or name" fails to give a person of ordinary intelligence a reasonable opportunity to know what conduct is prohibited and what conduct is permissible under § 14103.

58. The Department has acknowledged as recently as June 13, 2012 that some of VSECU's use of banking and (to) bank in its advertisements is permitted by § 14103. This recent position

would be reversed if the Cease and Desist Order included in the Notice were adopted by the Commissioner.

59. Other credit unions in Vermont use the word banking to advertise or describe their Internet banking, mobile banking and online banking services. The Department has failed to take any action against these other credit unions.

60. Section 14103's provisions, which confer broad administrative discretion to the Commissioner to determine the lawfulness of commercial speech without specific statutory guidelines, create a real danger of caprice and discrimination in the administration and application of § 14103. This danger—perhaps now elevated by outside heat on the Department—is real and imminent as evidenced by the Department's plan to enter a Cease and Desist Order which proposes to reverse the Department's previous position on the same statute permitting VSECU to use "banking" and (to) "bank."

61. Section 14103, if applied to prevent a credit union chartered and regulated by the same Department that regulates other state chartered entities that offer banking services from simply describing its core services and itself, is overly broad and would subject regulated entities that lawfully offer the services described in it to substantial penalties and financial harm.

62. Section 14103 is void-for-vagueness and overly broad.

#### COUNT VI

#### The Department Should Refrain from Arbitrarily Asserting a New Position with Respect to Use of "Banking" and (to) "Bank" to Describe the Activities of State Chartered Credit Unions

63. Petitioner reasserts paragraphs 1 through 62 and incorporates them herein by reference.

64. Because the Department received written notice of VSECU's intent to use "banking" and (to) "bank" in marketing materials five years ago and, as recently as June 13, 2012, has



acknowledged that some of VSECU's use of banking and (to) bank in its advertisements is permitted by § 14103, VSECU believes that the Department should not now arbitrarily prohibit VSECU and only VSECU from describing its activities as "banking" or using the verb "bank" in connection with its marketing efforts.

65. VSECU reasonably believes that its marketing strategy, often using the words (to) "bank" and "banking" to distinguish itself from its competitors that are chartered as banks, should not be subject to the whims of the Commissioner or the pressure he is under from third parties.

66. If VSECU were ordered to stop using "banking" and (to) "bank" in its advertising materials, it would suffer substantial financial harm because it would necessarily forego the benefit of its expenditures to develop its existing strategy and incur significant expense in developing new branding and marketing strategies.

67. The Department should refrain from ending its years of acceptance the way proposed in the Notice.

68. The Commissioner should choose to exercise the discretion afforded him by § 14103 and reconsider whether his policy reversal would have any benefit whatsoever to the state or the public.

#### REQUESTED RELIEF

**Wherefore** the Petitioner requests:

A. A declaration that 8 V.S.A. § 14103 does not prohibit a state chartered credit union such as VSECU from using the words "banking," (to) "bank" and "banking coop" in advertising and marketing materials to describe its services or itself, respectively.

B. A declaration that the NCUA has expressly occupied the field of permitted advertisements for all federally insured credit unions, including VSECU, and that in light of that determination (and the derivative determination that a state law similar to Section 14103 was preempted), the Commissioner has the authority to interpret and apply 8 V.S.A. § 14103 in a constitutional manner so that it does not violate the Supremacy Clause (Article VI, Clause 2) of the U.S. Constitution.<sup>4</sup>

C. A declaration that the Department acknowledges that using § 14103 to order VSECU or any other credit union to stop using the word “banking,” (to) “bank” and “banking coop” to describe their services or themselves, respectively, in advertisements and marketing materials would violate the Common Benefits Clause of Vermont Constitution (Chapter I, Article 7).

D. A declaration that the Commissioner has the authority to interpret and apply 8 V.S.A. § 14103 in a constitutional manner so that it does not violate the rights of VSECU or any other credit union under the Vermont Constitution’s Common Benefit Clause (Chapter 1, Article 7).

E. A declaration that the Department acknowledges that using § 14103 to order VSECU to stop using the words “banking,” (to) “bank” and “banking coop” would unconstitutionally violate VSECU’s or any other credit union’s commercial speech rights under the First Amendment to the U.S. Constitution.

F. A declaration that the Commissioner has the authority to interpret and apply 8 V.S.A. § 14103 in a constitutional manner so that it does not violate constitutionally protected Free

---

<sup>4</sup> VSECU recognizes that the Department lacks jurisdiction to declare a statute unconstitutional on its face. Nonetheless the Department has the inherent authority to interpret and apply a statute so that it passes constitutional muster. VSECU does not intend to waive its arguments on constitutionality or its available remedies in the event that the Department does not grant the relief requested. The Department should recognize and consider the constitutional concerns and related remedies that could be triggered by an avoidable interpretation that restricts VSECU’s ability to truthfully advertise the services that it is legally authorized to offer to its members.

Speech rights of VSECU or any other credit union that are guaranteed under the First Amendment to the U.S. Constitution.


G. A declaration that the Department does not intend to restrain a state chartered credit union such as VSECU from using “banking,” (to) “bank” and “banking coop” in its advertisements and marketing materials to describe its services or itself, respectively, through use of Section 14103 because such action would violate the due process rights of VSECU because Section 14103 is too vague to be applied in a constitutional manner and *ad hoc* interpretations using Commissioner discretion fail to adequately apprise regulated entities how such law is to be applied or enforced.

H. A declaration that the Department has the discretion to avoid causing VSECU to suffer the significant financial harm, either through monetary penalties or foregoing its branding and marketing strategies and developing new ones, that would result if the Department were to assert an interpretation of the scope and meaning of Section 14103 as described in its draft Cease and Desist Order.

I. A declaration that the Department will not take regulatory action against VSECU if it continues to use the words “banking,” (to) “bank,” “banking coop” and “banking alternative” in its advertising and marketing materials to describe its services or itself.

Dated this 18<sup>th</sup> day of June, 2012 at Montpelier, Vermont.

Vermont State Employees Credit Union

By:   
\_\_\_\_\_  
Jacqueline A. Hughes  
Storrow Buckley Hughes, LLP  
26 State Street, Suite 8  
Montpelier, VT 05602  
(802) 778-0303