Credit Union National Association
CUNA

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January 14, 2019

Mr. Gerard Poliquin
Secretary of the Board
National Credit Union Administration
1775 Duke Street
Alexandria, VA 22314

Re: Comments on Federal Credit Union Bylaws; RIN 3133–AE86

Dear Mr. Poliquin:

On behalf of America's credit unions, I am writing regarding the National Credit Union Administration's (NCUA) proposal to amend the federal credit union (FCU) bylaws found in Appendix A to part 701 of NCUA's rules and regulations. As NCUA proceeds with this rulemaking, we urge the agency to keep in mind the importance of flexibility when it comes to bylaws. As NCUA acknowledges in the proposal, and CUNA agrees, an overly rigid approach—including a lack of opportunity to deviate from the FCU bylaws—can inhibit an FCU's ability to respond to changing market practices or to address basic corporate governance matters in a prompt and efficient manner. Further, though beyond the jurisdiction of the NCUA Board, we believe the FCU Act as it applies to bylaws is overly prescriptive.[1] Decisions pertaining to FCU bylaws should be entirely in the hands of the FCUs themselves, not the regulator. The Credit Union National Association (CUNA) represents America's credit unions and their 115 million members.

BACKGROUND

NCUA is proposing to update, clarify, and simplify the FCU bylaws found in Appendix A to part 701 of NCUA's rules and regulations. NCUA is also proposing changes that will update and conform the FCU bylaws to legal opinions issued by NCUA's Office of General Counsel. Finally, NCUA is proposing other changes designed to remove outdated or obsolete provisions.

The proposed rule incorporates suggestions the agency received in response to the 2018 advance noticed of proposed rulemaking (ANPR) and throughout NCUA's ongoing review

[1] NCUA Rules and Regulations, Part 701—Organization and Operation of Federal Credit Unions. Statutory authority for part 701 is provided by the FCU Act as follows: 12 U.S.C. §§ 1752(5), 1755, 1756, 1757, 1758, 1759, 1761a, 1761b, 1766, 1767, 1782, 1784, 1785, 1786, 1787, 1788, and 1789.

of the FCU bylaws. In addition, the proposed rule clarifies provisions that have created confusion in the past. In some instances, a proposed change offers more detail or further elaboration to help FCU officials, employees, and members better understand a provision. The proposed rule also makes stylistic and grammatical changes throughout the FCU bylaws, intended to provide for a much clearer and more readable document.

PROPOSED AMENDMENTS

Introduction

Bylaw amendments (§ 3c)

The proposed rule modernizes the introductory language to the FCU bylaws. The proposal also establishes an explicit 90 calendar day deadline for NCUA's Office of Credit Union Resource and Expansion (CURE)—which now is the primary office handling bylaw amendments—to reach a decision on a bylaw amendment presented by an FCU.

CUNA supports a deadline for NCUA's decisions on possible bylaw amendments, as having a defined window of time can help FCUs plan efficiently. However, we believe 90 days is unnecessarily long. We suggest 60 days, which will provide credit unions with more timely responses, greater transparency, and enhanced accountability. We understand that this is a burdensome task, but if credit unions want to make operational changes to strengthen their financial positions and best serve their members, it is critical that we avoid unreasonable delay.

In addition to establishing a timeline, the proposal states that if CURE does not reach a decision on a proposed bylaw amendment within 90 days, the applicant FCU should consider the proposed amendment to be denied. NCUA favors this approach over one in which a proposed bylaw amendment is automatically considered approved in instances where CURE does not actively approve the amendment within the 90-day timeframe. NCUA believes such an alternative approach could result in adoption of a bylaw that has a material adverse effect on fundamental member rights, poses a safety and soundness risk to the FCU, or is otherwise contrary to law.

We also do not support an approach where a proposed bylaw amendment is considered approved if no response is received from CURE within 90 days. However, we do not support the approach proposed, in which an FCU should assume a bylaw amendment request has been denied if no response is received within 90 days. First, we understand situations may arise where CURE simply is unable to review a request and respond to the FCU within the pre-established timeframe. In such situations, CURE should be permitted to complete the review, rather than the application automatically be deemed denied. Second, the proposed approach suffers from insufficient communication to the FCU seeking a bylaw amendment. Without a response from CURE, the FCU is left wondering whether: an approval was in fact sent that the FCU somehow missed or did not receive; the proposed amendment was denied due to a substantive defect with the suggested change; or the proposed amendment was denied simply as a result of CURE's inability to review it within 90 days. Further, if the proposed bylaw amendment was denied due to a

substantive defect with the proposed change, a lack of response from CURE fails to provide the FCU with any detail on the reason it was denied, which would be extremely helpful to the FCU if it chooses to propose a similar bylaw amendment in the future aimed at addressing the issue contemplated by its initial request.

Thus, we support an approach where CURE responds to FCU applicants within the pre-determined timeframe, which we believe should be 60 days. In the rare situation where CURE is unable to respond within the 60-day window, CURE should inform the FCU of the delay and proceed with its decision as soon as reasonably practical. In addition, where a proposed bylaw amendment is denied, CURE should provide the applicant FCU with as much detail as appropriate regarding the reason for the denial.

The nature of the FCU Bylaws (§ 4d)

Identical to the current bylaws, section 4 of the proposal states that NCUA has discretion to take administrative actions when a credit union is not in compliance with its bylaws, and that if a potential violation is identified, NCUA will carefully consider all of the facts and circumstances in deciding whether to take enforcement action.

Further, the current FCU bylaws go on to state that "NCUA will not take action against minor or technical violations but emphasizes that it retains discretion to enforce the FCU bylaws in appropriate cases . . . ." However, the proposal would insert "generally" into this sentence, as follows: "NCUA will not *generally* take action against minor or technical violations but emphasizes that it retains discretion to enforce the FCU bylaws in appropriate cases . . . ."[2]

We disagree with NCUA's proposed addition of the word "generally." While it is not a dramatic change, we are nevertheless concerned with its implication. We strongly believe that NCUA should *not* take action against minor or technical violations. Further, we disagree with NCUA's enforcement of bylaws that merely address administrative issues.[3] The credit union and its members can and do resolve issues on their own in the vast majority of such cases. Involving NCUA in such situations, at least at the onset, is an inappropriate use of the credit union's and the agency's precious time and resources.

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[2] 83 Fed. Reg. 56640, 56649 (Nov. 13, 2018) (emphasis added).

[3] CUNA's official position on NCUA's enforcement of FCU bylaws is as follows: "CUNA recognizes that NCUA has the legal authority to enforce federal credit union bylaws but opposes NCUA's enforcement of bylaws that merely address administrative issues. NCUA should become involved in the enforcement of a federal bylaw only when a bylaw dispute cannot be resolved by the credit union first, using its own internal processes, before turning to NCUA. If NCUA must become involved, its actions should be reasonable and no harsher than actions taken by other regulators when addressing similar issues."

The Compendium of CUNA Policies on Legislative & Regulatory Issues, page 17, *available at* www.cuna.org/uploadedFiles/Advocacy/Priorities/State_Government_Affairs/Compendium-CUNA-Policies-Legislative-Regulatory-Issues.pdf.

Article II. Qualifications for Membership

Article II outlines the requirements for obtaining and continuing FCU membership. The proposed rule includes an expanded discussion in the staff commentary of measures that an FCU may take to address abusive and disruptive members. In an effort to provide additional clarity on an FCU's right to limit services or access to credit union facilities, the proposal includes commentary to Article II, based on prior legal opinions by NCUA's Office of General Counsel, that details how an FCU may handle an abusive or disruptive member.

Member in good standing (§ 5)

The current bylaws address limitation of services in a single sentence in section 4 of Article II. "A member who is disruptive to credit union operations may be subject to limitations on services and access to credit union facilities."

The proposal would create a new section 5 to address limitation of services. The proposed commentary notes that there is a reasonably wide range within which an FCU may fashion a limitation of services policy that is tailored to the needs of the individual FCU. An FCU has broad discretion to deny, as it deems appropriate, all or most credit union services, or access to credit union facilities to a member that has engaged in conduct that has caused a loss to the FCU or that threatens the safety of credit union staff, facilities, or other members. Accordingly, an FCU may take immediate action to address situations in which a member is violent, belligerent, disruptive, or poses a threat to the credit union, or other members, or its employees even if the FCU Act prohibits the FCU from immediately expelling the member.

To facilitate an FCU's implementation of its limitation of services policy, the proposed rule amends Article II to distinguish between a member that retains all the rights and privileges associated with FCU membership and a member that is subject to a limitation on services or a restriction on access to credit union facilities. Proposed section 5 describes the concept of a "member in good standing" as someone who retains all the rights of FCU membership. To remain in good standing, a member must be current on credit union loans, avoid engaging in any violent, belligerent, disruptive, or abusive behavior towards credit union staff or other credit union members in or near the FCU, and not cause a financial loss to the credit union. A member that fails to observe any of these basic requirements may be subject to reasonable limitations of service or access to credit union facilities pursuant to the FCU's limitation of services policy.

Many credit unions currently maintain limitation of services policies to address problems with members, including problems related to behaviors described in proposed section 5. We have heard from many credit unions that utilize limitation of services policies that they find them to be an extremely useful tool, particularly since, as a credit union policy, the credit union can adopt and enforce the policy free from constraints sometimes associated with regulatory text or FCU bylaws.

We greatly support NCUA's objective behind proposed section 5. Challenges in dealing with unruly members is an unfortunate reality. Aside from its ability to limit member services, an FCU is quite restricted in available remedies, such as possible member expulsion, which is addressed in detail below.

We appreciate NCUA's effort to consolidate in a single place (in proposed section 5 and associated commentary) past Office of General Counsel legal opinion letters relevant to FCUs' ability to limit member services. Illustrative examples, such as those provided, are very helpful for reference when complying with NCUA's rules and regulations.

Proposed section 5 describes a member in good standing and instances when a member would be deemed to not be in good standing and therefore subject to any applicable limitation of services policy. We are concerned that inclusion of section 5, as proposed, in the FCU bylaws may ultimately, and possibly unintentionally, result in a contraction of credit unions' ability to employ limitation of services policies.

While aspects of proposed section 5 could be helpful (*e.g.*, examples of services that may be limited), we are concerned that the potential downside of the proposed language (*i.e.*, unworkable restrictions on credit unions' ability to utilize limitation of services policies) may outweigh the potential benefit. Thus, we do not support section 5 as proposed. It is possible we could support a section 5 (and associated commentary) that refrains from addressing limitation of services policies, but it is unclear whether such revision would necessarily eliminate or greatly minimize the positive aspects of the section.

Article IV. Meetings of Members

Article IV addresses procedures related to annual and special meetings of an FCU's membership. The proposed rule makes several changes intended to encourage greater member participation, including enhanced notice requirements and adjustments to quorum requirements.

Notice of meetings (§ 2)

To ensure that members receive adequate notice of an annual or special meeting, the proposed rule requires that the notice for the annual meeting be posted in a conspicuous place in the FCU's physical office at least 30 calendar days before the meeting. The notice must also be prominently displayed on the FCU's website if the credit union maintains a website. NCUA believes these changes are appropriate because members are more likely to participate in annual and special meetings if the notice is widely announced.

The current notice requirement does not mandate, but allows, notice of the annual meeting to be placed in the FCU's physical office. The current requirement also does not address notice on an FCU's website.

We agree with NCUA's intent behind enhancing disclosure of FCUs' meetings. While many credit union members are familiar with the one-member, one-vote philosophy, there are members that choose not to take part in the democratic process for a variety of

reasons. With that said, we believe the jump from the current optional physical disclosure requirement to a mandatory physical and online disclosure requirement is unnecessary to achieve NCUA's objective and could prove operationally difficult for some credit unions (see related discussion below in section on Article XVII). Thus, we ask NCUA to allow an FCU to satisfy the disclosure requirement by providing a notice at the FCU's physical office *or* on the FCU's website.

As noted above, the current and proposed notice requirements state that notice of the annual meeting must be provided at least 30 calendar days before the meeting. Additionally, the proposal would maintain the 75-day maximum advance notice timeframe included in the current bylaws. Extended time to issue the notice for meetings might permit greater participation since it is not uncommon for people to schedule meetings a year in advance. The 75-day timeframe is not a statutory requirement. Thus, we ask NCUA to consider extending the timeframe as provided in the FCU bylaws or alternatively allowing FCUs the ability to provide notice of meetings as far in advance as is suitable and preferable to their membership.

Quorum (§ 5)

The proposed rule would adjust the quorum requirement for meetings. While the proposal would reduce from 15 to 12 the number of members required, it would also exclude board, credit union staff, and officials, for purposes of achieving a quorum. NCUA's stated rationale for this change is to encourage FCUs to have wider participation from members, rather than allowing credit union staff and board members to control all corporate decision making within the credit union.

As with most of the changes in this proposed rulemaking, CUNA agrees with the intent behind the amendments to the FCU bylaws. Member participation is an area that has room for improvement. To that end, innovative credit unions are making strides in not only attracting new members from previously less represented demographics but also energizing existing members to take more active roles in their credit union.

With that said, we agree that wider participation from members is something to work toward. However, we disagree with the path the agency is attempting to take to get there. Dramatically reducing the potential pool of individuals available to achieve a quorum would be challenging for some FCUs and extremely difficult for others. We are very concerned that if such an amendment were to be adopted, it would have harsh unintended consequences. We do recognize that the proposal would maintain the safety net of not requiring a specific number for a quorum at a subsequent meeting if a quorum is not achieved at the original meeting. However, we doubt NCUA would encourage a process where FCUs fall into a pattern of regularly failing to obtain a quorum initially and then relying on the safety net to achieve a quorum at subsequent meetings.

In addition, there are number of reasons an FCU may have difficulty achieving a quorum—difficulty that would be exacerbated under the proposed change. While sometimes a lack of member interest or awareness is the cause, oftentimes the challenge

stems from something out of the member's control, such as an inability to be physically present, particularly for those in the more rural areas of the country.

For these reasons, we oppose the proposed changes to the quorum requirement. We urge NCUA to maintain the current FCU bylaw provision included in section 5 of this article.

Combined virtual and in-person meetings (p 56643)

Furthermore, the proposed rule does not generally allow an FCU to conduct a virtual or hybrid (combined virtual and in-person) annual or special meeting. Due to its concerns about member disenfranchisement, NCUA does not currently support a change regarding virtual or hybrid meetings. NCUA is particularly concerned with the rights of members that do not have access to electronic devices or that may live in areas without access to broadband internet.

NCUA will, however, consider bylaw amendment requests allowing for hybrid meetings on a case-by-case basis depending on, among other things, the FCU's size, nature, and field of membership. For example, NCUA may grant such a bylaw amendment for an FCU that offers a majority of its financial services online or an FCU with a geographically dispersed field of membership. To avoid the possibility of member disenfranchisement, however, NCUA does not believe it is appropriate to allow a virtual meeting to completely supplant a member meeting. Therefore, FCUs holding hybrid meetings must always offer an option for in-person attendance as well as online.

CUNA encourages NCUA to amend Article IV to allow, at a minimum, hybrid annual or special meetings *without* the need to individually submit a request to do so. Allowing virtual, or even hybrid, meetings would undoubtedly enhance the level and likely the quality of member participation. We appreciate that NCUA allows an FCU to request a hybrid meeting on a case-by-case basis. However, we disagree with such an unnecessary step, and further we disagree that NCUA should be the entity to determine whether a hybrid meeting is in the members' best interest. Since the FCU seeking to hold a hybrid meeting is most intimately familiar with its membership, the step of NCUA's analysis would be unnecessary. Further, one could argue that the FCU pursuing a hybrid—or even virtual meeting—is more concerned with potential member disenfranchisement than an outside entity, including NCUA.

Thus, we request NCUA amend the FCU bylaws to allow any FCU to hold a hybrid annual or special meeting. Further, we ask NCUA to develop a process whereby an FCU may hold a virtual annual or special meeting. Since annual or special meetings are so important and the process of hosting such a meeting entirely virtually may require extra effort to ensure technical issues are worked out, we would not oppose an initial review or approval process by NCUA, at least in the early stages.

Article V. Elections

Electronic voting (comment vii)

The proposed rule provides staff commentary clarifying electronic voting. The commentary states that an FCU may use as many forms of electronic voting (*e.g.*, mobile phone or internet) as it wishes for those members who choose to vote electronically. However, the proposed rule does not allow an FCU to adopt an electronic-only voting process. While modern technological innovations have changed the way that corporations and other businesses conduct meetings and hold elections, NCUA remains concerned that allowing electronic-only voting could disenfranchise those members that do not have access to electronic devices or that live in areas without access to reliable internet. NCUA will, however, consider bylaw amendment requests allowing for electronic-only voting on a case-by-case basis.

CUNA appreciates NCUA's concern about disenfranchising certain members. However, since a credit union's management knows its membership best, we think it is appropriate to allow an FCU to determine which method of voting is most appropriate. Thus, we disagree with the proposed commentary prohibiting an FCU from utilizing electronic-only voting. Credit unions themselves are just as concerned with ensuring all members can participate in the democratic process associated with the credit union. So, it seems unlikely that a credit union would utilize a voting method that precludes members interested in voting from doing so. We believe that if, after an appropriate assessment by the credit union, the credit union determines that electronic-only voting is most appropriate, the credit union should be permitted to elect such method.

If NCUA does not agree to allow FCUs to freely employ electronic-only voting (*i.e.,* if NCUA maintains the prohibition as currently included in the proposed commentary), we support NCUA's practice of allowing electronic-only voting on a case-by-case basis.

Nominating committee (p 56644)

CUNA believes that recruitment of credit union board members would be enhanced by model processes, starting from guidance for nominating committees to help identify prospective candidates—clarity on valid criteria to use in the selection process, for example—to ongoing development of directors. Some credit unions, for example, might develop a board profile outlining the skills, professional experience, credit union background, and demographic information sought to be represented. Other credit unions may find it useful to formalize a Board Member Evaluation Program for annual review of oversight and governance. While the implementation may vary among credit unions of differing size, scope, and geography, the basic recommendation is to suggest mechanisms be developed to maintain board stability, continuity, training and development, and ensure director-level engagement. A clear roadmap outlining roles and responsibilities could act as a driving and living archive to ensure robust participation.

Article VI. Board of Directors

Associate directors (comment iii)

As part of its consultation process with the credit union industry, NCUA received comments suggesting that the FCU bylaws provide specific guidance to FCUs interested in establishing associate director positions. Commenters suggested that greater flexibility in regard to these types of arrangements will enable an FCU to better plan for vacancies in board positions and retirements among current directors.

To provide additional guidance to FCUs on associate director positions, the proposed rule clarifies, through staff commentary, that an FCU may establish associate director positions through board policy. It may be thought of as an apprenticeship position in which the incumbent receives training and knowledge about the business of the board, with the expectation that the experience will prepare him or her for an eventual election to a director position. The decision to establish an associate director position, as well as the selection of the individuals to become associate directors, is solely within the discretion of the FCU's board.

CUNA supports the proposed option for an FCU to establish associate director positions. We believe these positions will provide qualified individuals with a good opportunity to gain exposure to board meetings and discussions, but without formal director responsibility or the right to vote.

Article XIV. Expulsion and Withdrawal

Article XIV addresses the expulsion and withdrawal procedures for members. NCUA notes that expulsion of a member is very limited under the FCU Act, which states that an FCU may only expel a member upon a two-thirds majority vote of the membership at a special meeting called for that purpose or by operation of a board-approved nonparticipation policy.[4]

In the proposal, NCUA describes the term "nonparticipation" to generally refer to a "person not being involved with or participating in something. [T]he term 'nonparticipation' is best understood in a more limited sense to mean a failure to participate, or a lack of involvement, in credit union affairs. It does not refer to an act of malfeasance."[5]

We appreciate NCUA's interpretation of the term "nonparticipation," but we are concerned it is inappropriately narrow. As an undefined term in both the FCU Act and Appendix A to part 701, NCUA has latitude to provide illustrative examples, whether in the article itself or in the commentary, to help FCUs understand when expulsion of a member is warranted. We ask NCUA to work with its Office of General Counsel to revisit its determination that "nonparticipation" excludes any activity performed by a member.

[4] 12 U.S.C. § 1764.
[5] 83 Fed. Reg. 56640, 56646 (Nov. 13, 2018).

If upon revisiting the term, NCUA agrees that its current assessment is overly narrow, we ask NCUA to amend the bylaws, or commentary, to include examples of acts that could evidence "nonparticipation," including:

- Failure to maintain the necessary requirements for membership;
- Physical abuse or assault, harassment, or multiple incidents of verbal abuse of another member of the credit union;
- Neglect or refusal to comply with the FCU Act;
- Habitual neglect to pay obligations or default on an obligation resulting in a financial loss to the credit union;
- Theft, malfeasance, or misconduct that causes a financial loss to the credit union; and
- Insolvency or bankruptcy.

Article XVII. Amendments of Bylaws and Charter

Article XVII provides the requirements for amending an FCU's bylaws or charter. The proposed rule modernizes the language of this article and incorporates plain English writing principles. In addition, in conjunction with the proposed rule's requirement for an FCU to post its current bylaws on its website (if the FCU maintains a website), the proposed rule requires an FCU to update the posting if it amends its bylaws.

We support the purpose of this proposed requirement. We agree members should be able to access the bylaws and be assured the bylaws they are accessing are current. However, we caution NCUA from imposing a mandate for all FCUs to maintain their bylaws online. Since it would likely be unduly burdensome, NCUA provides an exception from the proposed requirement—which we agree with—for those FCUs that do not maintain a website. However, we believe it may also be unduly burdensome for some FCUs that do maintain a website. While of course many FCUs spend significant resources on their online presence, many provide much more meager online offerings, supported by limited staff. Though NCUA does offer a compliance burden estimate in its Paperwork Reduction Act analysis in the proposal, the burden may be felt disproportionately among FCUs of varying sizes, complexities, and membership. Thus, we do not support a mandate for all FCUs to maintain their bylaws online.

We do agree that some members may benefit from online access to their FCU's bylaws. Though we oppose a mandate, we would support language from NCUA expressing a preference for online posting of bylaws.

For FCUs that choose to post their bylaws on their website, we believe it is important that the version provided is most current. However, with an unprecedented amount of content that must be updated on a never-ending cycle, it is not unlikely that an FCU may, from time to time, fail to update amended bylaws posted to its website. Instances where an FCU fails to maintain the most recent bylaws on its website are almost certainly due to inadvertent oversight. While we appreciate that NCUA did not include a timeframe for updating amended bylaws, we believe the proposed language fails to provide credit unions with much needed flexibility. Thus, we ask NCUA to modify the proposed provision to

provide that "*Within a reasonable amount of time* after adopting amendments, the credit union will update the bylaws posted on its website . . . ." If NCUA is unwilling to make such a change in the article, we ask it to at least provide for such flexibility within the commentary.

CONCLUSION

On behalf of America's credit unions and their 115 million members, thank you for the opportunity to share our comments regarding NCUA's proposed changes to the FCU bylaws. We strongly support an approach to bylaws that provides FCUs with flexibility to work within the bylaws as well as an efficient process to allow for amendments to the bylaws when such deviation is most appropriate for a given FCU. If you have questions about our comments, please do not hesitate to contact me at (202) 508-6743.

Sincerely,

Luke Martone
Senior Director of Advocacy & Counsel