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Via email to: regcomments@ncua.gov

Mr. Gerard Poliquin
Secretary to the Board
National Credit Union Administration
1775 Duke Street
Alexandria, VA 22314-3428

Re: Advance Notice of Proposed Rulemaking – Federal Credit Union Bylaws

Dear Mr. Poliquin:

Thank you for the opportunity to comment on the National Credit Union Administration ("**NCUA**") advance notice of proposed rulemaking (the "**ANPR**") seeking public input on ways to change the standard federal credit union bylaws (the "**FCU bylaws**") to provide enhanced operational flexibility to federal credit unions ("**FCUs**") and to reduce regulatory compliance burdens on all FCUs. We are respectfully limiting our comments to responding to two questions presented in the ANPR.

How can the NCUA Board clarify the FCU bylaws provisions addressing limitation of service and expulsion of members?

In the ANPR, the NCUA Board (the "**NCUA Board**") requested specific comments on ways to improve Article II, § 4 of the FCU bylaws (the "**Continuation of Membership Clause**") to provide FCUs with the greatest possible clarity regarding the use and misuse of limitation of service policies. In connection with this question, the NCUA Board solicited comments on whether the Continuation of Membership Clause should be removed in its entirety and addressed as a separate regulation.

As attorneys, we have found that FCUs are frequently confused by the Continuation of Membership Clause as to the circumstances under which an FCU may expel a member, or deny a member access to the FCU's premises, or freeze or restrict access to various accounts when a member is delinquent on a loan. For example, in its brevity, the Continuation of Membership Clause does little to help FCUs understand that a member of an FCU has two fundamental rights, namely, the right to maintain a share account and the right to vote in annual and special meetings of the credit union (collectively, the "**Fundamental Rights**").[1] An FCU cannot withhold the Fundamental

[1] *See* 12 U.S.C. §1759.

Rights from a member without a formal expulsion based on Section 118 of the Federal Credit Union Act.[2]

The NCUA Office of General Counsel ("**OGC**") has opined that an FCU may limit all services, except the member's Fundamental Rights, to any member who has caused a loss to the federal credit union, so long as the FCU has a suspension of services policy that calls for a logical relationship between the objectionable conduct and the services to be suspended and the members receive notice of the policy.[3]

OGC opinions appear to distinguish between what might be called: (a) a "**Financial Loss-Causing Member**" – a member whose conduct with respect to financial matters causes a pecuniary loss to the FCU; and (b) an "**Abusive Member**" – a member whose non-financial conduct may cause physical or emotional harm to the FCU's employees, volunteers, or other members or physical damage to the FCU's property. Given that the persons harmed and the nature of the harm caused by a Financial Loss-Causing Member may be wholly unrelated to the persons harmed and the nature of the harm caused by an Abusive Member, and *vice versa*, we generally advise our FCU clients that their suspension of service policies and practices should carefully distinguish these members and the sanctions it will apply to each of them.

Further, OGC has cautioned that contract provisions in account and other member services agreements, as well as federal and state laws, may affect an FCU's ability to implement a suspension of services policy. For example, Regulation B may prohibit FCUs from implementing a suspension of services policy that has a disparate impact on minority borrowers. Similarly, because "freezing" a credit card account may be considered the functional equivalent of an offset that is prohibited unless the cardholder and the FCU have a consensual security agreement that permits the FCU to place a hold on the account,[4] that action taken under a suspension of services policy could result in a violation of Regulation Z.

Because this area can be particularly nuanced, and because the Continuation of Membership Clause is sufficiently vague as to cause confusion and a lack of certainty, we respectfully recommend that the Board remove the Continuation of Membership Clause from the FCU bylaws and, instead, issue a separate regulation that would provide greater clarity in this area.

How can the Board improve the FCU bylaws to encourage member attendance at annual and special meetings?

Acknowledging the rise of e-commerce and mobile banking, the NCUA Board seeks comment on ways to improve Article IV of the FCU bylaws to allow FCUs to harness new technologies, particularly social media and web-based conferencing solutions, to allow more members to attend annual and special meetings.

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[2] *See* 12 U.S.C. §1764.

[3] *See, e.g.,* NCUA Legal Opinion Letter 96-0530 (June 10, 1996); NCUA Legal Opinion Letter 08-0431 (Aug. 12, 2008).

[4] *See,* 12 C.F.R. Part. 1026, Supp. I, comment 12(d)(1)-1.

In about half the states, a for-profit company can amend its bylaws to allow either virtual[5] or hybrid (or both) shareholder meetings, usually as long as certain safeguards are in place. A "virtual" shareholder meeting is held exclusively via online technology without a corresponding-in person meeting. A "hybrid" meeting is an in-person meeting in which shareholders may participate online.[6] As a general matter, states that allow virtual and hybrid meetings require that each online participant be able to (a) vote during the meeting; (b) see and hear the proceedings on a real-time basis; (c) ask questions; and (d) have their remarks heard by the other participants.

In the past few years more than a hundred companies have made the switch to either hybrid or virtual annual shareholder meetings, including companies such as HP, Intel, FitBit, Sprint, JetBlue, and GoPro. Although the concept remains fairly new among credit unions, in January 2018, the Washington credit union regulator issued interpretive guidance that clarified that Washington credit unions can amend their bylaws to allow for hybrid member meetings.[7]

Of course, participation in FCU member meetings by remote technology will not be appropriate for some FCUs. However, those FCUs that believe this technology may enhance member experience and increase member engagement should have the alternative to employ it, as long as certain safeguards are in place. Accordingly, we respectfully recommend that the NCUA Board amend the FCU bylaws to provide that FCU members may attend membership meetings by remote communication, provided that (1) the FCU implement reasonable measures to verify that each person deemed present and permitted to vote at the meeting by means of remote communication is a member; (2) the FCU implement reasonable measures to provide such members a reasonable opportunity to participate in the meeting and to vote on matters submitted to the members, including, without limitation, an opportunity to communicate and to read or hear the proceedings of the meeting substantially concurrently with such proceedings; and (3) if any member votes at the meeting by means of remote communication, a record of such vote be maintained by the FCU.

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Again, thank you for the opportunity to comment on the ANPR.

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[5] *See, e.g.*, Del. Gen. Corp. Law, Sec. 211, *and* Fla. Stat. §607.0701

[6] For a general discussion of virtual shareholder meetings, see Broadridge, *White Paper: Principles and Best Practices for Virtual Annual Shareowner Meetings*, available at https://www.broadridge.com/white-paper/principles-and-best-practices-for-virtual-annual-shareowner-meetings?oldurl=http://www.broadridge.com/broadridge-insights/Guidelines-for-Protecting-and-Enhancing-Online-Shareholder-Participation-in-Annual-Meetings.html

[7] Washington Division of Credit Unions, Revised Interpretive Letter I-17-04 (Jan. 4, 2018).

Very truly yours,

[Signature omitted for electronic filing purposes.]

François G. Henriquez, II