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National Association of Federally-Insured Credit Unions

May 21, 2018

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

RE: Federal Credit Union Bylaws (RIN 3133-AE86)

Dear Mr. Poliquin:

On behalf of the National Association of Federally-Insured Credit Unions (NAFCU), the only national trade association focusing exclusively on federal issues affecting the nation's federally-insured credit unions, I am writing in regard to the National Credit Union Administration's (NCUA) advance notice of proposed rulemaking (ANPR) on ways to streamline, clarify, and improve the standard Federal Credit Union (FCU) bylaws. NAFCU commends the NCUA for its commitment to modernizing the bylaws with the express intent of reducing regulatory compliance burdens and providing increased operational flexibility to credit unions. NAFCU proposes several changes to the bylaws that would provide credit unions with even greater clarity and flexibility, including updates to the bylaws amendment process, explicit permission to conduct meetings via technology, and the removal of duplicative provisions. Above all else, NAFCU urges the NCUA to expand the definition of "nonparticipation," in regard to member expulsion based on nonparticipation, to include a member who is using the credit union's services in furtherance of illegal purposes.

Executive Summary

In this comment letter, NAFCU outlines the responses it has received from its member credit unions' regarding the five specific questions posed in the bylaws ANPR. In the order of the questions posed, NAFCU urges the NCUA to make the following changes to its bylaws:

Amendment Process

- Update the bylaws to reflect the current procedure for submitting amendments.
- Adopt a set timeline for responding to novel proposed bylaws amendments to provide credit unions with an appropriate and predictable turnaround.

Limitation of Service and Expulsion

- Preserve the limitations of services provision in its current form to afford credit unions with the flexibility to craft a policy that best suits their needs.

- Expand the definition of "nonparticipation," in regard to member expulsion based on nonparticipation, to include those individuals who use credit union services in furtherance of illegal purposes.

Recruitment and Development of Directors

- Afford greater flexibility to nominating committees in the election of directors.
- Consider conducting NCUA-sponsored, voluntary educational sessions to facilitate the development of current and potential directors.

Member Attendance at Meetings

- Permit the use of technological resources to increase member attendance at annual and special meetings.

Removing Overlaps with Regulations

- Remove portions of the bylaws that overlap with existing NCUA regulations, such as Article 11, which addresses loans and lines of credit to members.

General Comments

NAFCU thanks the current NCUA Board for its commitment to regulatory reform and willingness to consider changes to the bylaws in a transparent manner. NAFCU appreciates the opportunity to comment on the burdens imposed by the present bylaws and the requisite adjustments and amendments needed to afford greater clarity and flexibility to credit unions. Revisions to the bylaws are long overdue, given that the last substantive changes were made over a decade ago. Moving forward, NAFCU recommends that the NCUA revisit the bylaws on a more regular basis. More importantly, NAFCU requests that as the NCUA evaluates changes to the bylaws it recognizes that a one-size-fits-all approach does not work because all credit unions are unique. The bylaws should account for these differences and provide ample flexibility so that credit unions may tailor them to best suit their needs.

Regarding the bylaws' ease of use generally, NAFCU suggests the NCUA restructure the bylaws using an Arabic numeral hierarchy. The current use of Roman numerals is outdated and confusing for citation purposes. Additionally, for ease of reference within lengthy passages of certain Articles in the bylaws, NCUA should restructure the bylaws so that each section is preceded by the Article number and separated by a decimal. For example, Section 1 in Article 2 would be numbered as Section 2.1. This numbering would not only clearly identify each section's location within the appropriate Article, but it would also ensure consistent and correct citations. Finally, NCUA should truncate section titles, when possible, for brevity. For example, Article 4, Section 2, which is currently titled "Notice of meetings required," could be retitled to "Meeting Notice," or Article 5, Section 6, which is currently titled "Submission of information regarding credit union officials to NCUA," could be retitled to "NCUA Contact Information."

In accordance with the FCU Act, NAFCU recommends several improvements to the bylaws for each distinct question posed in the ANPR. If the NCUA finds these recommendations go beyond its authority, NAFCU encourages the NCUA to support legislative changes to the FCU Act that

are necessary to modernize the bylaws and provide flexibility to credit unions. This is particularly important with respect to expanding and clarifying the definition of "nonparticipation" in the bylaws. It is imperative that the NCUA take all possible measures to improve the FCU bylaws and provide relief to credit unions.

1. How can the Board improve the FCU bylaws amendment process?

The introduction to the bylaws outlines the process by which a credit union can adopt an amendment other than the options contained in the standard FCU bylaws; however, the current amendment process is outdated. NAFCU raised this issue with the NCUA's Office of General Counsel in 2014 when it formed a working group to discuss possible bylaws revisions. The introduction currently states that a credit union "wishing to adopt a bylaw amendment must file a request with its regional director." As of December 2017, a credit union must submit such proposed bylaws amendments to the Office of Credit Union Resources and Expansion (CURE), so the bylaws should be updated to reflect this procedure.

As noted in the ANPR, a credit union's decision to amend its bylaws is often motivated by a pressing operational concern. Although CURE must provide a decision to credit unions requesting previously approved bylaws amendments within 15 business days of receipt, there is not a set timeline for other proposed amendments. Such inconsistency can create uncertainty for a credit union and prevent it from responding to operational concerns in a timely manner. Consequently, NAFCU recommends that the NCUA adopt a set timeline for providing a decision on novel proposed bylaws amendments. NAFCU does not suggest a specific timeline, but it should be as short as is practical for CURE in order to provide credit unions with an appropriate and predictable turnaround. If it is immediately apparent that an amendment will not be approved, NAFCU urges CURE to alert the credit union as soon as possible.

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

At this time, NAFCU has no recommended changes to Article 2, Section 4 of the bylaws, which addresses limitations of services. The limitations of services provision is intentionally vague, simply stating that a "member who is disruptive to credit union operations may be subject to limitations on services and access to credit union facilities." The NCUA offered some legal guidance on the issue in Legal Opinion Letter 08-0431, which clarifies that the NCUA has "no objection to suspending certain services to members where there is a logical relationship between the objectionable conduct and the services to be suspended," so long as there is "direct evidence" of harm and the policy is in writing and provided to all members. Amending the bylaws to increase specificity would, in this instance, adversely impact credit unions because it would limit the flexibility they are currently afforded to craft a limitation of services policy that best suits their needs.

On the other hand, Article 14 of the bylaws, which addresses expulsion and withdrawal of members, poses an opportunity for the NCUA to further expand the flexibility of the bylaws. NAFCU and its member credit unions recognize that the FCU Act is explicit on the procedures

for expulsion. Under the FCU Act, a member can be expelled either by a nonparticipation policy, properly adopted and distributed by the board of directors, or by a two-thirds vote of members present at a special meeting called for that purpose, after the member has been given the opportunity to be heard. Even though the FCU Act is not explicit on the definition of "nonparticipation," Section 1764(b) lists certain criteria that credit unions should consider in their nonparticipation policies, including "a member's failure to vote in annual credit union elections or failure to purchase shares from, obtain a loan from, or lend to the Federal credit union." This list of factors is far from exhaustive and leaves many credit unions wondering what to do when a member is causing a loss to the credit union or engaging in illegal activity.

The NCUA has the authority to add clarifying language to Article 14 of the bylaws to provide that a credit union can deem a member "nonparticipating" if he or she is using the credit union's services in furtherance of illegal purposes. NAFCU contends that a member is only "participating" when he or she does so legitimately and legally. It follows that a member who is using the credit union's services in furtherance of illicit purposes is doing neither. Under the current bylaws, credit unions can only address such members by limiting the members' services. Unfortunately, this is not enough because it still allows the member to vote and effectively participate in credit union activities, which poses a risk to the credit union. Although credit unions could expel such individuals under the two-thirds vote procedure described in Section 1764(a) of the FCU Act, calling and holding a special meeting for the purpose of expelling these members is costly and burdensome. Moreover, in some cases, the inability to expel these members immediately poses a real risk to the safety of credit union employees and other members.

Illegal purposes do not just include violent behavior, but also encompasses the behaviors defined in the *Bank Secrecy Act* (BSA), including money laundering and fraudulent or suspicious activities. Such activities are often times linked to drug trafficking and even terrorist financing. Credit unions should be permitted to expel such members as well as members who are on the U.S. Department of the Treasury's Office of Foreign Asset Control's (OFAC) "Specially Designated Nationals and Blocked Persons List." These individuals' assets are blocked and U.S. persons are generally prohibited by law from dealing with them, so they are inactive members who are potentially causing the credit union a loss. Due to the cooperative nature of credit unions, a loss to one member is a loss to all members. Thus, NAFCU urges the NCUA to add language to Article 14 to allow credit unions to deem such members "nonparticipating" and subject to expulsion. If the NCUA believes such a change to the bylaws would exceed its statutory authority, NAFCU urges the NCUA to support a legislative amendment to permit expulsion of a member who is using the credit union's services in furtherance of illegal purposes.

3. How can the Board improve the FCU bylaws to facilitate the recruitment and development of directors?

NAFCU does not suggest that the NCUA amend the bylaws to include specific examples of non-binding factors that could be used to nominate members to vacancies on the board of directors. Credit unions should be able to establish criteria to best suit their individual needs based on the size and complexity of their operations. Currently, the only eligibility requirements mandated by

Article 5 of the bylaws are that the individual is a member of the credit union before ballots are distributed, the individual "cannot have been convicted of a crime involving dishonesty or breach of trust," and the individual meets the minimum age requirement. NAFCU recommends that credit unions be permitted to establish a minimum age requirement of up to 21, rather than the current minimum age requirement of 18. This change would simply allow credit unions increased flexibility to establish a minimum age requirement that best suits their needs but the current minimum age requirement would remain untouched as the mandatory floor.

NAFCU further recommends that the NCUA amend the duties of the nominating committee to afford credit unions additional flexibility and clarity when selecting nominees. NAFCU proposes that the bylaws be amended to clarify that the committee (1) does not have to nominate each person who seeks to be nominated; (2) can appoint an existing board member to remain in his or her seat until a candidate to fill the seat is found and duly nominated; and (3) is not required to fill each vacant seat. Clarifying that the committee does not have to nominate each person who seeks to be nominated would allow credit unions to better compose their board of directors with the individuals who are best suited for the job. Allowing an existing board member to remain in his or her seat until a replacement is found and nominated would ease the transition process, prevent disruption, and permit credit unions to have a fully functioning board at all times. Finally, there is no reason for every vacant seat on the board to be filled because a credit union should be able to determine, based on its needs, whether it would like to fill seats quickly or take time to find the most suitable candidate for that position.

Additionally, to encourage and facilitate the development of directors, NAFCU suggests that the NCUA consider sponsoring voluntary educational sessions for those individuals who are currently directors or seeking to become directors. Such sessions would be a valuable opportunity to exchange ideas and share best practices, especially for smaller or new credit unions. Moreover, educational sessions would have the added advantage of not posing an additional regulatory burden to credit unions. In fact, educational sessions would likely make credit union directors more effective at their duties and involved in their credit union, thus promoting the safety and soundness of the credit union and the prosperity of the credit union industry. Extending this educational program to those who are interested in becoming directors would also incentivize younger members to begin learning the processes and procedures required of the position before running or being appointed for the position, thus, helping credit unions thrive long-term.

The NCUA should amend the bylaws as explained in this response to help credit unions better identify, retain, and promote the development of its directors. Credit unions need knowledgeable and dedicated directors to ensure the effective and efficient continuity of their operations. Educational programs should be part of the process and would help directors benefit their credit union before and during their tenure. NAFCU encourages the NCUA to explore every possible avenue for incentivizing members to serve as directors.

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

Credit unions should have more independence to dictate the timing of providing notice of meetings. Article 4, Section 2 of the bylaws proscribes that notice of the annual meeting of members be provided from 30 to 75 days before the date, and that notice of any special meeting be provided at least 7 days before the date. NAFCU recommends the NCUA increase the time a credit union has to provide notice of annual meetings from 75 to 120 days before the scheduled date of the meeting. Alternatively, the NCUA should include possible timing options in the bylaws from which credit unions can choose based on the type of meeting and their internal practices.

With regard to the manner of providing notice, the option to provide notice by "posting the notice in a conspicuous place in the office of this credit union" should be amended to "posting the notice in a conspicuous place on the credit union's website and at each branch." Members of credit unions are increasingly, and sometimes exclusively, using online and mobile banking services. Providing public notice just in the office of the credit union is no longer a sufficient method of informing members of an upcoming meeting. Such changes are likely permissible under the FCU Act because Section 1760 ("Members' meetings") does not indicate specific timing or notice requirements, and defers to the bylaws as to when meetings shall be held. Providing more advance notice and posting the notice online would likely encourage member attendance at both annual and special meetings; therefore, the NCUA should amend the bylaws to permit such communications.

NAFCU also recommends that the NCUA amend the bylaws to explicitly permit member attendance and participation at meetings via technology such as teleconference, video conferencing or other web-based conferencing tools. Members could register through a link and verify their identities through a process of multi-factor identification to alleviate any concerns of fraudulent voting. Allowing technology-enabled participation at annual and special meetings would increase member attendance and improve the governance of credit unions. Many credit unions serve a nationally- or even globally-dispersed field of membership. It is often costly in terms of time and money for a member to attend a meeting in person. Moreover, it is not feasible for a member located across the country or world to attend a special meeting in-person given only 7 days' notice. Technological solutions would allow more members to participate in annual and special meetings at a lower cost.

5. Should the Board eliminate overlaps between the NCUA's regulations and the FCU bylaws?

Overall, NAFCU finds that the bylaws support the NCUA's regulations. Where possible, NAFCU supports the removal of bylaws provisions that duplicate regulatory requirements, which would help streamline the bylaws and leverage existing regulatory guidance. For example, as mentioned in the ANPR, the NCUA may remove Article 16, Section 4 of the bylaws, which covers conflicts of interest, and then expand Section 701.4 of its regulations to cover conflicts of interest, not just for directors, but also for committee members, officers, agents, and employees

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of the credit union. NAFCU supports this type of change because it would eliminate repetitive language and lead to more concise, comprehensible rules.

Another overlap that should be removed is in Article 11 regarding loans and lines of credit to members. The bylaws should not contain any references to lending because the NCUA and other federal regulators have promulgated extensive rules covering all aspects of credit union lending activities. Any reference to lending in the bylaws is not only duplicative of those regulations, but also the FCU Act. Article 11 serves no purpose and should be eliminated.

Conclusion

NAFCU appreciates the opportunity to provide comments on this ANPR regarding the standard FCU bylaws. If you have any questions or concerns, please do not hesitate to contact me at akossachev@nafcuhq.org or (703) 842-2212.

Sincerely,

A handwritten signature in black ink, appearing to read "Ann Kossachev". The signature is fluid and cursive, with the first name "Ann" and last name "Kossachev" clearly distinguishable.

Ann Kossachev
Regulatory Affairs Counsel