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May 21, 2018

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

Re: 12 C.F.R. 701 – Advanced Notice of Proposed Rulemaking ("ANPR"), 83 Fed. Reg 12283 (March 21, 2018) FR Docket 2018-05625 RIN 3133-AE86]

Dear Mr. Poliquin,

On behalf of SEFCU, we would like to thank the National Credit Union Administration (NCUA) Board for inviting us to comment on the advanced notice of proposed rulemaking related to Federal Credit Union (FCU) Bylaws.

SEFCU appreciates the opportunity to provide feedback to NCUA about issues contained in the Bylaws that we deem to be vital to the present and future of the credit union movement. We are pleased that NCUA is interested in ways to proactively streamline, clarify and improve the content of the Bylaws, as well as the Bylaw amendment process. SEFCU appreciates NCUA's commitment to making the Bylaws as relevant as possible, while at the same time reducing regulatory burden on credit unions. As the contract between the credit union and the membership, it is critical that the Bylaws have meaning for both parties and we support changes that would make the Bylaws clearer for all parties and to ease the process for amendments.

We suggest that the NCUA reevaluate whether certain current Bylaws should be modified to better balance the various considerations associated with important governance principles and the wide range of size among FCUs in terms of membership. In that regard, we are mindful that there is a great deal of research and analysis available about how Bylaws impact governance. We urge NCUA to consult these resources to ensure that the Bylaws of a FCU are as modern and effective as they can be.

Below please find SEFCU's comments and responses to the five questions NCUA included in the ANPR.

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

Bylaws are the operational backbone of good corporate governance. They must be well-crafted to ensure that a business and its stakeholders have the means to effectively and efficiently operate and, at the same time, address the best interests of its various stakeholders, especially, in this case, credit union members. But as with any written set of guidelines, the more responsive to changes in business activity, regulation and technology that they are, the more valuable Bylaws will be in maintaining a business' responsiveness and competitive position.

In that regard, a robust well-functioning amendment process should be a central focus, with the goal of allowing FCUs to operate in an effective manner that keeps pace with developments in the law and technology. The ANPR recognizes the importance of improving the amendment process. However, we note that NCUA's website indicates that only eleven Bylaw amendment proposals have been considered by the agency during the period from 2008 through the present, with none having been considered since 2012. We believe this data underscores the importance of implementing an enhanced process that will provide FCUs with much greater assurance of timely consideration of a Bylaw amendment request.

SEFCU recommends that NCUA allow FCUs to adopt Bylaws that are specific to each credit union. Each credit union is unique in its assets, operations, membership and culture. While SEFCU recognizes that NCUA is required by the FCU Act to create a Bylaw framework for FCUs, SEFCU would ask NCUA to consider allowing each FCU to customize its own Bylaws.

Any rulemaking proceeding initiated by NCUA in this regard should evaluate the legal and business necessity for a regulatory preference for uniform Bylaws among FCUs, the benefits of allowing reasonable differences and the validity of the rationale for uniformity. We urge NCUA to consider the costs and benefits that arise from allowing Bylaw differentiation.

From an operational standpoint, we recommend the NCUA consider a number of steps that could assist the agency in achieving its stated objective of providing a requesting FCU with a more timely response, greater transparency, and enhanced accountability. In that regard, we suggest that the NCUA consider:

- Establishing timelines for agency action on Bylaw amendment requests;
- The positions taken by other bank regulators on Bylaws; and
- Setting forth the basis on which the agency will evaluate whether to approve a proposed Bylaw amendment and require amendment decisions to state the grounds for the agency's decision.

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

SEFCU recognizes that denying services and expelling credit union members is a sensitive matter, and that membership is one of the most basic and most important differences between credit unions and other types of financial institutions. SEFCU also acknowledges that expulsion from membership is governed by the FCU Act, which permits expulsion of a member upon a two-thirds majority vote of members during a special meeting called for such purpose, provided such member has been given an opportunity to be heard, and by a majority of the board of directors based on nonparticipation of a member.

Since the FCU Act does not fully define nonparticipation, SEFCU would support additional detail in the regulations or agency interpretive materials of those scenarios and instances that would be considered nonparticipation, which allows the board to make the expulsion decision. Today the description of nonparticipation states that credit unions should consider 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 FCU. SEFCU would like to see NCUA expand on the definition of nonparticipation to include scenarios such as abusive or disruptive behavior, account or service abuse (including repeated overdrafts, repeated unsubstantiated fraud claims that indicate an understanding and a potential "playing" of the regulatory framework for fraud liability, and repeated requests for fee reversals when the situation does not warrant it), and high-risk financial behavior which poses risk under the Bank Secrecy Act and anti-money laundering laws. These issues result in an unmitigated waste of the credit union's time and resources to identify, monitor, and report on both internally and as required under the BSA. The result is the credit union ends up spending an inordinate amount of time and resources on a very small number of members who are creating difficult situations and potential financial losses to the credit union and the membership as a whole. The issue of handling these "bad actors" has become challenging, and it is certainly not in the best interest of the credit union to allow these members to keep their membership and continue to present this risk.

SEFCU understands that members are provided two basic rights once membership is established. These are the right to maintain a share account and the right to vote at special and annual meetings. These rights cannot be extinguished fully except by expulsion, and we are not suggesting that this decision be taken lightly. However, expulsion and denial/limitation of services have become some of the most difficult and challenging issues we deal with where our members are concerned. Credit unions are at a severe disadvantage when dealing with members who are abusive and disruptive with staff, other members and vendors. For example, SEFCU is not permitted to swiftly and immediately expel a member for sexually harassing an employee or other member, but SEFCU faces potential legal liability for an employee or member being sexually harassed by a member. Simply because of the membership relationship, it is too difficult today to

expel a member. There isn't a level playing field with other financial institutions. The Act's expulsion provision is antiquated, raises very challenging safety concerns, and our hands are tied when the expulsion from membership needs to happen immediately for everyone's safety.

Since, as a practical matter, expulsion is a very limited remedy, SEFCU believes that in light of the concerns described above, the recognition in Article II, Section 4 of the Bylaws of an FCU's authority to limit services and credit union access to a member who is disruptive to the credit union's operations is an important expression of the mutual obligations of an FCU and of its members that is appropriately set forth in the Bylaws and should be retained.

We also note that the ANPR states that an FCU may not implement a limitation of service policy that has a disparate impact on a protected class, such as may be the case regarding defaults. The ANPR cites Regulation B as support for this statement. The blanket statement in the ANPR fails to explain and acknowledge that a facially neutral practice that may have a disparate impact may not violate Regulation B where an FCU can show that the practice serves a genuine business need and there are not less discriminating ways to meet the business need. As a general matter of safety and soundness, FCUs are expected to act prudently with respect to their additional exposure to a defaulting borrower. We urge NCUA to carefully evaluate the law in this regard before proceeding.

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

The FCU Act mandates only two requirements for serving on the board of a FCU: the individual must be a member of the credit union; and cannot have been convicted of a crime involving dishonesty or breach of trust.

It has been NCUA's longstanding position that while these two restrictions ultimately determine who can serve, the nominating committee is permitted to consider additional criteria for who it will nominate to serve on the board. Currently, the commentary to the Bylaws states:

> "The FCU Act and the FCU Bylaws do not prohibit a board of directors from establishing reasonable criteria, in addition to the eligibility requirements, for a nominating committee to follow in making its nominations, such as financial experience, years of membership, or conflict of interest provisions. The board's nomination criteria, however, applies only to individuals nominated by the nominating committee; they cannot be imposed on individuals who meet the eligibility requirements and are properly nominated from the floor or by petition."

While the FCU Act states only the two criteria listed above for prospective board members, SEFCU suggests that NCUA further refine the requirement in the Bylaws by including additional criteria, such as what is stated in the commentary, which today is only expressly allowed for the nominating committee. In this environment of technology and complex financial markets, products and delivery mechanisms, it is more important than ever for credit unions to have highly trained and technically experienced board members. Recruitment of highly qualified board members will only be assured if the credit union is permitted to determine its own criteria regardless of how the board member is ultimately nominated to the board.

SEFCU also recommends that NCUA add specific language to the Bylaws related to electronic and remote options that are permissible for board meetings. As with any workplace today, credit union board members are finding it more and more difficult to attend meetings in person. This is due to multiple reasons, including the mobile nature of the workforce, more geographically expansive fields of membership and retirements that may result in board members moving to another location.

In all of these scenarios, it is important for credit unions to be able to retain board members and reduce the potential for turnover simply due to geographic challenges with meeting attendance. The Bylaws do currently allow boards to meet using audio and video teleconference methods. SEFCU encourages NCUA to present options and encourage credit unions to utilize as many remote and electronic options as possible to encourage board members to remain on the board and to be as engaged as possible.

In addition, while we recognize that the requirement to hold a board meeting each month is in the FCU Act, we recommend that NCUA consider supporting a legislative change, which would eliminate the requirement that meetings be held monthly. This should be a business decision left up to the Board. That is something that can easily be monitored by NCUA and corrected if boards do not meet frequently enough to satisfy their obligations.

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

SEFCU encourages NCUA to add options for electronic and technologically advanced methods for attending annual and special meetings for members, for the same reasons we requested this above for boards of directors. Credit union members today tend to be much more geographically diverse and mobile. Additionally, younger members tend to want to do business with their credit unions electronically.

Thus, credit unions have implemented more sophisticated electronic means for performing transactions and communication between the members and the credit union. Holding annual and special meetings at a location that is close to the credit union's headquarters simply doesn't make sense in today's mobile and technologically

advanced financial services environment. The result is credit unions appear to continue to be antiquated and not willing to change with the times. Ultimately, members may be more apt to be engaged with their credit unions if they have the opportunity to do so at any time of day or night and with the ease of an app on their cell phones.

The fact is that most members, like shareholders, are not disposed to physically attend annual or special meetings, and there is only so much that can be done to facilitate that attendance. However, NCUA should affirmatively consider the shareholder model and the analysis done in that context to increase member participation through virtual and other developing forms of attendance.

By way of example, in 2000, the Delaware Legislature adopted amendments to the Delaware General Corporation Law to allow companies to hold virtual-only and hybrid shareholder meetings. Twenty-two (22) states, including as Minnesota, Ohio, Pennsylvania and Texas, allow virtual-only meetings of shareholders. This approach also requires consideration of the ground rules of such meetings and the rendering and revocation of proxies and agency voting. It also requires the deployment of best practices, safeguards and mechanisms to protect the interests of members to ensure that technology is facilitating, and not preventing, opportunities for dialogue. We urge NCUA to consider all of these topics.

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

In this challenging competitive environment, flexibility is critical. The more that change and progress are slowed by static rules and Bylaws that take time to review and revise, the less likely that credit unions will remain competitive.

In that regard, SEFCU encourages NCUA to consider removing duplicative Bylaw provisions when the issue is governed by NCUA or other regulations. For example, the membership approval procedures should be removed from the Bylaws, as membership is addressed in the Chartering and Field of Membership Manual (which is incorporated into Part 701 of the regulations), as well as other peripheral rules such as the Customer Identification Program requirements of the Bank Secrecy Act. The credit union's field of membership is enumerated in Section 5 of the credit union's Charter and the procedures for establishing membership are contained in the credit union's policy and procedure manual. These procedures do not need to be repeated in the Bylaws.

Other Recommendations

At the ANPR stage, we recommend that NCUA review other respected sources of corporate governance law and regulations with respect to Bylaws of mutual as well as stock financial institutions. In this regard we would particularly recommend that NCUA consider: (i) the OCC's federal mutual Bylaws; (ii) state laws and regulations governing

Bylaws in effect in states with significant numbers of state-chartered depository institutions; and (iii) state laws and regulations governing mutual insurance companies.

In a number of instances, important governance matters in the Bylaws are determined by a particular minimum or maximum number of members. In light of the wide range in membership size across FCUs, we recommend that the NCUA consider the alternative of percentage requirements or consider applying percentage requirements to FCUs above certain specified thresholds. What may look like an important right of a member may also be used as means of obstructing the business of the credit union to the detriment of the best interests of all of the members. NCUA must thoroughly consider and analyze those issues when considering how to amend its Bylaws.

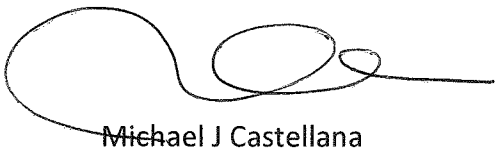
In this regard, we note that the current Bylaws provide for a special meeting of members to be called at the request of no more than 750 members, regardless of the percentage of the FCU's total membership that such members constitute. In contrast, the OCC's Bylaw requirements for members of mutual savings institution are set at a minimum of the holders of 10 percent of insured deposits as of the record date. Even 10% would be considered quite low a threshold with regard to the corporate governance of other businesses under state law.

A similar concern as to proportionality arises with respect to the provision of the Bylaws that provides for just 15 members to constitute a quorum at an annual or special meeting, thereby potentially empowering a minute portion of an FCU's membership to make major decisions impacting the FCU including the election and removal of directors. For example, the Bylaws provide that members may remove a director "by the affirmative vote of a majority of members present at a special meeting called for the purpose." Conceivably, this provision creates the possibility that a director could be removed by the affirmative vote of only eight members.

Please note that citations of federal rules, state laws and other references referred to herein are available for NCUA's information and consideration.

Once again, we would like to thank the NCUA Board for the opportunity to comment. We would be happy to further discuss this matter, if you so desire.

Sincerely,



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