



*League of Southeastern
Credit Unions & Affiliates*

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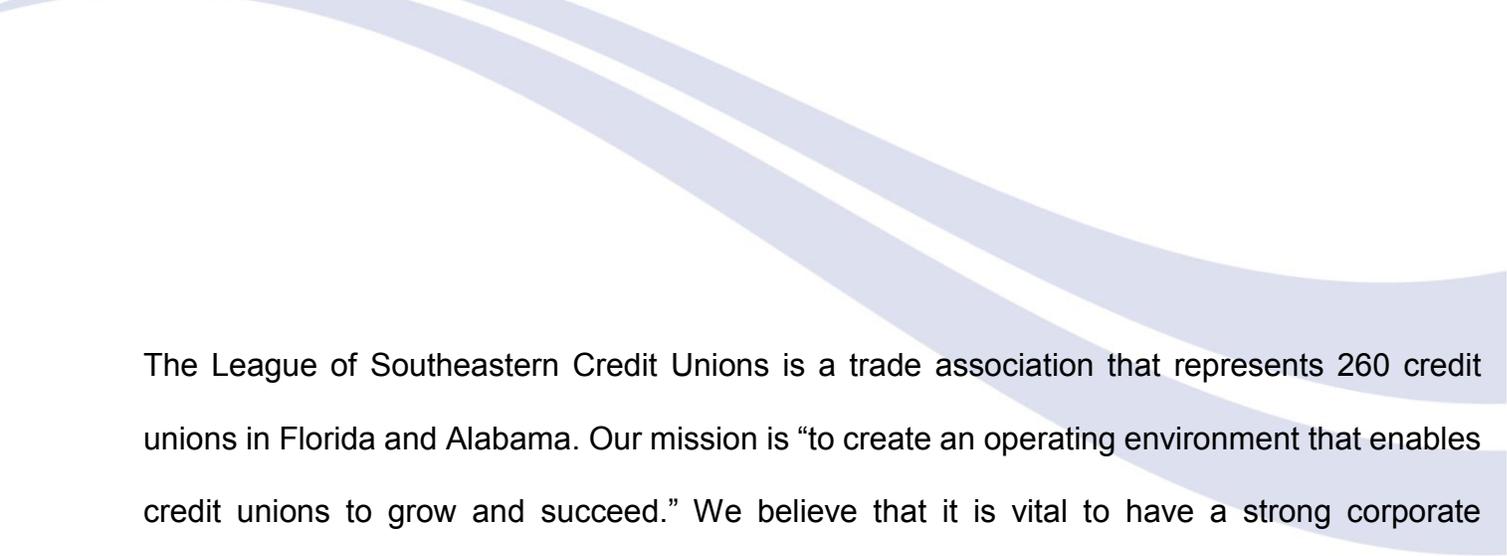
Gerard Poliquin
Secretary of the Board
National Credit Union Administration
1775 Duke St.
Alexandria, VA 22314-3428

Re: Federal Credit Union Bylaws ANPR

5/18/2018

Mr. Poliquin,

The League of Southeastern Credit Unions and Affiliates (LSCU) appreciates the opportunity to comment on this Advanced Notice of Proposed Rulemaking regarding the bylaws mandated for Federal credit unions. The LSCU thinks the NCUA has an opportunity to evaluate the corporate governance of the credit union industry and play a critical role in ensuring the future success of our industry as changes in society, technology, and the economy impact the wants and needs of American consumers. Our primary recommendation is to fully study corporate governance for not-for-profit entities and specifically, credit union governance around the world, to propose optional bylaws that can guide credit union leaders in their responsibilities into the future.



The League of Southeastern Credit Unions is a trade association that represents 260 credit unions in Florida and Alabama. Our mission is “to create an operating environment that enables credit unions to grow and succeed.” We believe that it is vital to have a strong corporate governance system to ensure the vitality of the credit union industry into the future, and this ANPR is an opportunity to help guide development of our industry towards success for generations to come.

A. Responses to the Board’s specific questions:

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

LSCU believes that in addition to the mandatory bylaws in the Appendix A to 701, NCUA should allow credit unions to draft and adopt bylaws of their choosing so credit unions can maintain flexibility in serving their member groups. Naturally, those bylaws would need to be approved by NCUA prior to their acceptance.

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

The Board should consider providing a non-exhaustive list of examples of non-participation that warrant expulsion/limitation of service including: abuse of members or staff of the credit union of any kind; theft or other criminal wrongdoing

toward the credit union, its staff, or members; or a failure to honor their obligations to the credit union due to bankruptcy or other circumstances. A more thorough development of this issue can be found in CUNA's letter to NCUA on this topic.¹

LSCU agrees with CUNA's recommendations on this issue.

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

LSCU thinks the following should be developed as options for credit unions:

- a. LSCU thinks NCUA should study the characteristics (perhaps in partnership with Filene) of successful credit union governance, then implement recommendations (in the form of optional bylaws) that further those governance practices. For instance, in one study by WOCCU² governance styles, including the "new model" that encouraged for-profit management practices that "focus on growth through economies of scale, self-sufficiency, and larger membership numbers."³ Indeed, in this study of Irish credit unions, those following the "new model" were more efficient, had better performing loans, were of greater asset size, and served a broader

¹ Letter from the Credit Union National Association to the National Credit Union Administration (April 24, 2018) (sent in response to an ANPRM on Federal Credit Union Bylaws), <https://www.cuna.org/uploadedFiles/Bylaws042418.pdf>.

² John Forker, Johanne Grosvold & Anne Marie Ward, *Management Models and Priorities in Member Associations: Is Credit Unions' Community Involvement Crowded-Out?*, 43 Nonprofit and Voluntary Sector Q. 105 (2014).

³ *Id.* at 114.

membership base (looser community bond).⁴ What is surprising and perhaps more important in the governance context for credit unions is that those “new model” credit unions continued to perform on the same level as “old model” credit unions in terms of community involvement and development.⁵ LSCU is not advocating for a particular model, but rather that bylaws be developed conducive to other governance models, so that credit unions can have the option to pursue new strategies in serving their members in this dynamic operating environment.

- b. One thing NCUA may consider is encouraging the diversity of experience on the board specifically as it relates to those things that affect credit union operations. For example, it may be useful to recommend having an attorney or compliance professional, a CPA or accounting professional, a finance or investing professional, and any other valuable professional to fill board positions. These professionals need not have specific credit union experience, but the key is to ensure the board has some members who are generally familiar with areas vital to credit union operations. Similarly, it is important to maintain a connection to the occupational bond (where relevant) to properly represent those members, for example including, a retired military officer in the case of a military based credit union, or a machinist in the case of a manufacturing based credit union.

⁴ *Id.* at 117.

⁵ *Id.* at 119.

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

Specifically relating to the NCUA's interest in input on web-based conferencing solutions, NCUA should consider modifying the bylaws to include this mechanism of participating in credit union affairs, including attending annual meetings and choosing directors. Allowing annual meetings to be broadcast via web-based conference applications may encourage a number of members to participate in credit union affairs when they are unable to attend. While this is not a panacea, for those credit unions that have low participation and particularly whose membership is spread widely geographically, this may improve participation. Additionally, the mechanisms exist to allow questions to be proposed and voting to be conducted in such virtual meetings, so that an annual meeting broadcast could improve member participation in governance issues.

Relating to this issue is the prohibition found in the Federal Credit Union Act on proxy voting.⁶ However, a proxy is “a person who is substituted or deputed by another to represent him and act for him, particularly in some meeting or public body.”⁷ With this methodology, attending and voting in a virtual annual meeting would not be prohibited

⁶ Federal Credit Union Act, 12 U.S.C. § 1760 (2013).

⁷ *Black's Law Dictionary* 1226 (6th ed. 1990).

by the Act because the member was actually attending (virtually), and voting and would not be substituted by another person.

While NCUA should maintain the present options in terms of voting in Article V., NCUA should consider creating a new option or modifying Option A4 to permit voting at the annual meeting via the web-based conference application mentioned above. In the case that the annual meeting is conducted virtually, there will be an opportunity for members to go to a local branch and attend the webcast. This can be particularly useful for those credit unions that have large geographic profiles.

It should be noted that Robert's Rules of Order envision a scenario where the bylaws allow electronic meetings.⁸ The rules point out that it is important that "simultaneous aural communication is essential to a deliberative character of the meeting."⁹ Some areas that NCUA should consider in developing an option for annual meetings via web based conference software will be how to: make a point of order, seek the floor, gain recognition, propose motions in writing, and methods and verification of voting.¹⁰

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

⁸ Henry M Robert, III, et. al, *Robert's Rules of Order Newly Revised* 97 (11th ed. 2011).

⁹ *Id.* at 98.

¹⁰ *Id.* at 99.

LSCU would welcome any reduction of duplicative requirements or language between the regulations and bylaws, but we have no specific input on this matter.

B. Unsolicited thoughts on changes to the bylaws

LSCU thinks the board should include the specific fiduciary duties (of loyalty, good faith, and care) of credit union board members in the bylaws, along with commentary further explaining the NCUA's expectations of them. We strive to assist boards in their efforts at good governance, and we believe a clear definition of fiduciary duties in the bylaws will further this cause because, by including those duties in writing, there will be more awareness of the issue and a greater focus on education relating to governance.

The question of the scope of a director's fiduciary duties has been a cause of confusion in the credit union industry for years.¹¹ Generally speaking, state law controls governance issues.¹² The NCUA Board has outlined that Federal credit unions specifically have a duty to the members and not only to the credit union itself.¹³ While some credit union members may have a private

¹¹ Joseph S. Melchione, *Fiduciary Duties of Credit Union Directors in the Merger Context*, 7 DePaul Bus. & Com. L.J. 203, 204 (2009).

¹² *Id.* at 206.

¹³ Conversion of Insured Credit Unions to Mutual Savings Banks, 12 CFR 708 (2007). <https://www.federalregister.gov/d/E6-21661/p-101>

cause of action under state law to enforce a board of directors' fiduciary duties toward the members, some courts and commentators believe NCUA has both the power and is the best mechanism for protecting the interests of the membership, particularly when state law offers no recourse.¹⁴ LSCU thinks the board should clearly express the fiduciary duties in the bylaws and include commentary regarding the circumstance in which the NCUA will consider reviewing a member petition regarding a breach of duties. While protecting members' interests is already addressed by the review process for mergers, there are still other cases where it will be valuable to provide recourse to the members.

We appreciate the opportunity to comment on this Advanced Notice of Proposed Rulemaking and look forward to NCUA's future rule making on this issue and to discussing the variety of issues brought up by this and other letters regarding credit union governance through the bylaws.

If you have any questions on these proposals, please feel free to contact me.

Sincerely,



Michael Lee

¹⁴ Raquel Maria Prieguez, *Federal Common Law and the Need Uniformity in the Regulation of Federal Savings and Loan Associations and Federal Credit Unions*. 29 San Diego L. Rev. 743, 754 (1992) (citing *Montford v. Robins Federal Credit Union*, 691 F. Supp. 347 (M.D. Ga. 1988)).