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Submitted via email to: regcomments@ncua.gov

Gerard Poliquin
Secretary of 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:

We appreciate the opportunity to respond to the National Credit Union Administration's ("NCUA") advance notice of proposed rulemaking ("ANPR") seeking public comments on ways to streamline and improve the standard federal credit union bylaws (FCU Bylaws) in order to provide enhanced operational flexibility and reduce regulatory compliance burdens on all FCUs.

Our firm represents many federal and state chartered credit unions nationwide and we serve as counsel to the Northwest Credit Union Association. Our comments are based upon our extensive experience in advising credit unions on corporate governance matters. These comments are our own, and are not offered on behalf of any client.

We believe that there are numerous ways in which NCUA can update and improve the FCU Bylaws to provide for more effective corporate governance and protection of members' rights. We will address the specific questions presented in the ANPR, and we have a number of additional comments on other issues. As requested in the ANPR, we provide the Federal Credit Union (FCUA) authority that supports our comments and suggested improvements.

Improvement of FCU Bylaws

The ANPR notes that the FCU Bylaws have not been significantly updated in approximately 10 years. Even that update did not address various anachronistic provisions that had been in place for decades. Nor did that update take into account the significant growth in credit union membership over the past several decades and the potential positive impact of technology on corporate governance issues. We believe NCUA can take meaningful steps to promote sound corporate governance, clarify and protect member rights, and reduce uncertainty associated with provisions that do not make sense in today's world.

1. Permit Well-Run Federal Credit Unions to Adopt Custom Amendments. The current standard bylaws take a "one-size fits all" approach that is ill-suited for the current technological, financial, and informational environment. A $4 billion federal credit union with a TIP charter serving 400,000 members from offices in 40 states must use essentially the same bylaws that are prescribed for a $4 million dollar credit union with a single occupational group charter serving 400 members out of a single office. In contrast, state chartered credit unions in a number of states, including Oregon and Washington, are not forced to follow regulator prescribed bylaws, but have the flexibility to adopt bylaws tailored to their specific circumstances and policies that fully comply with applicable law. This flexibility reduces operational and legal costs for those credit unions and ultimately provides greater protection of members' rights. For example, a large multi-state credit union may permit nominations, voting, and member feedback at meetings in ways that reflect the number and geographic spread of its membership, while a small union credit union may choose a more traditional approach. FCUs should have the same corporate governance advantages and flexibility as and parity with state chartered credit unions.

We recommend providing regulatory relief to mid-size to large FCUs (>$250 million in assets) that are well operated (CAMEL 1 & 2) by allowing them to adopt and maintain Bylaws drafted in full compliance with applicable law, but independent of the model FCU Bylaws. The NCUA could require the FCU to obtain a legal opinion on permissibility under the FCU Act before adopting a bylaw provision not included in the FCU Bylaws. Supported by a Bylaw legal opinion requirement, legal compliance can be ensured and NCUA's approval of the FCU drafted Bylaws can be quick and efficient. All parties win: FCU's receive important regulatory relief; FCU Bylaws are improved; FCU corporate governance is improved; FCU members' rights are preserved and promoted; and NCUA has less regulatory work with the same regulatory enforcement authority.

Another approach would follow that taken by the Office of the Comptroller of the Currency ("OCC") for mutual savings associations. The OCC provides model bylaws, but they are not mandatory. OCC regulations prescribe elements that must be included or addressed in the bylaws. Certain types of bylaw changes affecting governance must have OCC approval; the rest must simply be filed with the OCC at least 30 days before they become effective. 12 C.F.R. § 5.21. This approach would provide needed flexibility, while also ensuring that the NCUA continues to have oversight of bylaws used by FCUs.

This suggested regulatory relief is clearly supported by the FCUA. The FCUA provisions for bylaws for FCUs indicate that the requirement for NCUA to issue model bylaws is intended as a resource to help incorporators in organizing new FCUs. It is not a requirement to tie FCUs to that same model for the duration of their existence:

> **12 USC §1758. Bylaws.** In order to simplify the organization of Federal credit unions the Board shall from time to time cause to be prepared a form of organization certificate and a form of bylaws, consistent with this chapter, which shall be used by Federal credit union incorporators, and shall be supplied to them on request. At the time of presenting the organization certificate the incorporators shall also submit proposed bylaws to the Board for its approval. (*Emphasis added).*

The use of the terms "organization" and "incorporators" in this provision shows that Congress intended for the model bylaws to be a document to assist in forming credit unions, not a requirement for ongoing operation. When describing powers, requirements, and limitations applicable to ongoing FCU operations, other parts of the FCU Act refer to the "board of directors" rather than the "incorporators." For example, 12 U.S.C. § 1759 provides that membership may be contingent on payment of a uniform entrance fee prescribed by the "board of directors" (not the "incorporators"). It is also noteworthy that presentation of the proposed bylaws to the NCUA is required to occur only when the credit union is formed; the Act does not require subsequent submission of amended bylaws to the agency. The FCU Act does not require NCUA to impose a one size fits all set of Bylaws for all FCUs to be used throughout their existence, without regard to FCU size, resources and changes in corporate governance laws, practices and technology.

2. Removal of Operational and Unnecessary Provisions. In addition to the removal of overlapping regulatory provisions, discussed below, NCUA can greatly improve the FCU Bylaws by removing numerous provisions that are purely operational, have no relevance to corporate governance or benefit to the FCU Bylaws and are not required by any provision of the FCUA. In particular we have identified the following 9 provisions throughout the FCU Bylaws that can and should be removed.

- Article III Shares of Members. Nearly all of the provisions in this Article can be removed as the provisions either address deposit or operational issues that are already more fully addressed in deposit account and electronic services agreements or are no longer relevant.

- Art. III, Sec. 1. Par Value. The setting of a par value of a share in the Credit Union has little relevance or importance to the Credit Union or its members. The FCU Bylaws contain no explanation of what par value means for the member. 12 U.S.C. § 1759 requires the members to purchase "at least one share" in the credit union, but does not require establishment of "par value" and certainly does not require use of that term. 12 U.S.C. § 1753 requires the organizational certificate to specify the "initial par value" of shares but does not require an ongoing par value.

- Art. III, Sec. 2 Cap on Shares Held by One Person. This is a matter that can be addressed in credit union policy.

- Art. III Sec. 4. Transferability. This provision is archaic, operational and inconsistent with share transfer capabilities of most FCUs. Most FCU's provide online and mobile transfer services for internal account-to-account transfers, external transfers to accounts and other person's accounts in other financial institutions. Plus members can utilize third party transfer services (i.e. VENMO) to conduct share deposit transfers. All of these services are offered without regard to any "instrument in a form the board may prescribe." By contrast, most credit unions do not have the capability to permit a member

to transfer ownership of the account (as opposed to transfers of funds from the account) by an instrument. Transfers of account ownership at death are accomplished based on the account agreement or applicable state laws. Transfers at other times are accomplished by adding or deleting names to an account pursuant to the FCU's policies, or by the member closing an account and opening a new account. This archaic, operational provision should be deleted.

- Art. III. Sec. 5. Withdrawals. This is another provision that is archaic, operational and includes no corporate relevance for the Credit Union and its members. The share deposit withdrawal requirements, conditions and limits are fully addressed in deposit account agreements, overdraft protection agreements and disclosures and loan agreements. Similarly, the reference to payment of the minimum share amount in installments is simply irrelevant for most FCUs. The provisions in Section 5 are incomplete in scope and inconsistent with the FCUs' consumer contracts.

- Art. III. Sec. 6. Trusts. This provision attempts to address several issues related to shares "issued" in a trust. Membership eligibility for trusts and for maintenance of accounts for trusts should be addressed in regulation. Other treatment of accounts held by or for trusts is addressed by contract and by applicable state law governing trusts and deposit accounts and should not be prescribed in the FCU Bylaws.

- Art. X. Organizational Meeting. This provision for the initial meeting and initial election of directors and officers is unnecessary and not relevant for any FCU, except at the initial point of chartering. For all other FCUs this provision is not applicable or relevant for anything and FCUs should have the ability to amend and clean-up their Bylaws to remove such inapplicable provisions.

- Art. XI. Loans and Lines of Credit to Members. This provision is entirely operational and has no corporate governance relevance. FCUs provide extensive consumer and business loan documents that fully address the requirements, obligations, conditions, fees and enforcement of FCU loans to their members. This provision provides no benefit to the FCU or its members and should be deleted.

- Art. XV. Minors. This provision is entirely operational and has no corporate governance relevance. FCUs provide extensive operational procedures and deposit account agreements that more fully address the requirements, obligations, and conditions, for minor ownership of share accounts. This provision provides no benefit to the FCU or its members. Issues regarding minor members should be addressed by the board in its discretion.

Specific ANPR Questions

NCUA set forth five specific Bylaw issues on how to improve the FCU Bylaws.

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

As discussed above, most importantly FCUs need the ability to make meaningful amendments to Bylaws to adopt more current and corporate governance related changes. NCUA's current amendment process discourages and prevents meaningful and essential Bylaw amendments. Currently, requests for bylaw amendments even to remove some of the inapplicable provisions identified above are routinely denied. Other requests for adoption of modern corporate governance improvements are also denied. Unless FCUs are provided regulatory relief with the ability and flexibility to request important Bylaw changes as suggested above, the approval process itself is a minor issue.

NCUA's process for approving such amendments can be updated and provide true regulatory relief for FCUs, similar to the more regulatory friendly approach enjoyed by state chartered credit unions and federal mutual savings associations. The NCUA should accelerate the burdensome process for reviewing and approving FCUs' requests to approve their bylaws amendments. We believe NCUA can improve the amendment process by establishing a 20 day timeline within which NCUA review and determination must be completed or the Bylaws would be deemed approved.

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

We believe it would be helpful to reorganize these important member provisions in a single Article rather than having the provisions scattered in Art. II Sec. 4 and Art. XIV. A separate Article related to these members' rights and all other FCU members' rights would be an important enhancement that would be beneficial for members and FCUs.

We believe FCUs should continue to have full flexibility as provided in Art. II Sec. 4 to "specify the restrictions" in this Article, as well as to adopt denial of services policies and procedures that fully address the FCU's right to protect its officials, employees, facilities and members from abusive or threatening conditions and the corresponding members' rights to fair process. We believe it is unnecessary to provide examples of acts that constitute non-participation or abusive and threatening conduct that would permit immediate service denial. FCUs already have well developed policies and procedures that address these issues and such commentary examples would only serve to limit FCUs.

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

We appreciate NCUA's consideration of ways to help FCUs attract and retain qualified directors. State chartered credit unions have a unique advantage over FCUs with the ability to provide reasonable compensation for directors which permits state chartered credit unions to keep pace with other financial institutions' need to attract qualified and available leadership. Until the FCUA is amended, NCUA should consider actions to bring FCUs and their directors the most flexibility in establishing strong corporate governance structures. No one Bylaw amendment will allow FCUs to overcome the compensation prohibition disadvantage. However, less regulation and more flexibility will be the most important action that can help FCUs. We believe our proposal outlined above for well operated FCUs flexibility to draft and adopt their Bylaws is the type of action that would add value to the federal charter.

Within the FCU Bylaws Art. Vi, Sec. 5 (Meetings) should be substantially revised and expanded to permit FCUs to establish up to date provisions that reflect their use and practices of using electronic communications for taking Board actions without meetings and similar well recognized corporate governance actions.

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

We appreciate that NCUA is willing to consider new practices and technology for improving member attendance at annual and special meetings. However, we believe that the FCU Bylaws are not the appropriate tool for encouraging member attendance and participation. Here again, we believe that flexibility is the best approach. A large credit union with a TIP or multiple common bond charter that includes members from a large geographic area should be free to establish meeting formats that facilitate participation and attendance by members from its entire area. Those formats may be substantially different than the meeting format adopted by a small credit union whose members are concentrated in a single town.

With regard to special meetings, the timelines for notice and holding the meeting should be revised to recognize the logistical difficulties that can be involved in arranging for an adequate meeting space and sending notices.

The issue of virtual meetings can be addressed by regulation or other guidance and should not be incorporated in the FCU Bylaws. We encourage NCUA to carefully review the recent article "Public Company Virtual-Only Annual Meetings" by Lisa A. Fontenot published in the American Bar Association's *The Business Lawyer* Vol. 73, Winter 2017-2018, pages 35-51, which provides an excellent and thorough discussion of legal and practical issues in conducting virtual or hybrid annual meetings. While virtual/hybrid annual meetings may provide benefits of broader accessibility for FCUs with geographically dispersed members, the article recognizes significant drawbacks for such meetings including: (i) lack of secure and reliable controls on attendance, identification verification for attendance and voting, (ii) the failure to provide meaningful interaction by shareholders, and (iii) lack of transparency and potential manipulation

of the meeting format and interaction with participants. These challenges (and their solutions) are likely to change over time as technology changes.

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

We appreciate and agree with NCUA's desire to remove overlaps between NCUA regulations and FCU Bylaws. There is no need for regulatory redundancy especially in areas that cover corporate governance. In particular the following provisions in Article XVI should be deleted as currently provided:

- FCU Member Confidentiality. The current FCU Bylaw provision minimally addresses the importance of confidentiality of member and FCU information. Many FCUs have adopted code of ethics standards that provide more comprehensive and protective confidentiality obligations of directors and officers. FCUs should be able to establish stronger more protective confidentiality provisions beyond that provided in the FCUA or the BCFP's Regulation P.

- Conflicts of Interest. Similar to the confidentiality standards, the current FCU Bylaw provision minimally addresses the importance and scope of conflicts of interest within the fiduciary duties of FCU directors. Again, many FCUs have adopted code of ethics standards that provide more comprehensive and protective conflict of interest obligations of directors and officers. FCUs should be able to establish stronger more protective conflict of interest provisions beyond that provided in the FCUA. FCUs should have the ability to include such stronger conflict of interest provisions in their Bylaws or policies.

- Availability of Records. The current FCU Bylaw provision related to records availability minimally addresses the corporate records availability to FCU members. Many FCUs have adopted more comprehensive and protective records management and members' rights policies. FCUs should be able to establish stronger more protective records and members' rights provisions beyond that provided in the FCUA. FCUs should have the ability to include such stronger provisions in their Bylaws or policies.

NCUA does not need to expand or impose greater NCUA regulations in these areas. Rather NCUA should give FCU's the flexibility to adopt more effective corporate governance provisions on their own.

We appreciate the opportunity to share our experience and comments on FCU corporate governance and ways NCUA can improve the FCU Bylaws.

Respectfully,

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