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May 21, 2018

VIA E-MAIL ONLY: regcomments@ncua.gov

Gerard Poliquin, Secretary of the Board
NATIONAL CREDIT UNION ADMINISTRATION
1775 Duke Street
Alexandria, VA 22314-3428

Re: Styskal, Wiese & Melchione, LLP—Comments on Federal Credit Union Bylaws ANPR

Dear Mr. Poliquin:

This letter is written on behalf of SW&M, along with our federal credit union clients across the country. As a law firm representing hundreds of credit unions in numerous transactional areas, including governance and operational concerns, we welcome the opportunity to re-open the FCU bylaws for revision, and hope our comments below will be helpful to the NCUA.

In general, we support significant changes to update and modernize the FCU bylaws. Much of the language in the existing Bylaws represents operational settings for credit unions of limited size and complexity, and with limited governance structure. Other language is archaic, or requires significant "gap filling" through common law principals or parliamentary procedure. In other circumstances, NCUA's Office of General Counsel has issued interpretations regarding governance under the FCUA that would conflict with certain parliamentary procedure resources, resulting in significant need for outside experts to help credit unions navigate their own governance.

Specific Questions

In the sections below we address the Board's specific requests for comments, and then address particular areas in which we believe changes may be merited.

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

   If the NCUA plans to continue to have Bylaws processed through CURE as well as the Office of General Counsel, which in our experience is the case, the Board could streamline the application process by ensuring that non-standard Bylaw amendments are submitted in a state that the agency will be able to approve. This will require additional

clarity from CURE and OGC about particular internal approval principals they may be employing. Indeed, it appears that there may be internal policies at CURE and OGC that are not suggested in the Act or rules, but must instead be derived from incomplete legal opinion letters published. To avoid credit unions needing to submit FOIA requests or similar steps to find language that has previously been approved, the NCUA could easily (1) create a library of the language that has been approved, and/or (2) publish publicly the internal criteria on which certain frequent policy decisions are made. For example, there are at least two OGC opinions regarding the ability to add criteria to the requirements to be directors, but those opinions do not reflect that the OGC would prefer that at least one director seat be free of restrictions (a recent position taken while processing an application). If such positions were public, it would create predictability in applications and accountability for the agency.

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

The current language in Article II § 4 provides, "A member who is disruptive to credit union operations may be subject to limitations on services and access to credit union facilities." This language is not a complete rendering of the NCUA's guidance on limitation of services, as OGC has also communicated that causing a loss can be reason to limit services. The language is also problematic, in that a number of abusive behaviors should be available as reasons to limit certain services to members. The language being present in its current form could be interpreted as exclusive, rather than one example.

The NCUA does not need to encompass in Bylaws language or in a new regulation the scope of other federal regulations or laws. The NCUA does not need to remind by regulation that limitation of services actions should not be used to discriminate, and that disparate impacts on protected classes may be implicated through credit union operations.

As we believe this is an area where the Bylaws should be revised, we below suggest several options which we believe could result in workable solutions for FCUs:

- "Not all services are available to all members." This language would allow the greatest flexibility to credit unions in the Bylaws, while still maintaining the ability for guidance to shape what denials of services will be permissible (or how different services may be available based on permissible member attributes).
- "A member who is not in good standing, as defined by the Board of Directors and communicated to the membership, may have accounts and other services limited and/or be restricted in access to credit union facilities." This language would allow FCUs to define how limitations can occur in a policy and communicate it to the membership, but not restrict unduly what can cause a member to not be in "good standing." This type of definitional approach can allow FCUs to

encompass disruptive or abusive behavior, misuse of credit union services, illegal activity, or losses to the institution.

- "A member who is disruptive to credit union operations, abuses credit union services, or who does not fulfill the member's obligations to the credit union may have accounts and other services limited and/or be restricted in access to credit union facilities." This alternative language may serve in a somewhat more specific way to define the range of circumstances in which limitations of services may be appropriate.

Whether or not the NCUA determines to so revise the Bylaws, the Bylaws should not be revised to limit the ability of FCUs to protect themselves from the misbehaviors that can occur in a modern operating environment.

For example:

- Privileges to have a debit card should be able to be revoked as a result of irresponsibility with a card (to protect against loss).
- Institutions should be able to limit remote access (e.g., home banking, ATM) if a loan is delinquent and they are unable to contact the member, as leverage over access can be a highly effective tool in preventing loss to the institution, preventing longer delinquency (and therefore greater damage to the member's credit), and stopping continued operational losses from collections activity. Whether and when to do so should depend on the nature of the institution's particular operations.
- A member who violates credit union policy against opening marijuana related accounts by repeatedly trying to run marijuana business through personal checking accounts (even if it does not cause credit losses) should be able to be limited from access to checking accounts to limit operational losses from repeated SAR filings.
- Institutions need to be able to protect employees and other members from abusive or harassing behavior.
- A member who is subject to limitation of services may be a joint owner on an account with other members. Any language used by the NCUA in this area must ensure that FCUs have the flexibility to limit all abuse occurring with respect to accounts, and not only limiting services of the one member. Credit unions may not be able to operationally limit just one of the joints from engaging in EFTs, for example, if one of them has abused this privilege. Wrongdoers should not be able to circumvent rules by having joint accounts.

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

   We do not believe that recruitment and development is an area that is appropriate to specifically cover in Bylaws. These are cultural to each credit union. While any impediments to recruitment should be removed from the Bylaws, we do not believe that the Bylaws currently contain such impediments.

   In terms of establishment of advisory committee designed to garner participation, we believe this is a positive practice that is used by many successful institutions, but it is not an area where we believe NCUA commentary is necessary.

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

   We do not believe that this is a structural issue in the Bylaws. The NCUA should ensure that tools are available to FCUs. For example, the NCUA could implement language such as,

   > "A meeting of the members may also be conducted, in whole or in part, by electronic transmission by and to the Credit Union, or by video screen communication, if the Credit Union implements reasonable measures to provide members a reasonable opportunity to participate in and vote on matters submitted to the members, including an opportunity to hear the proceedings substantially concurrently with the proceedings. A record of any votes or other actions taken at a meeting by electronic means shall be maintained by the Credit Union."

   Modern corporations codes do not interpret electronic communication that is substantially concurrent with proceedings to be a proxy vote.[1]

[1] For example, California allows for proxy voting, but does not consider electronic participation as a proxy. See California Corporations Code § 7510(f):

> "A meeting of the members may be conducted, in whole or in part, by electronic transmission by and to the corporation or by electronic video screen communication (1) if the corporation implements reasonable measures to provide members in person (or, if proxies are allowed, by proxy) a reasonable opportunity to participate in the meeting and to vote on matters submitted to the members, including an opportunity to read or hear the proceedings of the meeting substantially concurrently with those proceedings, and (2) if any member votes or takes other action at the meeting by means of electronic transmission to the corporation or electronic video screen communication, a record of that vote or action is maintained by the corporation. Any request by a corporation to a member pursuant to clause (b) of Section 20 for consent to conduct a meeting of members by electronic transmission by and to the corporation, shall include a notice that absent consent of the member pursuant to clause (b) of Section 20, the meeting shall be held at a physical location in accordance with subdivision (a)."

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

   Certain overlaps can be eliminated; however, the Bylaws containing other overlaps can be an effective manner of ensuring that the "rules" for members and governance are contained in one place. Not all rules need to be spelled out entirely, but certain references can be effective. Any eliminations of this nature should pay attention to whether the elimination of an overlap is actually detrimental to communication and clear rules for members' relationships with the institution, and whether credit union research and understanding is streamlined by inclusion.

Additional Comments

- Organizational Meeting

  Article X is extraneous for FCUs that have already been formed. It should be permitted to be deleted.

- Nominations Process

  The nominations process for FCUs can be very confusing where there are either operational failures, or where a nominee withdraws or dies. It is surprisingly frequent that a nominee dies after he or she has been nominated, and after the close of nominations and all applicable notices are sent. In this circumstance, we do not believe that nominations from the floor are appropriate for institutions that have petition processes, as nominations from the floor are inherently anti-democratic.[2]

  We believe language like the following should be permissible for institutions that have a petition process (rather than exclusively nominations from the floor):

  > "A nominee of the nominating committee or a nominee by petition shall not be deemed to have not been nominated if the nominee, after the date the nominating committee files its nominations with the secretary of the credit union, dies, becomes unqualified, or withdraws from the election. If such a nominee is elected, his or her position shall be deemed vacant immediately after the Annual Meeting, and such vacancy shall be filled in accordance with Article VI Section 4."

  This would be permissible under the FCUA, and does not change the ultimate paradigm that the members elect directors.

[2] Only persons present in person are able to participate.

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- Failures in Process

  Neither the Bylaws nor applicable law answer the question of what happens if a FCU does not fulfill part of its obligations under the nominations process. For example, what if a nominating committee files its nominees and notice is provided of the nominees and the date of the meeting, but does not include in the notice that petitions can be submitted? Of course, if this error is caught prior to the deadline in the Bylaws, the problem can be solved. If not caught, then the Bylaws do not answer what happens, but rather muddy the waters of what would be acceptable by designating that the annual meeting "must be held" at a certain time or in a certain month.[3]

  As re-noticing the annual meeting can be a difficult or untenable process, most parliamentary systems and corporate laws allow for the meeting to be called to order and then adjourned to a later date to finish the business of the meeting.

  The Bylaws could state:

  > "If, in any year, the election of directors is not held at the annual meeting of the members or any adjournment of the meeting, the Board of Directors shall call a special meeting of the members not more than forty-five (45) days from the date of the annual meeting or adjourned meeting, for the purpose of holding the election and transacting such other business as may properly be brought before the meeting. At such meeting, the members shall elect directors and transact such other business as may properly be brought before the meeting, including agenda items if properly noticed."

- Record Date

  The FCU Bylaws do not currently answer the dates at which members must be members to be entitled to notice of meetings, or to vote at meetings. This creates a particular difficulty when determining how to send notices. It often takes 5 days from sending a notice to a mail house to get the notices in the mail. If a member joins between sending the content to the mailhouse and the letters going out, must the FCU amend its mailing list?

  Further, if a member joins the FCU after notices are mailed on a particular issue (e.g., a merger), should they be eligible to vote on the topic (when they may have joined not because of a true interest in services, but rather only to vote against the topic)?

[3] Article IV Section 1.

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In most types of corporations, the Board of Directors can determine how to set such a record date within certain limits. These limits have default settings (if a Board does not pick a date), and limits on the dates that can be selected. For California chartered credit unions, those rules are set at Corporations Code § 7611. They can be operationalized with language like the following:

> "(a) The Board may fix in advance a date as the record date for the purpose of determining the members entitled to notice of any meeting of the members. Such record date shall not be more than 90 nor less than 10 days before the date of the meeting. If the Board does not specifically fix in advance a record date, members of record at the close of business 5 calendar days before the notice date shall be entitled to notice.
>
> (b) The Board may fix in advance a date as the record date for the purpose of determining the members entitled to vote at a meeting of the members. Such record date shall not be more than 60 days before the date of the meeting. If the record date for notice is within 60 days of the meeting date and the Board does not fix an alternative date as the record date for voting, those members entitled to notice shall also be the members entitled to vote at a meeting. If the record date for voting is not within 60 days before the meeting date and the Board does not fix an alternative record date, members of record on the business day immediately preceding who are otherwise eligible to vote are entitled to vote at the meeting of members.
>
> (c) The record date for the purpose of determining the members entitled to cast written ballots shall be the date 5 days before the first written ballot is mailed.
>
> (d) In the event of a vote on a merger or charter conversion to be presented to the members by both written ballot and in person at a meeting, the record date for voting by mail ballot and at the meeting shall be the date 5 days before the mailing of the notice and ballot.
>
> (e) The record dates for any adjournment of a meeting shall be the same as for the adjourned meeting."

- Electronic Communications

Electronic communications of notices and ballots are currently only described when a FCU has selected option A4 of Article V. The Bylaws should include the ability for any notices to be sent electronically where the FCU has a valid ESIGN consent, or similar requirements. The Bylaws can be further modernized by allowing electronic

communications to or from the FCU. For example, operationalizing California Corporations Code §§ 20 and 21 is an effective method of providing for modernization while still providing for governance controls.

- Qualifications of Directors/Removal

The Bylaws should specify that when a director ceases to be bondable, or satisfies any of the other disqualifying events for institution affiliated parties under 12 USC § 1785(d), the Board of the FCU may declare their seat vacant (much as is available with failure to attend meetings). We note that in Article VI Section 8 the following language is vague and not practically operationalizable in the context of other rights of directors and members: "or otherwise fails to perform any of the duties as a director or committee member." The NCUA does not intend for this language to mean that the Board may create a duty by policy and then with a failure to fulfill that duty (e.g., file a disclosure report or come to a special strategic planning meeting) declare the seat vacant.

- Trust Membership / Shares

The Bylaws at Article III Section 6 provide for issuance of shares to trusts. We have two concerns with this section.

First is with the sentence which states, "The name of the beneficiary must be stated in both a revocable and irrevocable trust." While naming beneficiaries is important to ultimate determinations of share insurance status, many members are unwilling to share beneficiary names. This provision does not seem to be required, as at the point of a failure, NCUSIF can request information from the member/trust in order to determine the trust's beneficiaries and so the amount of insurance to which it is entitled. As the provision is extraneous, it should be removed to provide additional operational flexibility and member service options to FCUs.

Second, the question arises whether a trust can itself be a member, a question left with ambiguity by this section and a frequent question from credit unions to our office. A trust should be able to join a credit union in its own right as an "organization of such persons," or potentially through other means, such as a community or associational group. If the NCUA wishes to provide for how accounts under a natural person's membership can be opened in the name of a trust, then that should be clarified. If the NCUA is intending to limit or expand how non-natural persons (which can include both statutory trusts and revocable/irrevocable trusts) can become members in their own right, then the NCUA should so specify.

The issue of trust membership has been the source of significant ambiguity for FCUs over the years, and with the growing sophistication of FCU operations in the areas of

business lending and banking services the frequency of issues seems to be increasing. The NCUA should clarify that members can open accounts in the name of trusts of which they are settlors, or that members can open accounts in the name of irrevocable trusts of which they are beneficiaries, but that such accounts are not memberships entitled to vote. Separately, if the trust itself qualifies for membership under the FCU's Charter, it may join in its own right and receive a vote as would any other non-natural person member.

- Minors

  Article XV relates to service to minors. But in essence, it relates to membership. This section does not need its own article, and should be moved to join the other sections related to membership in Article III.

- Confusing/Archaic Provisions

  Certain provisions can be confusing for volunteers. For example:

  - Article VI Section 2: the "may or may not" provisions and the numbers of permitted employees through the fill in the blank provisions can be accidentally drafted to create contradictions. This could be drafted with two options, one with zero directors as employees (and the results of that for management officials and assistants) and the other with any non-zero number of directors as employees.
  - Article VII Section 6: the "financial officer" language is often confusing, as modern organizations may have a Board Treasurer (with largely symbolic functions) and a management "Chief Financial Officer." For custody of funds and similar steps, it should be noted earlier that the duties of the Treasurer may be delegated to a management official (CEO), and that the Treasurer only has such duties if the FCU does not have a CEO (whether permanent or interim). We note that the "financial officer" language in particular is only useful for small and simple institutions that do not have paid management—this is an area where the industry may have outgrown the language used.
  - Article II Section 4: the note that credit unions may restrict services to members no longer within the field of membership is a designation for FCUs who do not wish to follow the "once a member always a member" allowances for FCUs under the modern FCUA. While this is an important historical note, without context it can be confusing to new employees and volunteers who may not know the history of this particular provision. Additionally, credit unions invited to draft limitations in this open ended way may not create solutions that correspond with NCUA policy.

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Other provisions are archaic. For example:

- Article III Section 4 provides for terms on transfer of shares. Most credit unions do not allow for transfer of shares, rather treating share accounts like other types of deposit accounts. Transfers from one account to that of another person are transfers by check, ACH, wire, or similar method. They are withdrawals. In the modern financial services context, transfer of a share makes limited sense.
- Article VII Section 7 provides that the management official will be under the direction of the Board or of the financial officer. Often, a CEO (management official) will work under an executive committee, or interface with the Board Chair. This provision seems to assume an operational structure of the "financial officer" of the Board as the volunteer manager which is not reflective of modern norms.
- Article XVI Section 5 provides that minutes must be "signed." This signature requirement is archaic and unnecessarily formalistic, though we acknowledge that the minutes should be approved and completed by the Secretary of the body meeting (i.e., Board or committee).

- "Reserved" Sections

"Reserved" sections created through the deletion of prior sections are confusing for newcomers to the FCU Bylaws. With any major modernization, such placeholders should be eliminated.

We hope that these comments are helpful as the NCUA considers the FCU Bylaws, and with them the foundational rules governing operations of FCUs.

Sincerely,

STYSKAL, WIESE & MELCHIONE, LLP

Timothy I. Oppelt

TIO/no