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January 14, 2019

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

**Cooperative Credit Union Association, Inc. Comments on Proposed Rule on Federal Credit Union Bylaws (RIN 3133-AE86)**

**BY EMAIL ONLY**

Dear Secretary Poliquin:

On behalf of the member credit unions of the Cooperative Credit Union Association, Inc. ("Association"), please accept this letter relative to the National Credit Union Administration's ("NCUA") Proposed Rule on Federal Credit Union Bylaws. The Association is the state trade association representing credit unions located in the states of Delaware, Massachusetts, New Hampshire, New Jersey and Rhode Island, serving approximately 190 credit unions which further serve approximately 3.6 million consumer members.

The bylaws provide important directives for credit unions, and the Association has undertaken considerable efforts and initiatives to elicit members' views on how to respond to the agency's proposal to make the bylaws better. The Association formed a Bylaws Working Group ("BWG") and filed an extensive comment letter earlier this year in response to the agency's Advance Notice of Proposed Rulemaking on the bylaws. We are pleased that a number of the issues raised were addressed in the current proposal.

In coordination with the BWG, the Association held two conference calls and a webinar on the current proposal and developed a survey to capture member views and identify areas of agreement as well as concerns with the proposal.

The Association commends the agency for its comprehensive review of the bylaws, and is supportive of the efforts to update and streamline the bylaws.

However, the Association's members[1] support additional changes to further improve the bylaws and allow federal credit unions more authority to handle governance and operational issues addressed in a manner that best suits their members. The agency is urged to consider these recommendations and incorporate them into the final bylaw amendments. Comments are presented generally in the order of the proposed changes.

[1] A majority of members who commented on any particular issue raised in connection with the proposal.

## 1. Flexibility for Federal Credit Unions and Enforcement of the Bylaws

The bylaws are set out in Appendix A to part 701 of NCUA's rules. By incorporating the bylaws into the NCUA's regulations, the agency is able to use supervisory tools to compel compliance. While NCUA is not seeking comments on this matter, the issue is relevant to this review because concerns remain regarding the role of the agency in regulating and enforcing the bylaws.

The Association believes that the agency's approach to the bylaws should be less prescriptive and that credit unions should have more flexibility in addressing bylaw issues generally. Even though NCUA takes the view that it has authority to regulate the bylaws for all federal credit unions, the Federal Credit Union Act (Act) only references the agency's authority on bylaws in regard to new credit unions, 12 USC 1758. NCUA also takes the position that its role helps to protect credit union members' rights, but that view is inconsistent with the Act's fundamental depiction of credit unions as democratically controlled institutions.

In light of the Act's limitation on the agency's authority, the Association believes it is relevant for the Board to reconsider, as part of this rulemaking, whether the bylaws should be incorporated into its regulations in order to facilitate enforcement. More important, this rulemaking should fully consider the extent to which much greater leeway should be afforded to existing federal credit unions in developing and implementing bylaws that are tailored for their membership. The issue of virtual meetings, which is discussed in greater detail below, reinforces this concern. Further, the proposal would not allow a federal credit union to draft and adopt its own set of bylaws, although a credit union may adopt amendments, with NCUA approval.

While the agency should continue to develop and maintain model bylaws as a resource for established credit unions, it is overdue for the agency to move away from regulating the bylaws and enable federal credit unions to have greater capabilities to make their own decisions regarding the bylaws, including adopting their own bylaws without having to obtain prior agency approval, consistent with the Act and any other legal requirements.

The Association notes that the states of Massachusetts, New Hampshire and Rhode Island do not incorporate credit union bylaws into regulation. If the agency determines it must continue regulating the bylaws for existing credit unions, then the Association respectfully requests the agency to adopt the following changes to its proposal.

## 2. Timeframe for Approving Bylaw Amendments, Introduction

The proposed introduction provides that NCUA's Office of Credit Union Resources and Expansion ("CURE") is the primary office handling bylaw amendments. The proposal sets a 90 calendar day deadline for CURE to reach a decision on a bylaw amendment.

While having a time frame for agency action is positive, three months seems excessive in terms of how long CURE should take to review bylaw amendment requests. The Association urges the agency to reconsider the majority view under the ANPR that supported no longer than a 30-day

review period. The Association continues to support this time period but does appreciate that on occasion, there may be extenuating circumstances that could necessitate a reasonable delay.

It is recommended that the agency adopt an approach that most decisions will be made, and the credit union would be informed, within 30 days of the filing of the request, but the agency could take up to 60 days on a case by case basis, after it has informed the credit union that more time is needed and why.

Also, if within the allotted time the agency does not get back to the credit union, including, if relevant, notifying the credit union that more time up to 60 days is needed without substantive and documented justification, then the credit union should be allowed to consider the request as approved.

It is the experience of the Association that credit unions seeking a bylaw amendment are reacting to a current situation or trying to anticipate a near future circumstance and a three month delay in a decision could be burdensome, frustrating and problematic for the credit union. Also, the agency has not provided a sufficient explanation for why it would routinely need 90 days to review requests. The agency should not arbitrarily delay resolution of important and likely time-sensitive governance issues for credit unions.

### 3. Membership, Article II

A perennial issue for some credit unions is how to deal with the generally limited number of members who cause problems at the credit union due to their violent, abusive or otherwise disruptive behavior at the credit union, to the credit union's staff, or on property nearby to the credit union. While expelling such a member might be the most conclusive approach, the Association agrees that the Act limits expulsions to those carried out through a two-thirds vote of the members at a special meeting for that purpose or by majority vote of the board for "nonparticipation" of a member in the affairs of the credit. Credit unions must have a nonparticipation policy in place and members may only be expelled by the board consistent with the policy. 12 USC 1764

The proposal seeks to address how a federal credit union may deal with abusive and disruptive members, for which expulsion is not permitted under the Act. A member who fails any of the basic requirements for a "member in good standing" may be subject to reasonable limitations of service or access to credit union facilities under the federal credit union's limitation of services policy. This means a federal credit union could deny, as it deems appropriate, access to all or most credit union services such as ATM services, credit cards, loans, share draft privileges, preauthorized transfers, or access to credit union facilities to a member that has engaged in conduct that has caused a loss to the federal credit union or that threatens the safety of credit union staff, facilities, or other members in the federal credit union or its surrounding property.

The proposal adds a new section 5 to Article II describing the concept of a "member in good standing" to distinguish such members who enjoy all the rights and privileges from members who are not in good standing and as a result, may be subject to the credit union's limitations on

services policy. Under the proposal, a member in good standing would be current on loans, would not engage in violent, abusive or disruptive behavior at the credit union or surrounding property and would not cause a financial loss to the credit union.

Members believe the agency has generally developed a useful and well-reasoned approach that will help credit unions differentiate between members in good standing and those who are not for purposes of limiting services, in line with the federal credit union's policy.

However, some members believe they should be able to decide when a member is abusive, etc., without the agency setting limits on those terms through definitions or otherwise. Identifying and disclosing examples of behavior that would be inconsistent with good standing rather than hard definitions of specific attributes of improper behavior seems to be a preferred approach.

An important issue that the proposal does not address is how to deal with a member who raises a credit union's concerns regarding money laundering. Some members expressed the view that applying their limitation of services policy does not completely address their concerns because such a member, despite his or her efforts to engage in money laundering, can still vote and participate in the credit union's elections. The Association requests that the agency reconsider whether more flexibility could be provided for credit unions to deal with situations in which a member has caused legitimate money laundering concerns.

Also, rather than "current" on loans, the Association suggests that term be changed to "significantly past due" to avoid the possibility of negative action against a member who is not materially behind in payments.

**4. Shares of Members, Article III**

The proposed rule adds new language providing examples for federal credit unions to choose in establishing varying par values for different classes of membership (such as students, minors, or non-natural persons), provided that such differences conform to applicable legal requirements including anti-discrimination laws. Association members support this approach.

The new language also clarifies that federal credit unions have options regarding whether to require all members to maintain a regular share account, or whether to permit members to base their qualification for membership on some other type of account, such as a share draft account. Association members likewise agree with these options.

In addition, guidance on trust accounts is also proposed, which the Association supports. The staff commentary clarifies a number of issues such as trust itself, whether revocable or irrevocable, may be a member of a federal credit union in its own right if all parties to the trust are within the field of membership and actually join.

**5. Member Meetings, Article IV**

The proposed rule would require that the notice for the annual meeting be posted in a conspicuous place in the federal credit union's physical office, such as at the teller windows or on the front door office, at least 30 calendar days before the meeting. The notice must also be prominently displayed on the credit union's website if the credit union maintains one. A federal credit union is not required to establish and maintain a website solely for this purpose, however. The proposed rule also deletes the option for federal credit unions to avoid pre-meeting notice requirements if all members entitled to vote waived the notice requirement.

Association members do not oppose the additional notice provisions but question the effectiveness of on-site notice, as opposed to information available on a website. Some members note that additional on-site notices may add to the complications and possible member confusion associated with conducting member meetings.

The proposed rule would adjust the quorum requirement for member meetings. It would require 12 members, excluding the board, credit union staff, and officials, for a quorum. The Board indicates it wants to encourage federal credit unions to have wider participation from members, rather than allowing staff and board members to control corporate decision making within the credit union.

The Association's members do not support the proposed quorum changes and request the Board to eliminate such proposed provisions. While NCUA's stated purpose to encourage more democratic participation in a credit union's elections and meetings is appreciated, our members believe there are better ways to achieve participation, such as through member education and information, rather than through a restrictive new quorum requirement.

The proposed commentary encourages federal credit unions to provide a live webcast of annual and special meetings for interested members, as well as post a video of the annual meeting on the credit union's website. Members agree these mechanisms could help generate and maintain member interest in credit union meetings but do not agree including this in the commentary is appropriate.

Significantly, the proposal would not permit virtual only or hybrid in-person/electronic device access for members to participate in meetings. NCUA will, however, consider bylaw amendment requests allowing for hybrid meeting attendance on a case-by-case basis depending on, among other things, the credit union's size, nature, and field of membership. Association members feel this approach translates to micromanagement from the agency and that rather than NCUA making the determinations, federal credit unions should be allowed to decide whether to hold virtual or hybrid meetings without having to ask the agency for approval before they do. Virtual and hybrid meetings can expand opportunities for participation and are being used increasingly throughout the country, as the agency notes in the Supplementary Information when it acknowledges at least 22 states permit corporations to hold such meetings. 83 FR 56433.

Moreover, the concern about disenfranchisement of any member who may not have any or adequate Internet access or an electronic device can be addressed by credit unions, such as by allowing members to request a mail ballot or by providing such electronic access directly for the

benefit of members. For example, the addition of cyber cafes are growing in popularity. The Association does not believe that the agency has provided sufficient justification for restricting credit unions in the use of technology to encourage greater member participation.

The issue of how credit unions permit members to participate should be made at the individual credit union level, which would afford each credit union the opportunity to make its determination, reflecting member preferences, and not decided remotely by the agency. Strategic planning by credit unions continues to include increased use of technology. Any agency proposal that adds an obstacle to this process, such as one that impacts the centerpoint of a credit union's governance with its membership, is rejected. The Association opposes the agency's approach and urges NCUA to delete the provisions that would preclude or limit virtual and hybrid meetings.

**6. Elections, Article V**

The proposed staff commentary states that a federal credit union may allow as many forms of electronic voting (e.g., mobile phone or the Internet) as it wishes for those members who choose to vote electronically. However, the proposed rule does not allow a federal credit union to adopt an entirely electronic voting process. The NCUA said it may consider bylaw amendment requests allowing for electronic-only voting on a case-by-case basis. Similar to comments above on virtual and hybrid meetings, the Association does not support the agency's limitations on all electronic voting.

The Board seeks comment on whether the bylaws should include an option for conducting elections that would allow federal credit unions to use a combination of voting methods without needing to make individual requests to the agency's CURE office to do so. This approach seems to offer some flexibility, but as indicated above, credit unions should not have to offer an in-person meeting.

The Board would like input on whether the bylaws should require that the nominating committee widely publicize to all members the call for nominations by any medium the federal credit union determines and interview every member who volunteers to be nominated and serve. Our members were evenly divided on the issue of publicizing the call for nominations. They do not support an interview requirement because it would be time consuming, may discourage candidates, and there are other more effective means to obtain background information.

The Board also asks whether the nominations by petition along with those of the nominating committee should be required to be posted on the credit union's website (if the credit union maintains a website). Association members do not oppose this suggestion.

**7. Board of Directors, Article VI**

The proposed rule would allow a federal credit union to create director emeritus and associate director positions to augment current directors. The Association agrees these are positive changes and supports them.

The proposed rule amends the option to remove a director or a credit committee member for failure to attend regular meetings. The current bylaw language allows federal credit unions to remove a director or credit committee member that has missed 3 consecutive months, or 4 meetings in a calendar year. Under the proposed rule, a federal credit union may remove a director or credit committee member for missing 3 consecutive months or for missing 4 meetings within any 12 consecutive months. The Association supports this amendment.

The proposed rule adds language to allow federal credit unions to choose whether directors or credit committee members may be paid employees of the credit union after their volunteer service ends. The Association agrees with this approach and the flexibility it provides.

For federal credit unions that elect not to have a specifically appointed credit committee, the proposed rule adds two new options to provide additional flexibility in addressing an applicant's request for review of a denied loan application. The Association supports these additional options.

The proposed staff commentary encourages federal credit unions to form a board of directors that reflects the credit union's field of membership. The Association strongly supports inclusion but questions the effectiveness of including such provisions in the commentary. Rather than addressing this issue in the commentary, the agency could highlight efforts to enhance inclusion by credit unions in NCUA's newsletter and in other agency publications that promote credit union efforts to encourage diversity in their leadership. The Association notes that these objectives are consistent with related provisions contained in the Dodd-Frank Act.

The proposed staff commentary also encourages federal credit unions to notify members, through a website posting (if the credit union maintains a website), whenever the board adopts a resolution that changes the size of the board of directors. A federal credit union that does not maintain a website could post such a notice in a conspicuous place in its offices, such as at the teller windows or on the front doors. While the web posting may be useful, posting of the notice on-site is not likely to be read by many members. The Association does support clear and concise communications to directly to members of board resolutions in any manner of regular communications utilized by credit unions.

**8. Board Officers, Management Officials and Executive Committee, Article VII**

The proposed staff commentary states that in the absence of both the chair and vice chair, those directors who are present at a meeting may select from among themselves an individual director to act as temporary chair for that particular meeting.

Actions taken by the board under the direction of the temporary chair have the same validity and effect as if taken under the direction of the chair or the vice chair, provided a quorum of the board, including the temporary chair, is present. This is a useful clarification that the Association supports.

**9. Organizational Meeting, Article X**

This article only governs the initial organizational meeting at which the federal credit union is established. The proposed rule includes an option for federal credit unions to eliminate the article after five years of operation. The Association suggests a somewhat different approach. This article should be provided as a separate document to all organizing federal credit unions and eliminated from the bylaws for existing credit unions.

**10. Expulsion and Withdrawal, Article XV**

Consistent with the FCU Act, a Federal credit union may only expel a member upon a two-thirds majority vote of the membership at a special meeting called for that purpose or by operation of a board-approved nonparticipation policy, as discussed above. New commentary addresses these provisions and clarifies that only in-person voting is permitted in conjunction with a special meeting held for that purpose. The Association questions the necessity for this clarification, which will make it more difficult to handle expulsions, possibly expose credit union staff, directors and other members to safety issues, and does not support its inclusion in the commentary. Members who are subject to expulsion are entitled to have an opportunity to present their case for retention, but that can be accomplished through, for example, a written communication to the board of directors by an aggrieved member. Rhode Island recently amended its statute to permit such communication. R.I.G.L. 19-5-18.

**11. Bylaws on the FCU's Website, Article XVI**

The proposed rule would direct federal credit unions with websites to post their bylaws on the website and update the posting if amendments are approved. Consistent with other comments in this letter on posting notices and other information to inform credit union members, the Association does not oppose this amendment.

**Conclusion**

The Association commends the agency for its review of the bylaws and for its efforts to make them more efficient and effective. As addressed in this letter, while a number of the proposed changes are supported, it is the position of the Association that there is more the agency can do to improve the bylaws to facilitate credit union governance and operations. I appreciate the Board's consideration of our views and recommendations, and would be glad to respond to any questions from the agency regarding the issues raised.

Sincerely,

/Bruce Winne

John B. Winne
Interim CEO

JBW/md/mabc/kb