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National Association of Federally-Insured Credit Unions

January 11, 2019

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

RE: Federal Credit Union Bylaws (RIN 3133-AE86)

Dear Mr. Poliquin:

On behalf of the National Association of Federally-Insured Credit Unions (NAFCU), I am writing in response to the National Credit Union Administration's (NCUA) proposed rulemaking on federal credit union (FCU) bylaws. NAFCU advocates for all federally-insured not-for-profit credit unions that, in turn, serve over 115 million consumers with personal and small business financial service products. NAFCU and its members appreciate the NCUA's leadership and commitment to updating, clarifying and simplifying the bylaws. Governance is an essential function ensuring credit unions operate prudently, and preserve the safety and soundness of the industry. NAFCU proposes several bylaw amendments to carry out the NCUA's intent while allowing credit unions the flexibility necessary to implement bylaws that work best for their unique fields of membership, including updates to the bylaw amendment process, member meeting and election processes. More importantly, NAFCU urges the NCUA to amend the bylaws to expedite the process for expelling a member who is abusive, or conducting an illegal act. The importance of modernizing the expulsion process cannot be stressed enough.

General Comments

NAFCU continues to advocate for greater flexibility in developing bylaws that cater to a credit union's unique field of membership and member needs. Adaptability of the bylaws is important as the financial marketplace evolves with the current climate. While the NCUA recognizes that the current bylaws do not allow credit unions operational flexibility, the proposed rule could be substantially improved by the recommendations made below to offer even more flexibility. Ultimately, NAFCU encourages the NCUA to support legislative changes to the *Federal Credit Union Act* (FCU Act) should certain changes require additional authority.

The NCUA's Regulatory Reform Task Force recommended changes to the standard bylaws and suggested the issuance of an advance notice of proposed rulemaking (ANPR) and formation of a working group. The NCUA published an ANPR in March 2018 and specifically requested information related to: (1) improving the bylaw amendment process within the NCUA; (2) addressing ambiguities in the FCU bylaws allowing for an FCU to limit services to a member and

expel a member; (3) methods to facilitate recruitment and development of directors; (4) methods to encourage member attendance at annual and special meetings; and (5) eliminating regulatory overlaps between the FCU bylaws and the NCUA's regulations. NAFCU's comment letter, dated May 21, 2018, recommended several improvements to the FCU bylaws for each question posed in the ANPR. NAFCU appreciates the NCUA incorporating stakeholder suggestions from the ANPR into this proposed rule, but would like to reiterate several of its original recommendations plus new feedback gathered from our members. NAFCU encourages the NCUA to consider incorporating these recommendations into a final rule amending the FCU bylaws. In addition, the NCUA's December 2018 Regulatory Reform Task Force final report noted that bylaws modernization is a Tier I priority as the bylaws have not been updated in over a decade, NAFCU requests more frequent review of the FCU bylaws. The NCUA should revisit the bylaws on a more regular basis to reduce confusion and keep up with technological advances as well as changing credit union and member needs.

Executive Summary

In this comment letter, NAFCU outlines the recommended bylaws changes provided by its member credit unions regarding each individual article. The recommendations are as follows:

Amendment Process

- Re-establish standard and non-standard bylaw amendment categories, and adopt a distinguishable timeline for approval of each category. Standard bylaws that are not new or novel should be afforded a 30-day timeline for approval. New or novel bylaw amendments should be afforded the proposed 90-day timeline. Alternatively, more options of "fill-in-the-blank" provisions should be added.
- Implement a process that notifies the applicant credit union of the approval process status, and provide written notification and reasoning for the denial of a bylaw amendment.

Shares of Members

- Include a provision for community property states explicitly stating whether the owners jointly own the par value, and how credit unions can rely upon the par value in underwriting a loan for the married couple.

Limitation of Services

- Set forth factors to measure physical and verbal abuse for credit unions to make risk-based decisions regarding a limitation of services policy.

Meetings of Members

- Continue to allow a quorum that includes board members, directors, and employees. Alternatively, allow for a proportion of the quorum to be made up of board members, directors, and employees.
- Clarify what "prominently displayed," means regarding the requirement to display a meeting notice on the credit union's website.
- Allow credit unions the ability to increase the timeframe for advanced notice of meetings based on the type of meeting and the credit union's internal policies and procedures.

- Amend the bylaws to explicitly permit member attendance and participation at annual and special meetings via technology such as teleconference, video conferencing or other web-based conferring tools, with comprehensive cybersecurity measures in place.

Elections

- Reform the four voting options to explicitly allow for more combinations of voting utilizing technology.
- Remove the requirement of the nomination committee to interview all nominees.
- Remove the instructions encouraging credit unions to adopt a resolution inserting an age of 21 years of age or greater for holding elective or appointive office.

Recruitment and Development

- Consider conducting NCUA-sponsored, voluntary education sessions to facilitate the development of current and potential directors.

Expulsion

- Expand the definition of “nonparticipation” to encompass those members who do not utilize credit union services in a legitimate or legal manner.
- Remove the requirement of credit unions posting a copy of the bylaws on their website.

Introduction - Amendment Process

The current amendment process is outdated and an expedited and simple process for bylaw amendments should be adopted. NAFCU raised this issue with the NCUA’s Office of General Counsel (OGC) in 2014 when it formed a working group to discuss possible bylaw revisions. NAFCU suggests that the NCUA allow credit unions the ability to amend their own bylaws without regulatory approval for those simple and standard bylaw amendments.

Previously, the NCUA bylaws made a distinction between “standard” and “nonstandard” bylaw amendments, which allowed for “fill-in-the-blank” provisions and standard amendments to be adopted without the NCUA’s approval. The NCUA removed the distinction between standard and non-standard amendments, and all amendments that are not “fill-in-the-blank” provisions require the NCUA’s approval. The proposed rule retains a range of options that are considered “fill-in-the-blank” provisions that require a two-thirds vote of the board of directors. In addition, the proposed rule establishes a 90-day deadline for the NCUA’s Office of Credit Union Resources and Expansion (CURE) to reach a decision on bylaw amendments.

First, NAFCU suggests that the NCUA re-establish the allowance for standard or pre-approved bylaw amendments that do not require the NCUA’s approval. In the alternative, NAFCU suggests expansion of the options for “fill-in-the-blank” provisions that have been vetted by the OGC and are considered lower risk for adoption without prior approval. Secondly, NAFCU suggests the adoption of two distinguishable timelines. The first timeline is for those standard amendments that do not fall within the “fill-in-the-blank” category, but are not new or novel. The second timeline is for those amendments that are new or novel and require a lengthier approval process. NAFCU understands that the NCUA may require more time for approval of a bylaw amendment even if

previously approved for a different credit union, as each amendment must be looked at given the unique facts and circumstances of the applicant credit union. However, to impose a 90-day timeline for approval of *all* amendments causes an undue burden on the applicant credit union. Especially given that previously, a credit union would bring bylaw amendments to the Regional Director and would be provided with a decision within 15 days. While we understand that CURE needs sufficient time to process the amendment request, the amendment process for those standard bylaw amendments that are not new or novel should be processed more expeditiously than in 90 days. We suggest a 30-day deadline for such amendments. For those bylaws that are new or novel, the 90-day deadline is more appropriate.

Further, NAFCU suggests that the NCUA implement a process for CURE to notify the credit union of the approval status at various stages of the process. An open dialogue with the applicant credit union will help minimize time and resources expended by both parties, and mitigate frustrations. The proposed rule states that if an applicant does not receive approval in the 90-day timeline, then this constitutes a denial. The applicant credit union should at least be notified in writing within this 90-day timeline why the amendment request is being denied. This saves the credit union time if they choose to appeal the decision or re-apply. NAFCU members would appreciate more contact with the NCUA during the bylaw amendment process.

Article II – Qualifications for Membership

In NAFCU's May 2018 *Economic & CU Monitor Survey*, over 60 percent of members reported that modernization of the limitation of services and expulsion of members is a top priority. The current bylaw is vague and, when read in conjunction with the Legal Opinion Letters, creates a patchwork landscape for credit unions to craft a limitation of services policy. Incorporation of the Legal Opinion Letters would provide greater clarity, and the addition of the proposed new section regarding a "member in good standing" would help to facilitate a limitation of services policy; however, this still leaves too much grey area with respect to the type of physical and verbal abuse that qualifies for the limitation of services.

Members in good standing retain all the rights and privileges associated with membership, and the proposed rule sets forth the requirements for maintaining good standing. The proposed rule states that a member must be current on all loans and avoid engaging in any violent, belligerent, disruptive, or abusive behavior towards credit union staff, other members, property, and not cause a financial loss to the credit union. Accordingly, if a member causes a financial loss and destroys credit union property, the credit union may broadly limit services to the member, but the member retains certain member rights as stated in the proposed rule. To illustrate a potential flaw, those members not in good standing who are subsequently denied physical access to credit union locations may be unable to attend member meetings or vote depending upon the specific meeting and election processes in place. Therefore, the credit union runs the risk of a de facto expulsion and possible infringement of the member's rights. To prevent this, the credit union would then be burdened with a difficult, time-consuming, and potentially dangerous choice: (1) request changes to its bylaws to make accommodations for those members not in good standing, such as allowing voting by mail or electronic means; or (2) pursue approval from its board of directors to amend the limitation of services policy to allow those members to gain access to the physical credit union

locations solely for the purposes of attending meetings and voting, which runs the risk of additional harm to the credit union, its employees, or other members.

NAFCU recommends that the NCUA more clearly address what types of verbal or physical abuse merit a limitation of services. Retention of the intentionally vague bylaw is important to a certain degree, so credit unions have the flexibility to craft a limitation of services policy that works best for their institution and membership; however, credit unions are left guessing what degree of abuse they must endure before limiting the services of an abusive member. Not appropriately defining the limits of physical or verbal abuse means that credit unions may tolerate more abusive behavior than necessary, which puts the institution, employees, and other members at risk. NAFCU suggests that the NCUA address this issue not by providing a list of examples, but by setting forth concrete factors that a credit union can make a risk-based decision when evaluating the behavior against the factors. Additionally, NAFCU has heard from many of its members that the limitation of services does not resolve the underlying issue with the member's behavior. Consequently, and as explained below under the expulsion section, additional remedies may be necessary. NAFCU urges the NCUA to evaluate all potential avenues within the authority provided in the FCU Act that would permit more severe consequences for physical or verbal abuse.

Article III - Shares of Members

NAFCU members located in community property states have identified an operational challenge in the context of establishing par value and lending to married couples. The proposed rule allows for joint owners to establish one share account jointly or separately. However, in a community property state, each joint owner would equally own one-half of the share account. NAFCU suggests that the NCUA amend section seven of Article III of the bylaws to include provisions for community property states explicitly identifying whether the owners jointly own the par value, and how credit unions can rely upon the par value in underwriting a loan for the married couple. Such a clarification would assist credit unions in community property states to explain the parameters of membership to their members.

Article IV– Meetings of Members

NAFCU supports the proposal's requirement of providing more advance notice by posting notice of an annual meeting on the credit union's website, if a website is maintained. With the rise of online banking, it is only fitting that the notice be posted on the credit union website in conjunction with a conspicuous notice at branch locations. This change promotes awareness and encourages greater member attendance at annual meetings. NAFCU suggests that the NCUA further clarify "prominently displayed" and whether that means a credit union homepage, or a calendar listing upcoming meetings and events suffices.

The proposed rule does not allow for virtual or hybrid meetings, and these options are only available on a case by case basis. Over 50 percent of NAFCU member respondents to our May 2018 *Economic & CU Monitor Survey* identified that they would use technological solutions to encourage greater member participation in annual and special meetings. NAFCU recommends that the NCUA amend the bylaws to explicitly permit member attendance and participation at meetings

via technology such as teleconference, video conferencing or other web-based conferring tools. Conversely, any technology utilized must ensure members are not harmed or at risk for cybersecurity threats. Offering a registration link whereby a member's identity can be vetted would assist with documentation and verification for meetings. Multi-factor authentication would ensure a sufficient level of privacy and security protections are in place to prevent instances of identity fraud, specifically with respect to voting. NAFCU recommends the NCUA include a cybersecurity requirement within this provision.

Allowing for technology-enabled participation at annual and special meetings will increase overall member attendance and governance. Given many credit unions serve members all over the globe, it is not practical to require attendance in person, and allowing for easy to use alternatives is imperative. Further, there are circumstances where members are not given ample advanced notice in order to attend. For example, a credit union may give seven-day notice before a special meeting is held, and it may not be feasible for a member to participate in the special meeting if they no longer live in a geographical area where the credit union is located, but for joining the meeting via technology-enabled participation. It appears that the NCUA believes in virtual meetings encouraging greater member attendance. Staff commentary added in the proposed rule encourages credit unions to provide live webcasts of the annual and special meetings on their websites. NAFCU suggests that the NCUA clarify whether those members who participate in the meetings via a live webcast count towards the quorum, and whether credit unions will need to keep track of members that view the meeting via the live webcast.

Although the timeframes for providing members advanced notice of annual and special meetings is sufficient, NAFCU suggests that the NCUA explore allowing credit unions the ability to increase the timeframe based on the type of meeting and the credit unions internal policies and procedures. A credit union should be able to provide more advanced notice if they so choose. A suggested increase is allowing advanced notice of annual meetings up to 120 days before the scheduled date of the meeting. Allowing for a longer timeframe will put more members on notice of the meeting, and allow for resolution of scheduling conflicts well in advance of the meeting.

Lastly, NAFCU members request that the NCUA revisit the quorum requirements and allow for greater flexibility to attain a quorum. The proposed rule requires a quorum of twelve members excluding board members, directors, and employees. Credit unions were designed to operate as independent, democratic units, therefore we understand the NCUA's logic in the proposed rule. However, NAFCU believes that more specifically, quorums should not be made up solely by those members who are also in charge of the day to day operations of the credit union. Often times, however, board members, directors, and employees are members themselves. As members, these board members, directors, and employees' attendance should count just as any other member's attendance. The required minimum quorum may be more difficult for smaller credit unions to attain. NAFCU suggests that the NCUA allow a quorum to consist of a proportionate number of members who are directors and employees so long as a certain number of members who are not directors and employees are also present. Alternatively, we suggest a provision be added to the bylaw allowing for a phase-in quorum requirement to give a credit union time to formulate a program that works best for its membership. This would allow credit unions time to implement

online capabilities and other flexible channels. Further, the bylaws do not address the implications of when a quorum has not been obtained. NAFCU asks the NCUA to clarify this point as well.

Article V - Election Process

NAFCU appreciates the NCUA's intent to increase the number of members who vote in elections, however the bylaws do not reflect this intent. NAFCU does support the proposed rule's requirement of publicizing the call for nominees by any medium. This proposal aligns with the intent to increase voting, and could lead to more candidates. NAFCU has advocated that the bylaws offer more convenient election options and allow credit unions to conduct elections utilizing a combination of voting options without needing to make an individual request to the NCUA to do so. The current bylaws allow credit unions to choose one of four options listed, none of which allow for an entirely electronic mode of voting. The proposed rule adds new commentary clarifying that credit unions may use as many forms of electronic voting as desired, so long as the credit union does not adopt an entirely electronic voting process. Considering the rapid pace of technological advancements, credit unions need the flexibility to adapt to available technology as soon as they see fit. Those credit unions who wish to have an electronic-only voting process are still burdened with having to go to the NCUA to request this voting process on a case-by-case basis. NAFCU reiterates the call to reform the four options for voting processes to allow for more combinations of voting methods without needing the NCUA's approval via a bylaw amendment request.

Secondly, NAFCU suggests that the NCUA remove the provision in the proposed rule that requires nomination committees to interview every candidate that applies for a board or volunteer position. Credit unions should be allowed to vet candidates as they see fit. Requiring all candidates to be interviewed requires significant time from the nomination committee, and interviews would have to be completed within 30 days of being appointed, and in certain circumstances would not be feasible. Nomination committees have their own internal policies and procedures for determining those candidates who should be interviewed. Requiring the nomination committee to interview all the candidates blurs the intended role of the committee which its intended function is to vet qualified candidates. NAFCU urges the NCUA to prioritize flexibility in the election process and adopt these recommended changes to the bylaws.

Finally, the proposed rule adds instructions at the end of section seven encouraging credit union boards to adopt a resolution inserting an age not greater than 21 years of age for holding elective or appointive office, as opposed to the general limitation of 18 years of age to vote. The FCU Act does not prohibit a credit union from setting a minimum age, other than the legal age of majority. Encouraging a minimum age higher than 21 years of age could have the unintended consequences of less members able to participate in the governance of the credit union who would otherwise be qualified and eager candidates. Further, to assist with the development and recruitment of board members, a credit union may be looking to cultivate young and talented members. In order to facilitate greater flexibility, NAFCU recommends that the NCUA remove the instructions specifically encouraging the adoption of a resolution inserting an age not greater than 21 years of age for holding elective or appointive office.

Article VI – Board of Directors

Recruitment and development of future credit union directors is vital to credit union longevity. Credit unions, based on their size and complexity, need the freedom to best determine what constitutes a capable director. The necessary prerequisites as well as education and work history should be left up to the individual credit union. However, the NCUA has weighed in on requirements in Legal Opinion Letters in the past. NAFCU suggests that these Legal Opinion Letters be incorporated into the bylaws to allow for greater clarity.

The proposed rule includes bylaw provisions for the positions of Director Emeritus and Associate Director. Additionally, to encourage and facilitate the development of directors, NAFCU suggests that the NCUA consider sponsoring voluntary educational sessions for those individuals who are currently directors and associate directors. Such sessions would be a valuable opportunity to exchange ideas and share best practices, especially for smaller or new credit unions. Moreover, educational sessions would have the added advantage of not posing an additional regulatory burden on credit unions. NAFCU supports the creation of such educational opportunities as it would benefit the entire credit union industry by promoting greater understanding and encouraging more members to get involved in their credit union. Accordingly, the NCUA should amend the FCU bylaws to provide clearer direction to credit unions and help identify, retain, and promote the development of its directors.

Article XIV - Expulsion

Credit unions need an expedited process for expelling those members that are a threat to the safety of the credit union, its employees and members. While having a robust limitation of services policy is a good step, there are still obstacles as to how these policies are enforced. As requested by the NCUA in the proposed rule, NAFCU members have provided the following examples of extremely abusive member behavior. These examples are listed under this section to illustrate the egregiousness of the behavior warranting greater action than a limitation of services and illustrating the necessity for a more streamlined expulsion process is necessary for certain instances:

- A credit union employee assisting a member was physically stabbed by the member.
- A credit union member stole an employee's purse while assisting the member in connection with applying for a loan.
- A credit union member attempted to steal an ATM machine and in the process damaged credit union property and put other members and employees in danger.
- A credit union member made a bomb threat against the credit union.

This is just a short sampling of activities we have heard over the years. Currently, there are two main methods to limit services to disruptive members. First, the credit union may adopt a limitation of services policy, or may formally expel the member as spelled out in the FCU Act. In addition, the FCU Act outlines the removal of a member for "nonparticipation." Of note, the FCU Act does not define "nonparticipation" and the NCUA has the authority to interpret the term as necessary. Legal Opinion Letters throughout the years have interpreted this to mean a "continuing failure to

take an interest in the credit union or use its services.” NAFCU reiterates its call to expand the definition of “nonparticipation” to those members who are not utilizing credit union services in a legitimate or legal manner.

NAFCU and its member credit unions strongly urge the NCUA to adopt a more streamlined approach to expelling an extremely abusive member because the current avenues are grossly inadequate. Adding extremely abusive or illegal behavior to the definition of “nonparticipating,” as outlined in the examples above, would cause minimal disruption to the industry because those members who are expelled are still not relieved of their liability to the credit union. Expelling a credit union member is not a threat to the safety and soundness of the credit union or the National Credit Union Share Insurance Fund.

The existing options available to expel a member are burdensome and difficult. Calling a special meeting and obtaining the necessary votes is difficult, especially when short advanced notice is provided to members. Moreover, as illustrated in the above examples, in some cases the inability to expel a member immediately poses a risk to the safety of the credit union, its employees, and other members. Currently, the credit union may immediately limit the member’s services, which creates its own set of complications for the member and the credit union and may not resolve the abusive behavior, or contact law enforcement. Beginning the process of expulsion would not be feasible to resolve an immediate issue. In addition to being time-consuming and costly, calling for a special meeting and disclosing the member’s behavior also poses privacy concerns.

Furthermore, credit unions run into the issue of enforcement when dealing with a member who has committed an illegal activity. Although a credit union may have limited a member’s services, local law enforcement may have difficulties assisting in the enforcement. In order to limit a member from entering the premises or having no contact with certain credit union personnel, a restraining order would need to be filed. Applicable state laws determine whether or not an entity may file a restraining order against the individual member. In certain states, the entity is unable to file, and the individual who was harmed or threatened must file the restraining order, leaving the credit union employee to file and disclose their personal information and seek legal recourse on their own.

Lastly, state laws allow state chartered credit unions more leniency in the ability to expel members for abusive and violent behavior. More recently, there has been a noticeable trend of federal credit unions converting to state charters. Although the reason for conversion may be due to various reasons, the additional flexibility may be a primary factor, especially for those credit unions that have persistent issues with members. Allowing for greater parity between state and federally chartered credit unions will ease the burden of those credit unions forced to convert to a state charter in order to alleviate issues with members.

The proposed rule requires credit unions that maintain a website to post a copy of the bylaws on the website. This poses privacy and cybersecurity concerns as names, titles, and the structure and duties of the board of directors would be publicly disclosed. All books of account and records, including the bylaws, are available upon request. By not requiring credit unions post a copy of the bylaws online is not disenfranchising members or impeding their ability to request a copy. The

potential costs far outweigh the benefits of having the bylaws available on the credit union's website. There are several alternatives that would still allow access while protecting sensitive information. One alternative is to require the credit union post a disclosure of the right to inspect all books of account and records, including a copy of the bylaws. Another alternative is to only provide the copy within a password-protected, members only access area of the website. Due to the privacy and cybersecurity concerns, NAFCU recommends the NCUA remove the requirement of posting the bylaws online or adopt alternative methods for posting the bylaws safely.

Conclusion

NAFCU appreciates the opportunity to provide comments on the proposed rule regarding FCU bylaws. In summary, there are several amendments to the bylaws that would provide greater clarity and flexibility for credit unions. The most vital amendment needed that would provide the greatest impact to credit unions is amending Article 14 to allow for an expedited process to expel those credit union members who do not utilize credit union services in a legitimate and legal manner. If you have questions, please contact me at kschafer@nafcu.org or (703) 842-2249.

Sincerely,



Kaley Schafer
Regulatory Affairs Counsel