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May 30, 2019

Office of the General Counsel  
National Credit Union Administration  
1775 Duke Street  
Alexandria, VA 22314

Re: NCUA 2019 Regulatory Review

To Whom It May Concern:

On behalf of America's credit unions, I am writing regarding the National Credit Union Administration's (NCUA) annual one-third review of its regulations. The Credit Union National Association (CUNA) represents America's credit unions and their 115 million members.

We appreciate the NCUA's willingness to accept public input on the regulations scheduled for review this year. We support the agency's policy of continually reviewing its regulations to determine whether they should be updated, clarified, simplified, or eliminated. Further, we appreciate the recent work of the NCUA's Regulatory Reform Task Force, which released its second and final report in December 2018. While we continue to support the NCUA's one-third review, the recent Regulatory Reform Task Force report addresses many, if not most, of the items included in this review.

As the NCUA is aware, though it has slowed recently, the cumulative regulatory burden on credit unions is near an all-time high. Therefore, we urge the NCUA to promulgate new or expand existing rules only if such rules are clearly warranted based on a compelling need. Similarly, the agency should strongly consider the current regulatory burden on credit unions as it proceeds with this and future regulatory reviews.

### **Regulations Included in 2019 Review**

- **701.1 & Appendix B to Part 701: FCU Chartering and Field of Membership**

CUNA strongly believes that all consumers have the right to improve their financial well-being through the services of not-for-profit financial cooperatives. To that end, credit union boards of directors must have significant flexibility to determine their fields of membership to enhance safety, soundness, and service. Every consumer should have access to credit union services through one or more credit unions.

Competition among credit unions is beneficial to members, and cooperation among credit unions is essential to extending credit union services to more credit union members and potential members.

We applaud the NCUA for recognizing the stagnant nature of the agency's field of membership (FOM) requirements when compared to some innovative state charters. The agency has made efforts to improve several processes for FOM expansion, as evidenced by the multiple rulemakings issued since 2015, all of which we see as positive steps in the right direction. For example, we appreciate the latest rulemaking that provides more flexibility, including by reinstating the option for a credit union to submit a narrative to establish a well-defined local community, a change CUNA repeatedly advocated for since the narrative option was eliminated in 2010.<sup>1</sup>

However, we believe the NCUA can accomplish even more to improve the FOM regulation. While we recognize that the NCUA is restricted by provisions of the FCU Act, we believe additional changes can update the regulation's requirements so they are current with today's economic and technological environment.

FOM reform is a top issue for CUNA and our member credit unions. CUNA's federal and state-chartered credit union members have expressed concern that the federal charter is falling behind many state charters and thus has become a barrier to the flexibility needed to operate dynamic and efficient cooperative financial institutions. CUNA remains committed to the dual charter system and advocates for the strengthening of both charters, as we believe both are necessary for a strong and vigorous credit union system.

- **701.2 & Appendix A to Part 701: FCU Bylaws**

The NCUA has a pending rulemaking on FCU bylaws (which closed for comment January 14, 2019).<sup>2</sup> As the NCUA proceeds with that rulemaking, we urge the agency to appreciate the importance of credit union flexibility regarding the bylaws. An overly rigid approach—including a lack of opportunity to deviate from the FCU bylaws—can inhibit an FCU's ability to respond to changing market practices or address basic corporate governance matters in a prompt and efficient manner. Further, though beyond the jurisdiction of the NCUA Board, we believe the FCU Act, as it applies to bylaws, is overly prescriptive.<sup>3</sup> Decisions pertaining to FCU bylaws should be entirely in the hands of the FCUs themselves, not the regulator.

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<sup>1</sup> 83 Fed. Reg. 30289 (June 28, 2018).

<sup>2</sup> 83 Fed. Reg. 56640 (Nov. 13, 2018).

<sup>3</sup> NCUA Rules and Regulations, Part 701—Organization and Operation of Federal Credit Unions. Statutory authority for Part 701 is provided by the FCU Act as follows: 12 U.S.C. §§ 1752(5), 1755, 1756, 1757, 1758, 1759, 1761a, 1761b, 1766, 1767, 1782, 1784, 1785, 1786, 1787, 1788, and 1789.

CUNA submitted comprehensive comments in response to the outstanding bylaws rulemaking.<sup>4</sup> Below are several issues addressed in CUNA’s comment letter to the NCUA.

1) *Introduction: Bylaw amendments (§ 3c)*

The proposal would modernize the introductory language to the FCU bylaws.

We support aspects of these proposed changes. We support an approach where the NCUA’s Office of Credit Union Resources and Expansion (CURE) responds to FCU applicants within the pre-determined timeframe, which should be 60 days. In the rare instance where CURE is unable to respond within the 60-day window, CURE should inform the FCU of the delay and proceed with its decision as soon as reasonably practical. In addition, where a proposed bylaw amendment is denied, CURE should provide the applicant FCU with as much detail as appropriate regarding the reason for the denial.

2) *Introduction: The nature of the FCU Bylaws (§ 4d)*

Section 4 of the proposal states that the NCUA has discretion to take administrative actions when a credit union is not in compliance with its bylaws. The current FCU bylaws state that “NCUA will not take action against minor or technical violations but emphasizes that it retains discretion to enforce the FCU bylaws in appropriate cases . . . .” The proposal would insert “generally” into this sentence, as follows: “NCUA will not *generally* take action against minor or technical violations but emphasizes that it retains discretion to enforce the FCU bylaws in appropriate cases . . . .”<sup>5</sup>

We disagree with the NCUA’s proposed addition of the word “generally.” While it is not a dramatic change, we are concerned with its implication. We strongly believe that the NCUA should *not* take action against minor or technical violations. Further, we disagree with the NCUA’s enforcement of bylaws that merely address administrative issues. The credit union and its members can and do resolve issues on their own in the vast majority of cases. Involving the NCUA in these situations, at least at the onset, is an inappropriate use of the credit union’s and the agency’s time and resources.

3) *Article II: Qualifications for Membership - Member in good standing (§ 5)*

The proposal creates a new section 5 to address limitation of services. The proposed commentary notes that there is a reasonably wide range within which an FCU may fashion a limitation of services policy tailored to its individual needs. An FCU has broad discretion to deny credit union services or access to

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<sup>4</sup> CUNA Comment Letter to NCUA, FCU Bylaws Proposed Rulemaking (Jan. 14, 2019), *available at* [https://www.cuna.org/uploadedFiles/Advocacy/Actions/Comment\\_Calls,\\_Letters\\_and\\_Testimonies/2018/Letters/CL%20-%20NCUA%20-%20Bylaws%20NPR\\_final.pdf](https://www.cuna.org/uploadedFiles/Advocacy/Actions/Comment_Calls,_Letters_and_Testimonies/2018/Letters/CL%20-%20NCUA%20-%20Bylaws%20NPR_final.pdf).

<sup>5</sup> 83 Fed. Reg. 56640, 56649 (emphasis added).

credit union facilities to a member that has engaged in conduct that has caused a loss to the FCU or that threatens the safety of credit union staff, facilities, or members.

We strongly support the NCUA's objective behind proposed section 5. Challenges in dealing with unruly members is an unfortunate reality. Aside from its ability to limit member services, an FCU is restricted in available remedies, such as possible member expulsion.

While aspects of proposed section 5 could be helpful (*e.g.*, examples of services that may be limited), we are concerned that the potential downside of the proposed language (*i.e.*, unworkable restrictions on credit unions' ability to utilize limitation of services policies) may outweigh the potential benefit. Thus, we do not support section 5 as proposed. It is possible we could support a section 5 (and associated commentary) that refrains from addressing limitation of services policies, but it is unclear whether such revision would necessarily eliminate or greatly minimize the positive aspects of the section.

#### 4) *Article IV: Meetings of Members - Quorum (§ 5)*

The proposed rule would adjust the quorum requirement for meetings. While the proposal would reduce from 15 to 12 the number of members required, it would also exclude board, credit union staff, and officials, for purposes of achieving a quorum.

CUNA agrees with the intent behind this proposed change; wider participation from members is a worthwhile goal to work toward. However, we disagree with the path the agency is attempting to take to get there. Dramatically reducing the potential pool of individuals available to achieve a quorum would be challenging for some FCUs and extremely difficult for others. We are concerned that if such an amendment were adopted, it would have harsh unintended consequences.

There are many reasons an FCU may have difficulty achieving a quorum—difficulty that would be exacerbated under the proposed change. While sometimes a lack of member interest or awareness is the cause, oftentimes the challenges are outside the member's control, such as an inability to be physically present, particularly for members in the more rural areas of the country.

#### 5) *Article IV: Meetings of Members - Combined virtual and in-person meetings*

The proposed rule does not generally allow an FCU to conduct a virtual or hybrid (combined virtual and in-person) annual or special meeting. Due to its concerns about member disenfranchisement, the NCUA does not support a change regarding virtual or hybrid meetings. The NCUA is particularly concerned with the rights of members that do not have access to electronic devices or that live in areas without access to broadband internet.

CUNA encourages the NCUA to amend Article IV to allow, at a minimum, hybrid annual or special meetings *without* the need to individually submit a request to do so. Allowing virtual, or even hybrid, meetings would enhance the level and quality of member participation. We appreciate that the NCUA allows an FCU to request a hybrid meeting on a case-by-case basis. However, we disagree with such an unnecessary step, and further we disagree that the NCUA should be the entity to determine whether a hybrid meeting is in the members' best interest. Since the FCU seeking to hold a hybrid meeting is most familiar with its membership, the NCUA's analysis would be unnecessary. Further, the FCU pursuing a hybrid—or even virtual meeting—is likely more concerned with potential member disenfranchisement than an outside entity, including the NCUA.

6) *Article V: Elections - Electronic voting (comment vii)*

The proposed rule provides staff commentary clarifying electronic voting. The commentary states that an FCU may use as many forms of electronic voting (*e.g.*, mobile phone or internet) as it wishes for those members who choose to vote electronically. However, the proposed rule does not allow an FCU to adopt an electronic-only voting process.

CUNA appreciates the NCUA's concern about disenfranchising certain members. However, since a credit union's management knows its membership best, we think it is appropriate to allow an FCU to determine which method of voting is most appropriate. Thus, we disagree with the proposed commentary prohibiting an FCU from utilizing electronic-only voting. Credit unions are just as concerned with ensuring all members can participate in the democratic process associated with the credit union. Therefore, it is unlikely that a credit union would utilize a voting method that precludes members interested in voting from doing so. We believe that if, after an appropriate assessment by the credit union, the credit union determines that electronic-only voting is most appropriate, the credit union should be permitted to elect such method.

7) *Article XIV: Expulsion and Withdrawal*

Article XIV addresses the expulsion and withdrawal procedures for members. The NCUA notes that expulsion of a member is very limited under the FCU Act, which states that an FCU 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.<sup>6</sup>

In the proposal, the NCUA describes the term “nonparticipation” to generally refer to a “person not being involved with or participating in something. [T]he term ‘nonparticipation’ is best understood in a more limited sense to mean a

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<sup>6</sup> 12 U.S.C. § 1764.

failure to participate, or a lack of involvement, in credit union affairs. It does not refer to an act of malfeasance.”<sup>7</sup>

We appreciate the NCUA’s interpretation of the term “nonparticipation,” but we are concerned it is inappropriately narrow. As an undefined term in both the FCU Act and Appendix A to Part 701, the NCUA has latitude to provide illustrative examples, whether in the article itself or in the commentary, to help FCUs understand when expulsion of a member is warranted. We ask the NCUA to work with its Office of General Counsel to revisit its determination that “nonparticipation” excludes any activity performed by a member. If upon revisiting the term the NCUA agrees that its current assessment is overly narrow, we ask the NCUA to amend the bylaws, or commentary, to include examples of acts that could evidence “nonparticipation” (see CUNA’s comment letter for examples).

- **701.21: Loans to Members and Lines of Credit to Members**

CUNA refrains from providing comments on this provision at this time, as the NCUA is currently seeking public comments on a proposed rulemaking on this topic.<sup>8</sup> CUNA is in the process of developing its comments on the proposal and will submit a formal comment letter before the June 24, 2019, comment deadline.

- **701.22: Loan Participations**

CUNA supports eliminating the prescriptive limit on the aggregate amount of loan participations that may be purchased from any one originating lender. Returning flexibility to the individual credit union to set its own established limit within its risk appetite and consistent with the established policies of the credit union’s board of directors is appropriate given the inadequacy of a one-size-fits all standard in this regard. Credit unions should have the authority to invest in loan participations without unreasonable limitations related to how the loans were originated.

- **701.30: Services for Nonmembers within the Field of Membership**

Prior to adoption of § 701.30, credit unions that charged a fee for cashing on-us checks risked liability under the Uniform Commercial Code (UCC) for wrongful dishonor. However, § 701.30(b) preempts state UCC laws and protects an FCU from liability for wrongful dishonor if the FCU charges fees to nonmembers in its field of membership for cashing on-us checks. On the other hand, charging fees to cash checks for nonmembers *not* in the field of membership is *not* covered by § 701.30. Therefore, cashing on-us checks for a fee for these nonmembers would open FCUs to liability under the UCC for wrongful dishonor since there is no federal preemption.

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<sup>7</sup> 83 Fed. Reg. 56640, 56646.

<sup>8</sup> 84 Fed. Reg. 16796 (Apr. 23, 2019).

An FCU that charges fees for cashing checks pursuant to § 701.30(b) should implement procedures for quickly and accurately determining whether the nonmember attempting to cash an on-us or third-party check is within the FCU's field of membership. We ask the NCUA to adjust the rule to preempt liability for cashing on-us checks to nonmembers.

- **701.32: Payment on Shares by Public Units and Nonmembers**

CUNA refrains from providing comments on this provision at this time, as the NCUA is currently seeking public comments on a proposed rulemaking on this topic (issued for comment May 23, 2019). Upon thoroughly reviewing the proposal, CUNA will file a formal comment letter with the NCUA on the rulemaking.<sup>9</sup>

- **701.34: Designation of Low-income Status; Acceptance of Secondary Capital Accounts by Low-income Designated Credit Unions**

We appreciate the NCUA's efforts over the last several years to help identify credit unions that qualify for the low-income designation and the agency's encouragement for credit unions to accept the low-income designation.

CUNA urges the NCUA to review the low-income designation to provide a path for additional credit unions to qualify, to provide greater transparency with respect to the qualification thresholds, and to enhance certainty that if a credit union drops temporarily below a threshold it will not have to immediately begin an unwinding process that could result in the credit union pulling back services to members and, potentially, laying off staff.

The FCU Act gives the NCUA Board extensive authority to define "low-income" for exemptions to the FCU Act's limitations on accepting non-members' deposits, member business loan limits, and access to supplemental capital. CUNA urges the NCUA to fully exercise its statutory authority in defining "credit unions serving predominantly low-income members." Low-income credit unions operate with expanded powers not available to non-low-income credit unions. These expanded powers represent regulatory relief, and thus enable credit unions with these powers to better serve their members.

While there are numerous benefits to low-income designation, we have heard of frustration with the NCUA's process for applying for and being granted authority to use secondary capital. Specifically, member credit unions have described the process as arbitrary with wide variances of approval among NCUA regions. Thus, we ask the NCUA to consider improvements to the process, including in the area of consistency across regions.

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<sup>9</sup> Results from May 23, 2019, NCUA Board meeting, *available here*  
<https://www.ncua.gov/newsroom/press-release/2019/cure-expanding-resources-credit-unions>.

- **701.37: Treasury Tax and Loan Depositories; Depositories and Financial Agents of the Government**

This provision is no longer applicable, and we believe it is irrelevant and unnecessary. Therefore, we suggest it be removed.

- **701.38: Borrowed Funds from Natural Persons**

While a comprehensive borrowing rule could provide clarity to support supplemental capital concerns, CUNA cautions against imposing new or additional regulatory burdens. Any rule, however, should retain flexibility for a credit union to structure the offering in a cost-effective manner, regardless of the nature of the capital instrument, be it equity or subordinated debt.

- **702: Capital Adequacy**

We appreciate the NCUA's decision in October 2018 to make helpful amendments to the risk-based capital rule, including narrowing the number of credit unions impacted and delaying the effective date of the rule until January 1, 2020. We hope Chairman Hood and his fellow board members recognize there is more work to be done to ensure the risk-based capital standard credit unions are subject to is appropriate to the risk profile of the system and consistent with federal law.

We understand that the FCU Act requires a risk-based capital standard for determining whether a credit union is well-capitalized, but we continue to believe the current risk-based capital approach is a solution in search of a problem, and we question the legality of a dual-tiered, risk-based capital regime.

We appreciate comments regarding risk-based capital included in Chairman Hood's answers to written questions posed to him as part of the confirmation process.<sup>10</sup> Chairman Hood stated that he would support a further delay to the implementation of the risk-based capital rule to allow him and his fellow board members to further study and assess the rule's real effects on the credit union system. We urge Chairman Hood to pursue such a delay and implement a plan for a comprehensive study of the impact of the rule.

- **703: Investment and Deposit Activities**

CUNA supports expansion of credit unions' investment authority. Removal of unnecessary restrictions not mandated in the FCU Act, and adoption of a principles-based approach, is appropriate. To be competitive in today's financial services marketplace, credit unions should be permitted to invest in a broad range of investment alternatives, subject to the decision-making control of their board of directors. By amending this Part, credit unions could have access to professionally-

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<sup>10</sup> U.S. Senate Committee on Banking, Housing, and Urban Affairs, Nomination Hearing, p.136 (Feb. 14, 2019) (written responses of Rodney Hood) *available at* <https://www.govinfo.gov/content/pkg/CHRG-116shrg35617/pdf/CHRG-116shrg35617.pdf>.

managed, separate-account investments with greater transparency than is afforded currently permissible mutual funds.

- **704: Corporate Credit Unions**

We look forward to working with the NCUA in a thorough review of Part 704. Corporate credit unions play an important, if not essential, role in the business operations of thousands of natural person credit unions on a day-to-day basis. In a rapidly-evolving financial services marketplace, the reliance of natural person credit unions upon the services of corporate credit unions is only likely to grow in importance. Given the pace with which financial technology is evolving, it is important that Part 704 not impose unnecessary constraints on corporate credit unions' ability to respond to innovations in the financial services marketplace, so that natural person credit unions can offer competitive products and services to their members in a safe and sound manner.

We agree with the observation made during Chairman Hood's confirmation hearing that "the credit union industry has changed significantly" during the 40 years since the Central Liquidity Facility (CLF) was established.<sup>11</sup> We agree with his recommendation that during this 40th anniversary year of the founding of the CLF, the NCUA should make it a priority to conduct a review of Part 725 (*NCUA Central Liquidity Facility*), "with an eye toward making improvements that may be warranted based on the changes that have occurred" since its founding. In retrospect, the liquidity pressures that emerged early in the financial crisis of 2008-10 underscore the critical role that the CLF played in the maintenance of stability in the credit union system. Steps should be identified and taken to refine and bolster that role as the NCUA moves forward with any evaluation of the corporate relationship to the CLF. We believe such a review should, among other things, give careful consideration to ways in which the relationship between corporate credit unions and the CLF might be strengthened, including revision of rules relating to agent members of the CLF, so that corporates are well-positioned to assist their natural person member credit unions in accessing the resources of the CLF in a timely manner when liquidity needs warrant such action.

- **707: Truth in Savings**

Credit unions have raised concerns regarding Part 707's use of "average percentage yield earned" (APYE) in statement and account disclosures. In particular, we ask the NCUA to consider eliminating the provision in § 707.5 that requires subsequent disclosures for certificates to be provided to the member 30 days in advance, as we believe this is overly burdensome to the credit union and of little or no utility to the member.

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<sup>11</sup> U.S. Senate Committee on Banking, Housing, and Urban Affairs, Nomination Hearing, p.123 (Feb. 14, 2019) (comment by Senate Banking Committee Member Jerry Moran (R-KS)).

- **708: Mergers and Conversions**

Although the NCUA has taken steps to provide greater transparency and allow for greater participation by credit unions during an involuntary merger, some credit unions continue to express frustration in not being considered as a target when the NCUA is dealing with a troubled credit union. In particular, there is concern the NCUA is too selective in designating a credit union to take over a problem credit union. Some feel that credit unions that are more local to a troubled credit union are often overlooked.

Credit unions also express difficulty in obtaining information from the NCUA regarding the status of their application for a conversion, merger, or membership expansion. We urge the NCUA to review this process and provide more clarity to credit unions on timelines and contacts for such applications. Furthermore, credit unions should be permitted to designate appropriate representatives, including state credit union leagues, to work with the NCUA on issues regarding a credit union's application.

### **Process for Identifying Rules for Review and Soliciting Comments**

As we have stated numerous times, we believe the process for seeking comments on regulations included in the NCUA's Regulatory Review could be improved. For example, some of the rules included for review may already be the subject of proposed changes or recent modifications. In such instances, it is unclear the extent to which further amendments to those regulations will be contemplated by the agency.

In addition, since the notice of the regulatory review is not required to comply with the Administrative Procedure Act (APA), and is therefore not published in the *Federal Register*, potential commenters may be unaware of its issuance. To ensure adequate input is received, we ask the NCUA to consider ways to better highlight its request for comments on the regulatory review.

Since the regulatory review process is outside the APA, comments are not made available for public inspection. In addition, the NCUA does not publicly respond to commenters' suggestions. While not required to do so, it would be very useful if the NCUA were to choose to not only post public comments on its website but also publicly respond to input received. Doing so would permit CUNA, and credit unions alike, to identify patterns and/or trends within the regulations included in the review. This would allow for more effective and efficient advocacy, and ideally result in an improved operating environment for credit unions.

## **Conclusion**

On behalf of America's credit unions and their 115 million members, thank you for considering our comments on the agency's 2019 regulatory review. If you have questions about our comments, please do not hesitate to contact me at (202) 508-6743.

Sincerely,

A handwritten signature in blue ink that reads "Luke Martone". The signature is written in a cursive style with a long horizontal line extending from the end of the name.

Luke Martone  
Senior Director of Advocacy & Counsel