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December 2, 2022

Ms. Melane Conyers-Ausbrooks  
Secretary of the Board  
National Credit Union Administration  
1775 Duke Street  
Alexandria, VA 22314

Re: Federal Credit Union Bylaws – Member Expulsion; RIN 3133–0132

Dear Ms. Conyers-Ausbrooks:

On behalf of America's credit unions, we are writing to the National Credit Union Administration (NCUA) regarding the proposed rule to amend the federal credit union (FCU) bylaws on member expulsion. The Credit Union National Association (CUNA) represents America's credit unions and their more than 130 million members.

In March, Congress passed the Credit Union Governance Modernization Act (CUGMA), which requires the NCUA to develop a policy by which an FCU member may be expelled for cause by a two-thirds vote of a quorum of the FCU's board of directors. The NCUA has issued this proposal to amend the standard FCU Bylaws to adopt such a policy.

Together with our League partners, CUNA worked closely with Congress to develop and ultimately ensure passage of CUGMA, which we believe will provide FCUs with greater flexibility to deal with membership issues that may occasionally arise. As such, we support the proposed rule to implement this enhanced flexibility. While we provide specific feedback on the proposed rule below, we also would like to note that the text and layout of this proposal may be confusing for some FCUs to take advantage of once finalized. Thus, we ask the NCUA to consider how it can be simplified and/or streamlined to reduce the chances of confusion and increase its usability, particularly in instances where an FCU attempts to utilize the rule's flexibility in a time of possible stress, given the nature of circumstances surrounding member expulsion. If unable to simplify/streamline the regulatory text of the rule, we ask the NCUA to consider supplemental guidance (*e.g.*, a flowchart) to aid FCUs that seek to expel a member under this enhanced authority.

## **Background**

Under the FCU Act and standard FCU Bylaws, there are currently only two ways a member may be expelled:

- 1) A two-thirds vote of the membership present at a special meeting; and
- 2) For non-participation in the affairs of the credit union.

We agree with the NCUA that the expulsion of members is an extreme remedy that may have the effect of denying individuals access to financial services. Further, we support the statement in the legislative history that use of the authority under CUGMA should be “rare and saved for egregious examples of member behavior.” However, as addressed below, it is vital that this new authority be promulgated through regulation in a manner that makes it possible and practical for an FCU to utilize in practice.

## **Proposed Rule**

### ***Member in Good Standing***

The 2019 Bylaws Final Rule codified the concept of a “member in good standing.”<sup>1</sup> So long as a member remains in good standing, that member retains all of the rights and privileges associated with FCU membership. A member not in good standing, however, may be subject to the FCU’s limitation of services policy. The primary reason for permitting FCUs to adopt a limitation of services policy was to provide FCUs with an alternative to holding a special meeting to address certain egregious member behavior. The passage of CUGMA, however, has provided FCUs’ boards of directors with direct authority to expel a member for cause.

The proposed rule would retain the member in good standing provisions. We support this approach and agree that including both authorities in the FCU Bylaws provides additional flexibility for FCUs to address certain disruptive member behaviors. A limitation of services policy allows an FCU to take a more targeted approach to deal with certain disruptive behaviors that may not otherwise warrant expulsion, such as restricting access to certain credit products by a member who may have caused losses due to credit card delinquencies.

Additionally, and potentially more importantly, an FCU may use the limitation of services policy in the case of a violent or abusive member who has yet to be expelled through the expanded authority provided under CUGMA. As described below, CUGMA requires certain procedures before a member’s expulsion, including a 60-day period in which the member may request a hearing. An FCU may use its limitation of services policy, in conjunction with its ability to expel a member for cause.

The proposed rule would include a few substantive changes to the member in good standing provisions. Specifically, the current definition of a member not in good standing would be removed. This definition includes a list of behaviors that if engaged in by a member could trigger limitation to FCU services. However, CUGMA also includes a list of behaviors that may warrant termination of membership. Instead of including two separate lists of disruptive, abusive, or violent behaviors, the proposed rule would define

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<sup>1</sup> 84 Fed. Reg. 53,278, 53,290 - 53,291 (Oct. 4, 2019).

a member not in good standing as a member who has engaged in any of the conduct listed in CUGMA, as implemented in Article XIV of the FCU Bylaws.

As noted above, we believe an FCU's ability to use a limitation of services policy is a critical tool that should continue to be available. With regard to the description of a member not in good standing in existing Article II, Section 5, we agree with eliminating the list of behaviors and instead referencing the for-cause termination provision of Article XIV. Doing so would maintain the current scope of behaviors exemplifying a member not in good standing while at the same time reducing potential confusion if parallel lists were to be included in the FCU Bylaws in Article II and Article XIV.

Existing Article II of the FCU Bylaws requires a logical relationship between the objectionable behavior and the limitation of services. Specifically: "A credit union may limit services for violent, belligerent, disruptive, or abusive activities only if there is a logical relationship between the objectionable activities and the services to be suspended." As noted above, we agree with the proposed removal of the list of behaviors regarding a member not in good standing in Article II. We also believe the "logical relationship" component should be eliminated, as such a requirement is unnecessary, and is absent from the relevant provisions in CUGMA.

### ***Notice of the Expulsion Policy***

Before an FCU expels a member under these provisions, it must send a copy of its Article XIV to each member. The proposed rule does not include a standard disclosure form of the NCUA expulsion policy outside of the language in Article XIV of the FCU Bylaws. However, the proposed rule states that the communication of the expulsion policy, along with all notices required under the proposed rule, must be legible, written in plain language, and reasonably understandable by ordinary members.

We appreciate the NCUA's intention of not including a standard disclosure form in the proposed rule to provide FCUs with additional flexibility. However, this is an instance where it is preferable to have a standard disclosure that FCUs can rely on. While we believe many, if not most, FCUs would utilize the standard disclosure, those that wish to adopt variations to their Article XIV would of course be permitted to do so, subject to their bylaw amendments being approved by the NCUA. With that said, we believe FCUs should be given the flexibility to make certain bylaw amendments related to expulsion procedures without having to obtain agency approval. Certain modifications, such as allowing for an in-person hearing, should be considered fill-in-the-blank type provisions and therefore not require agency approval.

Regarding delivery of notices, we disagree with the suggestion that disclosure be provided to all members both by mail and electronically, regardless of whether the member elected to receive electronic communications. We believe this would be unnecessary and, in some instances, contrary to the member's stated preference. Disclosure should be required only in the manner indicated by the member.

## ***Expulsion Vote and Notice of Pending Expulsion***

As noted above, CUGMA allows an FCU's board of directors to vote to expel a member for cause by a two-thirds vote of a quorum. Under the proposed rule, if an FCU's board votes to expel a member, the member must be notified of the pending expulsion, along with the reason for such expulsion. Such notice shall be provided in person, by mail to the member's address, or electronically, depending on the member's preferred method of communication. The proposed rule would require that the reason for the expulsion be specific and not just include conclusory statements. For example, a general statement saying the member's behavior has been deemed abusive and the member is being subject to expulsion procedures would be insufficient as an explanation. The notice must include sufficient detail for the member to understand why he or she is being subject to expulsion so that the member has a meaningful opportunity to present his or her case against expulsion and an opportunity to respond to the FCU's concerns in a requested hearing. The notice must also clearly state the member's right to request a hearing, but if a hearing is not requested, membership will automatically terminate after 60 calendar days.

Under the proposal, the language in Section 2 of Article XIV regarding the content of the notice of expulsion appears reasonable, including the date of the incident and specific information describing the incident, such as a general description of the member's conduct. We appreciate the significance of potential expulsion and, therefore, agree with ensuring the affected member has sufficient information to adequately prepare for an expulsion hearing. With that said, there is always concern that an examiner could interpret such language more broadly than the FCU. Thus, to minimize the chance of disagreement between examiner and FCU regarding sufficiency of the notice, we ask the NCUA to delete "must include sufficient detail for the member to understand the grounds for expulsion and"<sup>2</sup> from proposed Article XIV.

As amended by CUGMA, the FCU Act provides that a "member shall have 60 days from the date of receipt of a notification [of pending expulsion] to request a hearing from the board of directors of the [FCU]."<sup>3</sup> The FCU Act goes on to state that, "[i]f a member does not request a hearing during the 60-day period . . . the member shall be expelled after the end of the 60-day period."<sup>4</sup> The statutory language appears to say that a member may not be expelled until the end of the 60-day period. While providing an FCU with the ability to expel a member immediately, followed by a 60-day period during which the member is able to request a hearing regarding expulsion, may be optimal from a credit union safety perspective, it is unclear whether the statutory intent is to allow for such a process. As such, we ask the agency to fully examine the legislative history to determine whether the 60-day requirement must come before or after member expulsion. If the NCUA determines the 60-day hearing window can occur after expulsion, we urge the agency to reflect this in the final rule.

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<sup>2</sup> 87 Fed. Reg. 59,740, 59,747 (Oct. 3, 2022).

<sup>3</sup> 12 U.S.C. § 1764(C)(3)(B)(i).

<sup>4</sup> 12 U.S.C. § 1764(C)(3)(B)(ii).

## ***Hearing***

If a member requests a hearing, the board of directors must provide the member with a hearing. CUGMA is silent on whether the hearing must be in person. The proposed rule would not require the FCU to hold an in person hearing for the member. We agree with the agency, particularly regarding concern that an in-person hearing may be problematic in cases of expulsion due to violence or threatened violence. Further, we support the proposed approach of allowing the FCU to decide whether to permit the member to attend in person or virtually, so long as the member has the ability to orally present their case.

The proposed rule would not include prescriptive requirements related to the structure and procedure for the hearing. The only requirements included in the proposed rule related to the hearing are that it permits the meaningful opportunity for the member to orally present their case to the board and that the FCU board does not raise any new fact or cause for expulsion. Additionally, the NCUA expects hearings to be held in a fair, reasonable, and consistent manner that provides members with a reasonable opportunity to present their case. Finally, the member may choose to provide a written submission to the credit union board instead of a hearing with oral statements. We believe the proposed requirements regarding the expulsion hearing are appropriate, as they provide FCUs with sufficient flexibility to conduct the hearing as they deem appropriate.

After the hearing, the FCU board of directors must hold a vote in a timely manner on expelling the member. The proposed rule defines a timely manner as within 30 calendar days. We ask the NCUA to extend this timeframe to 90 days following the hearing. We believe 90 days should provide the board with enough time to hold a vote while also ensuring the member has certainty regarding expulsion within a reasonable amount of time.

## ***For Cause***

Under CUGMA, an FCU's board may expel a member for cause, which means: (A) a substantial or repeated violation of the membership agreement of the credit union; (B) a substantial or repeated disruption, including dangerous or abusive behavior, to the operations of a credit union; or (C) fraud, attempted fraud, or other illegal conduct that a member has been convicted of in relation to the credit union, including the credit union's employees conducting business on behalf of the credit union.

Regarding a repeated non-substantial violation of the membership agreement, under the proposed rule the FCU must have provided written notice to the member at least one time prior to the notice of expulsion, and the member must have repeated the violation after having been notified of the violation. Further, under the proposed rule, the written notice must state the specific nature of the violation and that if the conduct occurs again the member may be expelled from the FCU. The NCUA believes this is necessary to ensure members are aware that they may be expelled for repeated, non-substantial violations of the membership agreement. The NCUA notes that this warning notice before the notice of expulsion is only for potential expulsions related to repeated violations that are not deemed substantial. The FCU's board may act to expel a member immediately for

substantial violations of the membership agreement and does not need to provide a warning notice for substantial violations of the membership agreement.

We do not believe there should be a limit on the time between the FCU's notice of a violation and the repeated behavior. Such a requirement is unnecessary given the ample notice requirement described above, which will ensure the member is aware of the violation that could result in expulsion if repeated. This also provides the FCU with adequate flexibility.

Under the proposed rule, a member may also be expelled by an FCU board for a substantial or repeated disruption, including dangerous or abusive behavior, to the operations of a credit union. The proposed rule would define dangerous or abusive behavior as:

- 1) Violence, intimidation, physical threats, harassment, or physical or verbal abuse of officials or employees of the credit union, members, or agents of the credit union (this includes actions while on FCU premises and through use of telephone, mail, email or other electronic method);
- 2) Behavior that causes or threatens damage to FCU property; and
- 3) Unauthorized use or access of FCU property.

The proposed rule would further provide that expressions of frustration with the FCU or its employees through elevated volume and tone; expressions of intent to seek lawful recourse, regardless of perceived merit; or repeated interactions with FCU employees are insufficient to constitute dangerous or abusive behavior. This definition is derived from the current definition of a member not in good standing.

Similar to repeated violations of the membership agreement, if the FCU's board acts to expel a member for repeated disruptions that are not substantial, the FCU must have first provided written notice to the member after an instance of such disruption. In contrast, substantial disruptions, including any conduct that would constitute dangerous or abusive behavior, may be grounds for immediate action and termination of membership.

A member may also be expelled for cause if the member has engaged in fraud, attempted fraud, or other illegal conduct that a member has been convicted of in relation to the credit union, including the credit union's employees conducting business on behalf of the credit union. Under the proposed rule, a criminal conviction is not necessary for membership expulsion related to fraud or attempted fraud.

We do not believe the NCUA should define fraud or attempted fraud. This should be left to the FCU to determine within its own judgement. Regarding criminal conviction, we support the provision to allow FCU boards to terminate membership regardless of whether the member has been convicted of fraud or attempted fraud. This provides the FCU with greater flexibility, allowing it to take necessary steps to avoid losses/potential losses associated with fraudulent activity.

## ***Reinstatement***

Under CUGMA, a member expelled by a two-thirds vote of an FCU's board of directors must be given an opportunity to request reinstatement of membership. The member may be reinstated by either a majority vote of a quorum of the directors of the FCU or a majority vote of the members of the FCU present at a meeting. Under the proposed rule, such a meeting would have to be a special meeting. The proposed rule would specify that an FCU is only required to hold a board vote or special meeting in response to a reinstatement request once.

Given the permanence of expulsion, we support the proposed provision providing the former member with an opportunity for possible reinstatement via a board vote or special meeting. While we believe an FCU should be required to formally consider such a request only once, the rule should provide the FCU with discretion to consider multiple requests at its own discretion. This would provide appropriate opportunity for the former member to seek to rejoin the FCU, while also being mindful of the burden multiple board votes and/or special meetings have on the FCU.

## **Conclusion**

On behalf of America's credit unions and their more than 130 million members, thank you for considering our comments regarding the member expulsion proposal. If you have questions about our comments, please do not hesitate to contact me at (202) 508-6743 or LMartone@cuna.coop.

Sincerely,

A handwritten signature in blue ink that reads "Luke Martone". The signature is written in a cursive, flowing style.

Luke Martone  
Senior Director of Advocacy & Counsel