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August 28, 2017 **VIA E-MAIL ONLY: regulations@dbo.ca.gov**

Department of Business Oversight
Attn: Regulations Coordinator, Legal Division
1515 K Street, Suite 200
Sacramento, CA 95814

Re: PRO 03-15
Comments to Notice of Rulemaking Action Regarding Bylaw Amendments

Dear Regulations Coordinator:

We are writing to comment on the Notice of Rulemaking Action (the "Proposed Action") recently filed with the Office of Administrative Law by the California Department of Business Oversight ("DBO"). Our law firm has primarily represented credit unions for over 30 years, and we currently represent dozens of state-chartered credit unions in the State of California. Given our history and extensive experience with bylaws issues, including representation regarding the bylaw amendments and examinations processes, we believe we offer valuable insight into the DBO's proposed changes to these processes.

The Proposed Action would repeal section 30.105 of title 10 of the California Code of Regulations, which requires credit union bylaw amendments to be approved by the Commissioner of Business Oversight. Instead, a review of bylaw amendments would be included in the bi-annual examination process. The proposed changes to the regulations would also amend section 30.60, subdivision (d)(2), which addresses applications for expansion of a credit union's field of membership ("FOM"), to remove the reference to section 30.105.

In General, We Support the Proposed Action.

Currently, section 30.105 and the bylaw amendments approvals process generally require that state-chartered credit unions submit two (2) original copies of a certificate of secretary indicating that the bylaw amendments have been approved by the board of directors (and, if necessary, by the membership), a copy of the bylaws with the proposed amendments in marked up format, and a copy of the restated bylaws which incorporates the proposed amendments. In the interest of transparency and to address common or anticipated inquiries from the DBO, many credit unions also prepare a cover letter addressing the reasoning behind the requested changes. On occasion, after the application is submitted, a credit union may also be called upon by the DBO to answer

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questions in writing relating to the requested changes, and/or to make additional changes to the amendments before they are approved. The revised bylaws are not considered finalized until the credit union receives back an approved copy "as filed" by the DBO Commissioner. In our experience, this process can take anywhere between one (1) to nine (9) months.

Eliminating these application and approval procedures will allow state-chartered credit unions to reallocate valuable time and resources spent in the preparation and submission of such bylaw amendments package. In turn, by addressing proposed bylaw amendments during the examinations process, both the credit union and its examiners may be more primed to consider any such amendments in the broader context of the credit union's business objectives, as well as the safety, soundness, and impact on the overall financial health of the institution.

We also note that the Proposed Action does not revise any of the longstanding requirements for approval by the membership for amendments to provisions affecting member voting rights, use of proxies, and/or the number of seats on the board of directors. As such, there remains a timely and effective screening process in place for amendments which would purport to alter key tenets of membership, until such time that a credit union undergoes its next examination.

Consistent Enforcement and Approval Based on Legal Requirements Will Be Critical.

Our primary concern with the Proposed Action relates to the consistency of review of bylaw amendments across all examiners, and across all examinations. Specifically, the DBO should note that credit unions currently submitting requests for bylaw amendments already struggle with inconsistent feedback and, in some cases, rejection from the DBO regarding proposed changes, despite the fact that such changes do not implicate safety and soundness concerns, and are not prohibited by state or federal law or regulation.

Credit unions that attempt to engage with the DBO about why these types of proposed amendments have been denied rarely receive adequate explanation, and are often at a loss as to how to incorporate desired customizations into their bylaws when such requests are perhaps atypical but not unmanageably risky or legally impermissible. As one example, there is currently no legal or regulatory requirement that a credit union's supervisory committee consist of an odd number of members; however, the DBO has in some cases signaled it would reject credit union bylaw amendments which would either leave this open or would explicitly permit an even-number sized committee. Though the general perception is that an odd-numbered committee is better able to resolve issues without being stuck in a tied vote, it would not be unreasonable for a credit union to want to encourage deliberation and discourse by its supervisory committee in the rare instances where such a tie may occur. Yet, the DBO has resisted such bylaw amendment requests in the past, despite the topic being a governance issue, and not a safety and soundness or legal compliance problem.

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We have strong concerns that, absent any further regulatory clarifications or "checks and balances" limitations on examination reviews of bylaw amendments, the Proposed Action could exacerbate both aspects of this phenomenon: inconsistent approvals for bylaw amendments, and the rejection of amendments which are neither legally prohibited nor a true safety or soundness concern.

To the extent such measures are not already in place, we urge the DBO to ensure that uniform standards and consistent benchmarks for the identification of controversial amendments exist, and that they be specifically tied to legal or regulatory prohibitions or safety and soundness concerns. This will help standardize the metrics for examiners' review and approval of both controversial and noncontroversial bylaw amendments—and help ensure that the regulatory relief apparently afforded by the Proposed Action is not reversed at the time of examinations.

Of course, any directives from examiners relating to bylaw amendments should also be consistent with regulatory requirements, policies, and prior findings. Similarly, as with any other examination issue, credit unions should be afforded the opportunity to discuss draft findings with their examiners, if any, prior to final issuance of the examination report, as well as the right to appeal examiner findings or directives without fear of retaliation.

<u>Impact on Related Regulations</u>

In addition to deleting section 30.105 of Title 10 of the California Code of Regulations, the Proposed Action also proposes amending section 30.60(d)(2) to delete the specific reference to section 30.105.

In light of the removal of the submission process, we ask that the DBO also consider whether section 30.73(a)(1)(E) of Title 10 of the California Code of Regulations should also be updated to contemplate the revised procedure. This provision sets forth the requirements for filing an application with the DBO to add select groups to a credit union's FOM, and subparagraph (a)(1)(E) specifically references "Two copies of the bylaw amendment adding the select group of the field of membership of the credit union. The bylaw amendment shall be in the form of certificate of secretary or assistant secretary." It is our estimation that such requirement (and therefore subparagraph (a)(1)(E)) is no longer necessary and can be deleted as well.

<u>Conclusion</u>

We believe the DBO's Proposed Action will succeed in both streamlining the bylaw amendments process and in providing a degree of regulatory relief for California state-chartered credit unions of all sizes. We generally support these efforts, and call upon the DBO to ensure that examiners apply consistent standards with respect to their evaluations of bylaw changes which will allow for approval of amendments that do not violate legal or regulatory requirements

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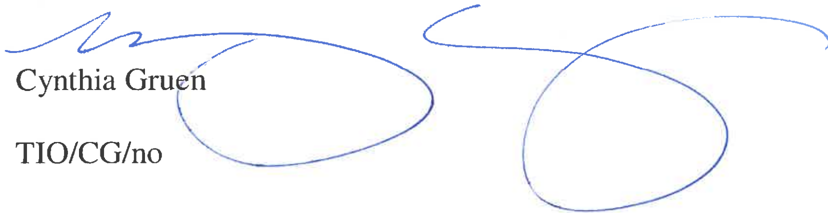
and do not implicate safety or soundness concerns. We look forward to additional revisions of this nature where the DBO believes they are supportable under California Credit Union Law.

If we can be of assistance in providing any other information or comments to the DBO, please do not hesitate to contact us.

Sincerely,

STYSKAL, WIESE & MELCHIONE, LLP

Timothy Oppelt



Cynthia Gruen

TIO/CG/no