

State Credit Union Board Fiduciary / Regulatory Duties

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MCUL Spring Leadership Dev. Conference

Soaring Eagle Casino,

Mt. Pleasant

Presented by:

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Agenda

- Individual Directors Role
- The Role of the Board
- Purpose of the Examination Process
- Board's Role in the Examination Process
- Regulatory / Legal Implications for Directors
- Examination Hot Topics



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Individual Directors role

- How much do CU Directors have at risk?
- What “rights” or “authority” do you have as a Director?
- What is the regulatory and case law “duties” for individual directors?



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Director Regulatory Duty (cont.)

- **MCUA 490.341(8)** outlines requirements to be a Director: member in good standing; bonded; has not been removed from another FI; not convicted of a felony in the last 20 years; not habitually negligent in paying financial obligations; and not convicted of violating any law of this state overseen by the Commissioner.
- Numerous other sections of the MCUA cite director responsibilities and authority.



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Generally Speaking

- Directors should thoroughly understand their duties and responsibilities under the Michigan Credit Union Act (MCUA).
- Directors should have a genuine interest in their office, attend meetings regularly, and keep well-informed about the affairs of their credit union and the credit union industry at all times.



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Board Fiduciary Duty (Case Law)

Review the OFIR Guide for Michigan State-Chartered Credit Union Directors

- Duty of Care: prudent and diligent care in managing the affairs of others.
- Duty of Loyalty: personal interests are secondary to the interest of the CU and its membership.
- Duty of Candor or Disclosure: requires full disclosure of all facts which may impact the Board's decision.
- Relationship also controlled through the institution's Bylaws.



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Generally Speaking – cont.

- Directors should be capable of retaining confidences, as required under the MCUA, and refrain from divulging confidential information gained through their position.
- The director must be capable of evaluating facts, and free from prejudices or personal interest, in reaching sound, independent decisions.



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Generally speaking – cont.

- Directors should give undivided loyalty to their office and not engage in interests adverse to the credit union.
- Directors should possess the integrity not to use their office for personal benefits through information gained by virtue of their position.



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[Generally Speaking – cont.]

- Directors should not lose sight of their primary responsibility, which is to protect the members and depositors who have placed their trust in them.



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[The Role of the Board]

- What is the difference between the role of each director individually and the board collectively?
- What authority does the collective Board have related to the institution?
- What are the regulatory citations for that authority?



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Board Regulatory Duty

- **MCUA 490.342(2)** outlines the Board's responsibility for maintaining the CU's Safety and Soundness.
- **MCUA 490.342** also outlines specific duties the Board must perform, and others they may perform or delegate to a manager.



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Terms and Meetings

- Under standard bylaws, a regular term of office is typically three years.
- The board must meet at least every 62 days and at least nine times each calendar year.



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MCUA 490.342

The Board cannot delegate the following duties:

- Filling Board vacancies between elections.
- Establishing maximum individual shareholdings of members.
- Establishing the maximum amount of secured and unsecured loans made (within MCUA limitation of MCUA 423(12)).
- Employing the manager and fixing their compensation.



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MCUA 490.342 (cont.)

The Board cannot delegate the following duties:

- Appt. special committees.
- Borrowing money (401(2)(j)).
- Fixing the amount of surety bonding.
- Determining the par value of shares.
- Recommending changes to the bylaws.
- Specifying the forms and procedures for application of membership.



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MCUA 490.342 (cont.)

The Board cannot delegate the following duties:

- Adopting policies appropriate to maintain the safety and soundness of the institution.
- Establishing officers and their titles.
- Meeting at least every 62 days.



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MCUA 490.342 (cont.)

The Board can delegate the following duties: (but retain the oversight responsibility)

- Acting on applications for membership.
- Determining interest rates on loans and deposits.
- Hiring employees.
- Ensuring safe investments.
- Designating depositories.
- Establishing and implementing policies.



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MCUA 490.342 (cont.)

**The Board can delegate the following duties:
(but retain the oversight responsibility)**

- Establishing internal controls.
- Determining dividends.



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Purpose of the Examination Process

- So why does the regulatory agencies conducts these examinations?
- How much of the examination information can I share?
- What information is the institution and/or directors required to report?
- What is a directors role in the exam process?
- What are common board mistakes OFIR sees?
- What resources are available to directors?



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Regulatory Examinations

- Required as a condition of CU charter.
- Commissioner is required to conduct by MCUA 490.207(1) at least every 18 months.
- Can be a valuable, independent review of the operations of the CU for the Board and its members.
- Does not replace, and should not be construed as a financial, IT, BSA or any other form of an audit.



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Purpose of the Examination Report

- Ensure compliance with state and federal regulations.
- Ensure MCUA required deposit insurance.
- Assess the overall safety and soundness.
- Outline regulatory concerns to the Board.
- Communication of regulatory concerns to the Board.



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Confidential Nature of Information

- MCUA 490.207(6) makes it a violation of the act if any person disseminates all or part of the report for other than legitimate business purposes.
- MCUA 490.205(1) requires all current and former OFIR staff to keep secret all facts obtained in the course of their duties.
- The Identity Theft Protection Act (452 PA 2004) requires OFIR notification of the CU of any potential breach of personally identifiable information of the membership.



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The Board's Role in the Exam Process

Implicit to ensuring safety and soundness, a Board must:

- Ensure compliance with all applicable regulations, CU Bylaws and internal policies.
- Ensure effective and accountable management of the institution.
- Provide strategic vision for the institution.
- Ensure adequate financial performance.



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OFIR Access to Information

- MCUA 490.201(6) and 490.305(1) requires production of books and records in whatever fashion maintained.
- MCUA 490.218 grants Commissioner authority to require any report necessary in his judgment to be fully informed about the condition of the CU and outlines fines for failure to produce.
- MCUA 490.232 grants the Commissioner liquidation authority if a CU refuses to submit its books for inspection



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Common Board Mistakes

- Not asking questions.
- Failure to understand the risks the CU faces.
- Failure to lead on ethics and compliance.
- Not insisting on crisis-management planning.
- Discounting examination findings.
- Failure to hold CEO accountable.
- Not speaking with one voice.



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Director Resources

- Michigan CU Homepage @ www.michigan.gov/ofircreditunion
 - Director's Pamphlet.
 - Michigan CU Index
 - Applicable Acts, Rules, Bulletins and Letters.
- NCUA Website www.ncua.gov (FISCU applicable sections).



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Director Resources (Cont.)

- Examiners
- Consultants
- Attorneys
- CPA
- Internal Audit Staff



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Regulatory / Legal implications for Directors

- What regulatory actions can OFIR or NCUA initiate against a director, the board or the credit union?
- What legal risk do directors face?



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Possible Regulatory Actions

- Commissioner make take regulatory action if:
 - CU has engaged in or is about to engage in Unsafe and Unsound Practice.
 - CU has violated or is about to violate a law or rule.
 - The Commissioner considers it necessary in order to conserve the assets for the members.
 - The CU refuses to pay obligations in accordance with their terms, refuses to submit its books, or is in an unsafe and unsound condition.
 - The CU is insolvent, or in danger of becoming insolvent.
 - The CU does not submit reports of financial condition as required by the Commissioner.



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Possible Regulatory Actions (cont.)

- Credit Union Actions.
 - Memorandum of Agreement.
 - Cease and Desist Order (MCUA 210).
 - Conservatorship (MCUA 241).
 - Involuntary Merger (MCUA 251).
 - Involuntary Dissolution (MCUA 331).
 - Receivership (MCUA 232).
 - Revocation of Charter (MCUA 201(4)).
 - Fines/Penalties (MCUA 218,220, 201(4)).



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Possible Regulatory Actions (cont.)

- Individual Actions.
 - Removal of an Official (MCUA 212, 214, 217).
 - Industry Prohibition (MCUA 212, 217).
 - Fines/Penalties (MCUA 220, 217).



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Legal Implications

- **Lawsuits Against Bank Officers and Directors: Prepare Now!**
- **CEO Pleads Guilty to \$1.2 Million Embezzlement (\$4 million institution).**
- **Deposit Insurance and/or Bond Insurance Provider Suits**



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Exam Hot Topics

- Declining RE values.
- Lack of industry experience with this economic cycle (including collections).
- Declining consumer collateral residual values.
- Falling ROA / future IRR impact.
- Under-reported delinquencies.
- Inadequately Funded ALLL.
- Appropriate and consistent extension policies.



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