

7535-01-U

NATIONAL CREDIT UNION ADMINISTRATION

12 CFR part 701, Appendix A

RIN 3133-AE86

Federal Credit Union Bylaws

AGENCY: National Credit Union Administration (NCUA).

ACTION: Advance notice of proposed rulemaking.

SUMMARY: The NCUA Board (Board) is issuing this advance notice of proposed rulemaking to solicit stakeholder comments on ways to streamline, clarify, and improve the standard Federal Credit Union (FCU) bylaws. The standard FCU bylaws provide a comprehensive set of corporate governance procedures that are mandatory for any FCU that had not adopted bylaws as of November 30, 2007. The Board is considering a number of significant changes to the FCU bylaws to provide enhanced operational flexibility to FCUs and to reduce regulatory compliance burdens on all FCUs.

DATES: Comments must be received on or before [INSERT DATE 60 DAYS AFTER PUBLICATION IN THE FEDERAL REGISTER].

ADDRESSES: You may submit comments by any of the following methods (**Please send comments by one method only**):

- Federal eRulemaking Portal: <http://www.regulations.gov>. Follow the instructions for submitting comments.
- NCUA Web Site: <http://www.ncua.gov/Legal/Regs/Pages/PropRegs.aspx>. Follow the instructions for submitting comments.
- E-mail: Address to regcomments@ncua.gov. Include “[Your name]—Comments on Federal Credit Union Bylaws ANPR” in the e-mail subject line.
- Fax: (703) 518-6319. Use the subject line described above for e-mail.
- Mail: Address to Gerard Poliquin, Secretary of the Board, National Credit Union Administration, 1775 Duke Street, Alexandria, Virginia 22314-3428.
- Hand Delivery/Courier: Same as mail address.

PUBLIC INSPECTION: You can view all public comments on NCUA’s website at <http://www.ncua.gov/Legal/Regs/Pages/PropRegs.aspx> as submitted, except for those we cannot post for technical reasons. NCUA will not edit or remove any identifying or contact information from the public comments submitted. You may inspect paper copies of comments in NCUA’s law library at 1775 Duke Street, Alexandria, Virginia 22314-3428, by appointment weekdays between 9 a.m. and 3 p.m. To make an appointment, call (703) 518-6546 or send an e-mail to OGCMail@ncua.gov.

FOR FURTHER INFORMATION CONTACT: Elizabeth Wirick, Senior Staff

Attorney, Sarah Chung, Senior Staff Attorney, or Benjamin M. Litchfield, Staff Attorney, National Credit Union Administration, 1775 Duke Street, Alexandria, Virginia 22314-3428 or telephone: (703) 518-6540.

SUPPLEMENTAL INFORMATION:

I. Background

FCU incorporators must present proposed FCU bylaws along with an organization certificate to the Board for its approval prior to commencing business as an FCU.¹ To simplify the organization of FCUs, the Federal Credit Union Act (FCU Act) requires the Board to prepare “from time to time” a form of FCU bylaws to be used by FCU incorporators and to make that form available upon request.² The FCU Act grants the Board considerable discretion in drafting this form “from time to time,” provided that the FCU bylaws are consistent with basic corporate governance procedures set out in the FCU Act. Those corporate governance procedures are designed to protect fundamental FCU member rights that underpin the cooperative principles that serve as the cornerstone of the credit union movement.³

¹ 12 U.S.C. 1754, 1758.

² 12 U.S.C. 1758.

³ Specifically, these rights include the right to: (1) maintain a share account; (2) maintain FCU membership; (3) have access to credit union facilities; (4) participate in the director election process; (5) attend annual and special meetings; and (6) petition for removal of directors and committee members. *See* Federal Credit Union Bylaws, 72 FR 30984, 30986 (Aug. 6, 2007) (proposed rule).

The FCU bylaws and accompanying guidance were not part of the NCUA's regulations for almost 25 years.⁴ During that time, in consultation with the NCUA, FCUs had considerable discretion to adopt reasonable FCU bylaws provisions provided that they did not conflict with the FCU Act, the NCUA's regulations, established federal policy, or otherwise pose a safety and soundness risk to the FCU.⁵ Accordingly, the Board did not view FCU bylaws disputes predominantly as a federal regulatory matter. Instead, the Board believed that state corporate law and state courts were the appropriate vehicles through which FCU officials and members could settle FCU bylaws disputes where state corporate law was not preempted by federal law.

However, the Board observed a number of troubling cases in which members were unable to enforce fundamental FCU member rights in state courts.⁶ Moreover, the Board began to see troubling precedents developing in federal courts holding that FCUs do not have fiduciary duties to their members despite the clear status conferred by the FCU Act on a credit union member as a partial owner of the FCU.⁷ Treating FCU bylaw disputes as largely matters of state corporate law also diminished the NCUA's ability to take proactive enforcement measures in this area. Accordingly, the Board incorporated the standard FCU bylaws as part of the NCUA's regulations and required all FCUs that had

⁴ Federal Credit Union Bylaws, 72 FR 61495, 61496 (Oct. 31, 2007) (final rule) (codified at 12 CFR 701, App. A).

⁵ *Id.*

⁶ See 72 FR at 30985 (Aug. 6, 2007) (observing member difficulties obtaining redress in state courts); see also *Bruns v. Nat'l Credit Union Admin.*, 122 F.3d 1251, 1257 (9th Cir. 1997) (citing *Montford v. Robins Fed'l Credit Union*, 691 F. Supp. 347, 351-52 (M.D. Ga. 1988)) (NCUA appropriate body to hear FCU bylaw complaints).

⁷ *Id.*; see also *Miur v. Navy Fed'l Credit Union*, 529 F.3d 1100, 1107-8 (D.C. Cir. 2008) (applying the Virginia Commercial Code).

not adopted bylaws prior to November 30, 2007 to adopt the standard FCU bylaws.⁸

FCUs that had adopted bylaws prior to that date were allowed to retain their then current bylaws. However, the Board strongly encouraged those FCUs to adopt the standard FCU bylaws.

Since incorporating standard FCU bylaws into the NCUA's regulations, the NCUA has periodically solicited comment from stakeholders on ways to streamline, clarify, and improve the standard FCU bylaws to provide FCUs with greater operational flexibility. For example, the NCUA's Office of General Counsel met with stakeholders in 2013 to discuss possible revisions to the standard FCU bylaws. Those stakeholders provided valuable input on particular provisions of the standard FCU bylaws. Their comments and recommended changes included: (1) adding flexibility where consistent with law, regulation, and the protection of fundamental member rights; (2) removing outdated or obsolete provisions and terms; (3) conforming the standard FCU bylaws to plain English writing principles; (4) expanding the commentary section to provide additional information and guidance; (5) adding provisions related to member rights and responsibilities and clarifying the permissible actions FCUs can take to address members who are abusive or disruptive; and (6) addressing provisions pertaining to meeting procedures, quorums, and notice requirements. The Office of General Counsel has a record of these comments and continues to take them into account.

⁸ 12 CFR 701, App. A, Instruction A.

Recently, the NCUA's Regulatory Reform Task Force (Task Force), a group created by the NCUA Chairman to implement the NCUA's regulatory reform agenda, has suggested that more wholesale changes to the standard FCU bylaws may be necessary because they have not been significantly updated in nearly 10 years.⁹ To ensure that the standard FCU bylaws are amended in a transparent manner that affords stakeholders enhanced opportunity to participate in the rulemaking process, the Task Force recommended that the Board issue an advance notice of proposed rulemaking to request comments on ways in which the FCU bylaws may be streamlined, clarified, and improved.

II. Request for Comments on Specific Topics

In accordance with the Task Force's recommendation, the Board is issuing this advance notice of proposed rulemaking to solicit stakeholder comments on the standard FCU bylaws. In particular, the Board requests specific comments on the following questions:

1. How can the Board improve the FCU bylaws amendment process?

A perennial concern among stakeholders is that the process to amend the standard FCU bylaws is complicated and time consuming. An FCU's decision to amend its bylaws often results from a pressing operational concern. The FCU's ability to respond to that concern in a timely manner is not just a matter of convenience, but also an important safety and soundness issue. An FCU that wishes to amend its bylaws must request

⁹ Regulatory Reform Agenda, 82 FR 39702, 39705 (Aug. 22, 2017). The Task Force's report was adopted by the Board and issued for public comment with a comment period ending on November 20, 2017.

approval from the NCUA's Office of Credit Union Resources and Expansion (CURE) for many amendments to the standard FCU bylaws. While CURE processes bylaws amendment requests as expeditiously as possible, the standard FCU bylaws do not provide for any timeline by which CURE must arrive at its determination, except in the case of previously approved bylaws amendments.¹⁰ Accordingly, the Board seeks specific stakeholder comments on ways to improve this process to provide a requesting FCU with a more timely response, greater transparency, and enhanced accountability.

2. How can the Board clarify the FCU bylaws provisions addressing limitation of service and expulsion of members?

In the past, stakeholders have asked for clarification on the FCU bylaws provisions addressing limitation of service policies. Article II, § 4 of the standard FCU bylaws permits an FCU to limit services or access to credit union facilities to “a member who is disruptive to credit union operations.”¹¹ The Office of General Counsel's longstanding interpretation of the phrase “disruptive to credit union operations” is that an FCU may limit services to an FCU member in a number of cases, including situations where a member is abusive to FCU staff or has caused a loss to the FCU. This is the case provided that members have received adequate notice of the limitation of service policy and there is some “logical relationship between the objectionable conduct and the services to be suspended.”¹²

¹⁰ 12 CFR 701, App. A, Instruction C.4.

¹¹ 12 CFR 701, App. A, Art. II, § 4.

¹² Suspension of Service Policy, OGC Op. Letter 08-0431 (Aug. 12, 2008); Request for Interpretation of Section 118 of the Federal Credit Union Act, OGC Op. Letter 96-0530 (June 10, 1996).

However, the Office of General Counsel has also stated that contract provisions in account and other member service agreements, as well as federal and state laws, may affect an FCU's ability to implement a limitation of service policy.¹³ For example, an FCU may not implement a limitation of service policy that has a disparate impact on a protected class, such as may be the case regarding defaults on consumer loans.¹⁴ The ambiguity surrounding the use of limitation of service policies has led to some justifiable stakeholder confusion and enforcement issues.

Accordingly, the Board is particularly interested in specific stakeholder comments on ways to improve Article II, § 4 of the standard FCU bylaws to provide FCUs with the greatest possible clarity regarding the use and misuse of limitation of service policies. The Board is also interested in specific stakeholder comments on whether this regulatory text should be removed in its entirety and addressed as a separate regulation.

3. How can the Board improve the FCU bylaws to facilitate the recruitment and development of directors?

As the credit union movement continues to undergo significant changes, the Board is interested in ways that it can improve the FCU bylaws to facilitate the recruitment of FCU directors. Article V of the standard FCU bylaws sets out four distinct procedures

¹³ *Id.*

¹⁴ Regulation B, which implements the Equal Credit Opportunity Act, prohibits discrimination on the basis of a protected class. *See* 12 CFR 1002.

that an FCU may choose to follow in order to select directors.¹⁵ In each case, a nominating committee must appoint at least one member to each vacancy, including any unexpired term vacancy, for which elections are being held. However, these procedures do not provide guidance on how the nominating committee should proceed with identifying prospective candidates nor do they clarify the criteria that the nominating committee may use when selecting candidates.

While the Board believes that these matters fall squarely within the sound business judgment of each individual FCU, the Board is interested in ways that it can amend the standard FCU bylaws to facilitate effective business continuity planning. For example, should the Board include commentary to Article V of the standard FCU bylaws recommending certain non-binding factors that the nominating committee may consider when selecting a candidate to fill a particular vacancy? If so, what factors should the Board highlight? In addition, should the Board include commentary authorizing FCUs to establish standing advisory committees designed to recruit potential candidates to fill board vacancies? If so, which individuals within the FCU should be part of this advisory committee? What safeguards should be put in place to prevent conflicts of interest?

4. How can the Board improve the FCU bylaws to encourage member attendance at annual and special meetings?

¹⁵ 12 CFR 701, App. A, Art. V.

A key difference “between credit unions and other federally chartered financial institutions lies in the democratic control and management of credit unions.”¹⁶

Accordingly, the Board is interested in ways that it can improve the standard FCU bylaws to encourage active member participation in annual and special meetings. Article IV of the standard FCU bylaws sets out the procedures that must be followed when an FCU holds a meeting of members.¹⁷ For an annual meeting, the secretary of the FCU must provide members with at least 30 but not more than 75 days written notice before the date of any annual meeting. For a special meeting, the written notice must be at least 7 days before the date of the special meeting. The Board seeks stakeholder input on whether these time periods are adequate to ensure that members have sufficient advanced notice to afford an actual opportunity to attend annual and special meetings.

In addition, with the rise of e-commerce and mobile banking, the Board is interested in stakeholder comments on ways that it may improve Article IV of the standard FCU bylaws to allow FCUs to harness new technologies, particularly social media and web-based conferencing solutions, to allow more members to attend annual and special meetings. For example, should the Board allow an FCU to conduct an annual or special meeting through teleconference? If so, what market solutions exist to allow members to debate issues brought to the floor or to securely vote on director nominations? Would the use of such a market solution be considered an impermissible proxy vote? What risks are associated with the use of these products? Would the use of these kinds of solutions encourage greater member participation from those individuals who largely rely on

¹⁶ *La Caisse Populaire Ste-Marie (St. Mary's Bank) v. U.S.*, 425 F. Supp. 512, 517 (D.N.H. 1976).

¹⁷ 12 CFR 701, App. A, Art. IV.

mobile financial services and avoid traditional brick-and-mortar branches? Could this technology be provided through a mobile application?

5. Should the Board eliminate overlaps between the NCUA's regulations and the FCU bylaws?

In reviewing the standard FCU bylaws, NCUA staff identified a number of the NCUA's regulations that overlap, to some extent, with the standard FCU bylaws. Many of the overlapping standard FCU bylaws provisions are located in Article XVI and address issues such as FCU member confidentiality, conflicts of interest, record retention, and the availability of books and records to FCU members. Do these duplicative regulatory and bylaws requirements increase compliance burden in a manner that outweighs any measurable member benefit? If so, the Board requests specific stakeholder comments on how to address these provisions.

If such overlap is problematic, a solution the Board could consider is to remove the overlapping provisions from the standard FCU bylaws to the greatest extent possible and make appropriate adjustments to the NCUA's regulations to maintain their substantive protections. For example, should the Board remove Article XVI, § 4 of the standard FCU bylaws, which governs conflicts of interests for institutional-affiliated parties?¹⁸ If so, the Board could make appropriate amendments to its conflicts of interest rule, § 701.4,¹⁹ to expand the scope of that rule to cover all institution-affiliated parties of an FCU rather

¹⁸ 12 CFR 701, App. A, Art. XVI, § 4.

¹⁹ 12 CFR 701.4.

than just FCU directors. Similarly, should the Board remove Article XVI, §§ 5 and 6 and make appropriate changes to the NCUA's rule governing FCU member access to FCU records, § 701.3,²⁰ and the rule governing record retention, part 749?²¹

III. Request for General Comments

In addition to requesting specific comments addressing the issues identified above, the Board also requests stakeholder comments on any aspect of the standard FCU bylaws that commenters wish to bring to the Board's attention to improve the standard FCU bylaws' usefulness and ease of use. Further, the Board invites stakeholders that have previously commented on proposed changes to the standard FCU bylaws to offer additional comments based on recent experiences.

The Board asks stakeholders, who are requesting a specific change to a provision of the standard FCU bylaws, to please provide a brief statement regarding whether the FCU Act would permit such a change. Some provisions of the standard FCU bylaws are drawn directly from the FCU Act and, therefore, may not be legally amended. For example, § 109 of the FCU Act provides that an FCU may not charge any other fee for FCU membership other than a "uniform entrance fee if required by the board of directors."²² This provision of the FCU Act prohibits FCUs from imposing monthly membership fees and other similar charges²³ and was codified in the standard FCU bylaws to simplify

²⁰ 12 CFR 701.3.

²¹ 12 CFR 749.

²² 12 U.S.C. 1759.

²³ See Monthly Membership Fees, OGC Op. Letter 15-0902 (May 1, 2015).

compliance obligations for FCUs.²⁴ Accordingly, any request to change this provision or any similar provisions that correspond to a statutory requirement set out in the FCU Act, regardless of how compelling the stakeholder’s arguments, would be impermissible. In providing this brief supporting statement, the Board asks that stakeholders not only consider whether the statutory text would permit such a change but also whether the change fits within the spirit and intent of the FCU Act.²⁵

By the National Credit Union Administration Board on March 15, 2018.

Gerard Poliquin
Secretary of the Board

²⁴ See 12 CFR 701, App. A, Art. II, § 2.

²⁵ It is a “familiar rule that a thing may be within the letter of a statute and yet not within the statute, because not within its spirit nor within the intention of its makers.” *Mova Pharmaceutical Corp. v. Shalala*, 140 F.3d 1060, 1068 (D.C. Cir. 1998) (citing *Holy Trinity Church v. U.S.*, 143 U.S. 457, 459-60 (1892)).