

7535-01-U

NATIONAL CREDIT UNION ADMINISTRATION

12 CFR Part 701

Federal Credit Union Bylaws

AGENCY: National Credit Union Administration (NCUA).

ACTION: Proposed rule.

SUMMARY: NCUA is proposing to reincorporate the Federal Credit Union (FCU) Bylaws into NCUA regulations. This change clarifies NCUA's ability to use a range of enforcement authorities, in appropriate cases, to enforce the FCU Bylaws. In addition, NCUA is adding a bylaw provision on director succession, an issue it has previously addressed in legal opinions, and is revising the introduction to the Bylaws to conform it to these changes.

DATES: Comments must be received by August 6, 2007.

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/RegulationsOpinionsLaws/proposed_regs/proposed_regs.html. Follow the instructions for submitting comments.
- E-mail: Address to regcomments@ncua.gov. Include “[Your name] Comments on FCU Bylaws” in the e-mail subject line.
- Fax: (703) 518-6319. Use the subject line described above for e-mail.
- Mail: Address to Mary Rupp, Secretary of the Board, National Credit Union Administration, 1775 Duke Street, Alexandria, Virginia 22314-3428.
- Hand Delivery/Courier: Same as mail address.

Public inspection: All public comments are available on the agency’s website at <http://www.ncua.gov/RegulationsOpinionsLaws/comments> as submitted, except as may not be possible for technical reasons. Public comments will not be edited to remove any identifying or contact information. Paper copies of comments may be inspected in NCUA’s law library, at 1775 Duke Street, Alexandria, Virginia 22314, by appointment weekdays between 9:00 a.m. and 3:00 p.m. To make an appointment, call (703) 518-6546 or send an e-mail to OGC Mail @ncua.gov.

FOR FURTHER INFORMATION CONTACT: Elizabeth Wirick, Staff Attorney, Office of General Counsel, National Credit Union Administration, 1775 Duke Street, Alexandria, Virginia 22314-3428 or telephone: (703) 518-6540.

SUPPLEMENTARY INFORMATION:

A. Background

The Federal Credit Union Act (the Act) requires the NCUA Board to prepare bylaws that “shall be used” by FCUs and authorizes NCUA to enforce FCU Bylaws through charter suspension and liquidation. 12 U.S.C. 1758, 1766. Until 1982, the FCU Bylaws were incorporated by reference in NCUA’s regulations. NCUA’s authority to enforce bylaw violations through less severe administrative remedies then was clear because such violations could be viewed as a violation of NCUA’s regulations, thus enabling NCUA to bring a variety of administrative enforcement actions to effect compliance in appropriate cases.

In 1982, the Bylaws were removed from the regulations as part of a general deregulatory effort. At that time, three separate sections of NCUA regulations incorporated the FCU Bylaws by reference. 12 CFR 701.2, 701.3, 701.14 (1982). Another section required NCUA approval of any bylaw amendments. 12 CFR 701.4 (1982). NCUA deleted two of the sections incorporating the Bylaws by reference, as well as the regulation requiring NCUA approval of amendments,

in two final rules issued in 1982. 47 FR 23685 (June 1, 1982); 47 FR 46249 (Oct. 18, 1982).

These rules were one result of a comprehensive review of agency regulations NCUA undertook in the early 1980s in an effort to eliminate redundant or outdated requirements. The goal of this process was to reduce the number and complexity of NCUA regulations and delete guidance found in other publications. 47 FR 46249 (Oct. 18, 1982). The Bylaws were only one of several items deleted from incorporation by reference in the 1982 rules cited above. One of the rules also deleted the NCUA Accounting Manual and Data Processing Guidelines from incorporation by reference. 47 FR 23685 (June 1, 1982). The other also deleted references to chartering procedures contained elsewhere in NCUA guidance. 47 FR 46249 (Oct. 18, 1982). The discussions in the proposed and final rules and at the NCUA Board meetings focus on the other provisions in the rules, with very little information about the Bylaws. *Id.*; 47 FR 23750 (June 1, 1982); 47 FR 23686 (June 1, 1982); 46 FR 48940 (Oct. 5, 1981); Recordings of NCUA Board Meetings Sept. 24, 1981; May 20, 1982 and Sept. 23, 1982. The sole comment about the Bylaws available in the administrative record is in the preamble to one of the final rules, and it states: “The commenters also were in agreement with NCUA’s deregulation of charter and bylaw provisions and condensation of chartering procedures.” 47 FR at 46249.

The Board's 1982 actions resulted in the retention of one section incorporating the Bylaws by reference, §701.2, which was not deleted until 1999. 12 CFR 701.2 (1982-1999). Although one of the 1982 rules deleted other publications incorporated by reference in §701.2, while leaving the reference to the Bylaws intact, the proposed and final rules do not explain this action. 47 FR 23685 (June 1, 1982); 46 FR 48490 (Sept. 24, 1981). NCUA deleted §701.2 as a technical amendment in 1999. 64 FR 57363 (Oct. 25, 1999). After reviewing the entire record, retention of the incorporation of the bylaws in §701.2 appears to have been an oversight.

When the Bylaws were deregulated in 1982, the rule changes did not address the issue of whether the agency would enforce the Bylaws or intervene in disputes concerning the Bylaws. NCUA's policy not to become involved in bylaw disputes unless the bylaw violation threatens the safety and soundness of the credit union or violates a provision of the FCU Act or NCUA regulations evolved in various issuances and procedures after 1982. Numerous legal opinion letters state this policy, as well as NCUA's position that the Bylaws represented a contract between a credit union and its members. NCUA's view was that state corporate law, if consistent with the Act and NCUA regulations, determined disputes regarding the enforcement of bylaw provisions. As a result of the deregulation of the bylaws, NCUA's ability to enforce the Bylaws, absent a safety and soundness reason, has become problematic.

NCUA's post-deregulatory policy has sometimes had the effect of requiring FCU members to resort to state court action in order to force their credit union to abide by its bylaws. While this approach worked fairly well for the most part over the years, recently, NCUA has learned of cases where members have been unable to use the judicial system to enforce rights granted by the Bylaws. While NCUA continues to maintain members can enforce the bylaws as a contract, the Board recognizes that, in certain circumstances, this remedy may not be practical or provide adequate relief due to circumstances such as timing and cost.

As the administrative record demonstrates, the Board did not foresee the current challenges members can face in seeking to enforce the bylaws when it deregulated the Bylaws in 1982 in an effort to eliminate redundancy and maximize flexibility for FCUs. At this time, the Board finds reincorporating the bylaws into NCUA's regulations is an appropriate step. Reincorporation is the least burdensome way to ensure FCUs and their members are aware of NCUA's authority to issue and enforce the Bylaws under the Act.

Congress has provided the Board explicit authority in the Act to suspend or revoke the charter of any FCU, or place the FCU into involuntary liquidation, for a violation of any provision of its bylaws. 12 U.S.C. 1766(b)(1). A charter suspension or liquidation, however, is a very extreme remedy and is unlikely to be an appropriate remedy for any bylaw violation. The resultant loss of credit

union service would likely result in far more harm to members than the FCU's failure to follow its bylaws.

NCUA believes the better approach is to reincorporate the Bylaws into NCUA's regulations. The Board believes credit unions and their members should be able to resolve bylaw disputes without NCUA taking administrative action. In those rare cases where disputes cannot be resolved, NCUA will have clear authority to use a range of administrative actions. This will result in administrative remedies far less harsh than a charter suspension or liquidation to effect a credit union's compliance with its bylaws.

Reincorporating the Bylaws into NCUA's regulations imposes no new regulatory burden, as all FCUs are already required to have NCUA-approved bylaws.

NCUA publishes form bylaw language and all FCUs have adopted some version of the form language. The latest version of the Bylaws allows FCUs flexibility wherever possible by providing check-off or fill-in-the-blank options that can be adopted without further NCUA action. NCUA's regional directors must approve all other bylaw amendments. NCUA will approve all proposed bylaw amendments that do not conflict with the Act or NCUA regulation and guidance, present a potential safety and soundness threat, or restrict members' rights.

NCUA does not maintain copies of each FCU's bylaws and bylaw amendments.

In considering reincorporation, the Board again thought about whether it should continue to prescribe model bylaw language or whether it should, as suggested by several commenters during the 2006 Bylaw revision process, prescribe only general categories and allow FCUs to draft their own bylaws. The Board's concerns with this approach remain the potential for confusion and the adoption of illegal bylaw provisions. While some previous commenters suggested a categories-style rule, others, including credit union employees and credit union legal representatives, have indicated that having form Bylaws is an aid and is not overly burdensome. Credit union staff members and boards of directors know that the Bylaws are a condensation of some requirements in the Act, NCUA regulations, and NCUA guidance. For most, the option to draft bylaws completely on their own is unattractive because of the amount of research required to ensure inclusion of all necessary provisions. Also, presumably, NCUA would have to adopt some oversight mechanism to prevent adoption of bylaw provisions that are inconsistent with statutory and regulatory requirements or present safety and soundness concerns. Because NCUA does not now maintain copies of individual FCU bylaws or review bylaws in examinations as a matter of course, having a category-type regulation would likely result in more regulation, not less.

The Board also considered modeling its bylaw regulation on the approach used by the Office of Thrift Supervision (OTS). The OTS has detailed regulations listing required bylaw provisions and also provides model bylaw language

separately. 12 CFR 544.5, 552.5; OTS Applications Handbook, Forms 1577, 1508. The model language is mostly a restatement of the regulation. Id. Thrifts are not required to adopt the model language exactly, and, like FCUs, may also adopt certain optional provisions. All amendments, including the model option provisions, must be filed with OTS. 12 CFR 544.5(d), 552.6(c). The result of the OTS approach is similar to NCUA's. Both federal thrifts and FCUs have form bylaw language. Although the regulation permits thrifts to adopt their own language rather than the model, drafting bylaws that comply with the requirements of the regulation results in bylaws nearly indistinguishable from the form bylaws. Both federal thrifts and FCUs are allowed to select certain options without further agency action, but thrifts must file all amendments with OTS. After considering the OTS approach, the Board continues to believe that incorporating the Bylaws by reference into NCUA's regulations is the most expeditious and least burdensome approach.

The proposed rule will give NCUA authority to enforce bylaw violations in certain, limited cases through administrative tools in the Act. Incorporating the FCU Bylaws into NCUA's regulations will not mean NCUA will become involved as a matter of course in bylaw disputes. The Board believes credit union officials and members should be able to work together to resolve the vast majority of bylaw and internal governance disputes. This was true before 1982 when the Bylaws were incorporated by reference in NCUA's regulations and, as was the case then, NCUA has no intention of using agency resources to enforce every bylaw

violation. Furthermore, under the risk-based examination system in use for FCUs, examiners do not currently, nor will they under this proposed rule, inquire into an FCU's bylaws unless the FCU's management raises the issue.

A credit union's management, however, should not be able to ignore the Bylaws unilaterally. Members have a reasonable expectation that their credit union will be operated in accordance with its approved bylaws. NCUA already has the authority to exercise its administrative enforcement authority when a credit union violates the Act or NCUA regulations or a threat to the safety and soundness of the institution exists. NCUA also believes it should have the ability to institute an enforcement action when a bylaw violation poses a threat to fundamental, material credit union member rights. These rights are those that go to the very heart of the cooperative principles that serve as the cornerstone of the credit union system. Specifically, they include the right to:

- maintain a share account;
- maintain credit union membership;
- have access to credit union facilities;
- participate in the director election process;
- attend annual and special meetings; and
- petition for removal of directors and committee members.

It continues to be NCUA's intent that credit unions and their members will make every effort to resolve bylaw disputes without NCUA intervention. If a bylaw dispute cannot be resolved, however, credit union officials or members should contact the regional office with jurisdiction for the FCU. Regional offices have substantial experience in reviewing and working with credit unions on bylaw disputes, as well as proposed bylaw amendments. The regional offices have historically assisted credit union officials and members in resolving bylaw and internal governance disputes. However, if a matter involves fundamental, material credit union member rights, NCUA will have clear discretion to take administrative action as warranted. The Board believes this is preferable to requiring credit unions and their members to resort to the state courts, with the attendant expense, time delays and uncertainty regarding bylaw enforceability.

B. Specific Changes to the FCU Bylaws

NCUA issued an updated and revised version of the FCU Bylaws in 2006. 71 FR 24551 (April 26, 2006). Because the revised Bylaws were issued so recently, NCUA believes another major review is unnecessary at this time. The Board believes, however, this rulemaking presents an appropriate opportunity to address one particular circumstance previously only addressed in legal opinions, namely, the responsibility of the Supervisory Committee to assume the responsibilities of the board of directors temporarily if, for any reason, an entire board of directors is simultaneously removed or unable to serve. See OGC

Opinion 06-0446 (April 27, 2006). This proposed rule adds new provisions to the Bylaws clarifying responsibilities and procedures if, for any reason, including removal or other inability to serve, an FCU has no remaining directors. This proposed rule also revises the introduction to the Bylaws to reflect the reincorporation of the Bylaws in the regulations.

The proposal adds a new Section to Article IX to clarify the Supervisory Committee's responsibilities if an FCU has no remaining directors. If an entire board of directors resigns, is removed simultaneously, or for whatever circumstance is unable to serve, the Supervisory Committee has the responsibility to act as a temporary board of directors. As has been previously stated in NCUA legal opinions, the FCU Bylaws will now provide that, as the temporary board of directors, the Supervisory Committee must either schedule a special meeting to elect an interim board, or, if the credit union's next annual meeting of members will occur within 45 days after the FCU loses its directors, must serve as the temporary board until the next annual meeting.

NCUA believes this provision belongs in Article IX, entitled "Supervisory Committee," because it addresses responsibilities of the Supervisory Committee when an FCU has no remaining directors. Several other bylaws refer to procedures by which remaining directors can replace directors who have been removed or have resigned, but because this bylaw addresses the situation where

no directors remain and the responsibility falls upon the Supervisory Committee, it is placed in Article IX.

The proposal also cross references this new language in Article XVI, Section 3, addressing removal of directors by members, and Article VI, Section 4, addressing board of director vacancies. These new provisions do not automatically become part of any FCU's existing bylaws and FCUs are not required to adopt them. In the event a credit union does not adopt the new bylaw provisions, NCUA will continue to follow the guidance expressed in its prior legal opinion, cited above.

The NCUA Board has also considered whether to allow more flexibility in the Bylaws regarding the number of members necessary to request a special meeting as well as the timing for when the meeting is held. NCUA's position is that any necessary changes in this area for a particular credit union should be handled through the bylaw amendment process explained in the introduction to the Bylaws.

NCUA is also adopting a minor procedural change in an effort to streamline the bylaw amendment process even further. NCUA will continue to post all bylaw amendment opinion letters on its website. Bylaw opinion letters issued since the last major revision of the bylaws in April 2006 will now include the language for any amendment approved, or a link to that language. Credit unions seeking to

adopt a bylaw amendment using identical language to a previously approved amendment must still file the proposed amendment with their Regional Office, but will receive notice of the Region's action on their request within 15 business days. Review of all bylaw amendment requests ensures that an amendment approved for one FCU is appropriate for another FCU, but NCUA believes this review can be accomplished more quickly when the requested amendment is identical to one approved for another FCU.

Finally, the proposal includes a revised introduction to reflect incorporation of the Bylaws in NCUA regulations. The introduction retains language explaining how to adopt and amend the bylaws as well as additional guidance. For bylaw amendments, the introduction now states that FCUs seeking a bylaw amendment identical to a previously approved bylaw amendment can expect an answer from their Regional Office within 15 business days of the receipt of the request.

C. Request for Comments

NCUA seeks comment on the proposal to incorporate the Bylaws in NCUA regulations. NCUA specifically requests comments on the standards, discussed above, for when it will intervene in bylaw disputes, including any other criteria NCUA should consider in determining when it will institute an enforcement action regarding the bylaws. Also, NCUA specifically requests comment on the "fundamental, material member rights" discussed above and whether any rights

should be added to or deleted from this list. Finally, NCUA seeks comments on the addition of the director succession bylaw and the revised introduction.

REGULATORY PROCEDURES

Regulatory Flexibility Act

The Regulatory Flexibility Act requires NCUA to prepare an analysis to describe any significant economic impact a rule may have on a substantial number of small credit unions, defined as those under ten million dollars in assets. This proposed rule incorporates the Bylaws into NCUA's regulations without imposing any regulatory burden, since the FCU Act requires FCUs to adopt NCUA-approved bylaws. The proposed rule will not have a significant economic impact on a substantial number of small credit unions, and, therefore, a regulatory flexibility analysis is not required.

Paperwork Reduction Act

NCUA has determined that the proposed rule would not increase paperwork requirements under the Paperwork Reduction Act of 1995 and regulations of the Office of Management and Budget. 44 U.S.C. 3501 et seq.; 5 CFR part 1320.

Executive Order 13132

Executive Order 13132 encourages independent regulatory agencies to consider the impact of their actions on state and local interests. In adherence to fundamental federalism principles, NCUA, an independent regulatory agency as defined in 44 U.S.C. 3502(5), voluntarily complies with the executive order. The proposed rule would not have substantial direct effects on the states, on the connection between the national government and the states, or on the distribution of power and responsibilities among the various levels of government. NCUA has determined that this proposed rule does not constitute a policy that has federalism implications for purposes of the executive order.

The Treasury and General Government Appropriations Act, 1999 – Assessment of Federal Regulations and Policies on Families

The NCUA has determined that the proposed rule would not affect family well-being within the meaning of § 654 of the Treasury and General Government Appropriations Act, 1999, Pub. L. 105-277, 112 Stat. 2681 (1998).

List of Subjects

12 CFR §701.2

Federal credit union bylaws.

By the National Credit Union Administration Board on May 24, 2007.

Mary F. Rupp
Secretary of the Board

Accordingly, NCUA proposes to amend 12 CFR part 701 by adding §701.2 to read as follows:

**PART 701 — ORGANIZATION AND OPERATION OF FEDERAL CREDIT
UNIONS**

1. The authority citation for part 701 is amended to read as follows:

Authority: 12 U.S.C. 1752(5), 1755, 1756, 1757, 1758, 1759, 1761a, 1761b, 1766, 1767, 1782, 1784, 1786, 1787, 1789. Section 701.6 is also authorized by 15 U.S.C. 3717. Section 701.31 is also authorized by 15 U.S.C. 1601 et seq.; 42 U.S.C. 1981 and 3601-3610. Section 701.35 is also authorized by 42 U.S.C. 4311-4312.

2. Part 701 is amended by adding §701.2 to read as follows:

701.2 Federal Credit Union Bylaws

(a) Federal credit unions must operate in accordance with their approved bylaws. The Federal Credit Union Bylaws and any amendments approved for specific Federal Credit Unions are hereby incorporated by reference pursuant to 5 U.S.C. 552(a)(1) and accompanying regulations. Federal credit unions may adopt amendments to their bylaws as provided in the bylaws, with the approval of the Board.

(b) Copies of the Federal Credit Union Bylaws may be obtained at www.ncua.gov or by request addressed to National Credit Union Administration, 1775 Duke Street, Alexandria, VA 22314.

(c) The National Credit Union Administration may issue revisions or amendments of the Federal Credit Union Bylaws from time to time. An historic file of amendments or revisions is maintained and made available for inspection at the National Credit Union Administration, 1775 Duke Street, Alexandria, VA 22314.

(d) Copies of the Federal Credit Union Bylaws are on file with the Director, Office of the Federal Register, National Archives and Records Service, General Services Administration, Washington, D.C. 20408. NCUA will file the text of any changes in the Federal Credit Union Bylaws with the Director, Office of the Federal Register, and publish notice of changes in the FEDERAL REGISTER.

Note: The text of the Federal Credit Union Bylaws does not appear in the Code of Federal Regulations.

3. The Federal Credit Union Bylaws are revised as follows:

(a) Add the following paragraph at the end of Section 3 of Article IX:

If all director positions become vacant simultaneously, the supervisory committee immediately becomes the temporary board of directors. The temporary board must call and hold a special meeting to elect an interim board at least 7 but no more than 14 days after all director positions become vacant. Candidates for the interim board at the special meeting may be nominated by petition or from the floor. The interim elected board serves until the next annual meeting of members. If the next annual meeting has been scheduled and will occur within 45 days after all director positions become vacant, the temporary board may not call a special meeting to elect an interim board and must serve until the annual meeting.

If the next annual meeting has not been scheduled, the temporary board may not call a special meeting to elect interim directors if the month and day of the previous year's meeting plus 7 days falls within 45 days after all director positions become vacant. In this case, the temporary board will call and hold the next annual meeting within 7 days before or after the month and day of the previous

annual meeting and the temporary board must serve until the annual meeting. If an interim board is elected and the annual meeting has not been scheduled, the interim board must schedule the annual meeting within 7 days before or after the month and day of the previous annual meeting.

The supervisory committee acting as the temporary board may not act on policy matters. An interim board elected under this section has the same powers as a board elected under the credit union's regular election procedures and may act on policy matters.

(b) Add the following sentence at the end of Section 3 of Article XVI:

If member votes at a special meeting result in the removal of all directors, the supervisory committee immediately becomes the temporary board of directors and must follow the procedures in Article IX, Section 3.

(c) Insert the following sentence after the first sentence of Section 4 of Article VI:

If all director positions become vacant simultaneously, the supervisory committee immediately becomes the temporary board of directors and must follow the procedures in Article IX, Section 3.

(d) Replace the sixth paragraph of the introduction with the following:

Federal credit unions considering an amendment may find it useful to review the bylaws section of the agency website, which includes Office of General Counsel opinions about proposed bylaw amendments. Opinions issued after April 2006 will include the language of approved amendments. Even if an amendment has been previously approved, the credit union must submit a proposed amendment to NCUA for review under the procedure listed above to ensure the amendment is identical. Credit unions requesting previously approved amendments will receive notice of the regional office's decision within 15 business days of the receipt of the request.

(e) Replace the last paragraph of the introduction with the following:

NCUA has discretion to take administrative actions when a credit union is not in compliance with its bylaws. If a potential violation is identified, NCUA will carefully consider all of the facts and circumstances in deciding whether to take enforcement action. NCUA will not take action against every minor or technical violation, but emphasizes that it retains discretion to enforce the bylaws in appropriate cases, which may include, but are not limited to, safety and soundness concerns or threats to fundamental, material credit union member rights.

(f) Replace the first paragraph of the introduction with the following:

Effective date: After consideration of public comment, the National Credit Union Administration (NCUA) Board adopted these Bylaws and incorporated them by reference in section 701.2 of NCUA's regulations on [date of final]. Unless a federal credit union has adopted bylaws before [date of final] it must adopt these revised Bylaws.