

BOARD ACTION MEMORANDUM

TO: NCUA Board

DATE: September 9, 2004

FROM: Office of General Counsel

SUBJ: Notice and Request for
Comment - Federal Credit Union
Bylaws

ACTION REQUESTED: NCUA Board approval of the attached notice and request for comment (Federal Credit Union Bylaws).

DATE ACTION REQUESTED: September 23, 2004.

OTHER OFFICES CONSULTED: Office of Examination and Insurance, Office of Credit Union Development, All Regional Directors.

VIEWS OF OTHER OFFICES CONSULTED: Concur

BUDGET IMPACT, IF ANY: None.

SUBMITTED TO INSPECTOR GENERAL FOR REVIEW: Yes.

RESPONSIBLE STAFF MEMBERS: Chrisanthy Loizos, Staff Attorney, Office of General Counsel.

SUMMARY: As part of NCUA's regulatory review for 2003, staff considered whether changes to the Federal Credit Union Bylaws were warranted. Given that it is five years since the Federal Credit Union Bylaws were published following a full review and revision, staff recommends that the NCUA Board issue the attached notice and request for comment. The notice seeks comment on ways to update, clarify and simplify the Federal Credit Union Bylaws. In addition, the notice requests comments on specific, suggested changes to the Federal Credit Union Bylaws.

RECOMMENDED ACTION: Recommend the Board issue the notice and request for comment.

ATTACHMENT: Draft Notice and Request for Comment.

7535-01-U

NATIONAL CREDIT UNION ADMINISTRATION

Federal Credit Union Bylaws

AGENCY: National Credit Union Administration (NCUA).

ACTION: Notice and Request for Comment.

SUMMARY: The NCUA Board is requesting comment on ways to update, clarify and simplify the Federal Credit Union (FCU) Bylaws. In addition, this notice requests comment on specific, suggested changes to the FCU Bylaws.

DATES: The NCUA must receive comments 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/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 F. Rupp, Secretary of the Board, National Credit Union Administration, 1775 Duke Street, Alexandria, Virginia 22314-3428.
- Hand Delivery/Courier: Same as mail address.

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

SUPPLEMENTARY INFORMATION:

Background

The FCU Act requires the NCUA Board to prepare bylaws that “shall be used” by FCUs. 12 U.S.C. 1758. In 1999, the NCUA Board issued revised FCU Bylaws. 64 FR 55760 (October 14, 1999). The 1999 revision included consolidating the existing bylaws into one publication, deleting outdated and obsolete bylaws, and using plain English.

It has been five years since that revision. The NCUA Board has a policy of continually reviewing NCUA regulations to “update, clarify and simplify existing regulations and eliminate unnecessary and redundant and unnecessary provisions.” NCUA Interpretive Ruling and Policy Statement (IRPS) 87-2, Developing and Reviewing Government Regulations. As a result of NCUA’s 2003 review, the Board has decided to seek comment on the FCU Bylaws to see if there are areas needing additional revisions at this time. The Board is aware of a few provisions in the bylaws it believes should be revised and is requesting comment on the specific, suggested changes discussed below.

Request for Comment

Article III, Section 7. In 1999, the Board clarified in the FCU Bylaws that owners of a joint account may be members of the FCU without opening separate accounts if they each purchase at least one share. Because some FCUs may not want to allow joint owners of one account to be members, the Board is proposing to add an alternative bylaw provision that would allow an FCU to require separate accounts for membership. An FCU would choose in its bylaws whether or not to allow joint account holders to be members without each opening a separate account. The Board proposes the following language as an alternative Section 7: “Each member must purchase and maintain at least one share in a share account that names the member as the sole or primary owner. Being named as a joint owner of a joint account is insufficient to establish membership.”

Article IV, Section 4. This section provides the suggested order of business at annual meetings but does not require that every item of business listed be addressed during the

meeting. The Board seeks comment on whether this section should include the required items of business that FCU officials must present at the annual meeting. For instance, the annual meeting must include the election of directors to vacant seats. 12 U.S.C. 1761(a). The supervisory committee is also required to provide a summary of its annual audit report to the members either orally or in writing at the annual meeting. 12 U.S.C. 1761d; 12 CFR 715.10. An FCU that participates in the Community Development Revolving Loan Program must report on its progress of providing needed community services at its annual meeting unless it sends the information to members in a written report. 12 CFR 705.6(b). The Board seeks comment on whether annual meeting requirements like the ones noted should be added to the bylaws.

Article V, Option A4, Sections 1 and 2. In Section 2, the sentence “All elections are determined by plurality vote” was inadvertently omitted from the beginning of this section. We recommend including this language that is present in the other three election options.

In addition, the Board is considering changing this provision, which currently permits voting electronically, to allow for mailing all notices electronically if the member consents. This would be accomplished by: 1) adding to Section 1 at the end of paragraph one “or the secretary may use electronic mail to notify members who have opted to receive notices or statements electronically;” 2) deleting “written” everywhere it appears in Section 1, paragraph two; and 3) adding to the end of Section 2(b) “provided,

however, that electronic mail may be used to provide the notice of ballot to members who have opted to receive notices or statements electronically.”

Article V, Option A4, Section 2(c)(2). The Board is considering amending this provision to require an FCU to include a mail ballot with its electronic election procedure instructions rather than require a member without the requisite electronic device to request a ballot. Requiring members to contact the FCU in order to receive a ballot may discourage member participation in the election process. If the mail ballot is included with the electronic election instructions, members will have a choice as to the voting method without having to contact the FCU.

Article V, Option A4, Section 2(d)(5). This provision addresses mail ballots and states that, if one form is used for the ballot and identification form, it must be “properly designed.” NCUA’s Office of General Counsel has interpreted this provision to require secrecy in the balloting process. OGC Legal Opinions 03-510, dated July 30, 2003; 03-1048, dated March 12, 2004. Prior editions of the FCU Bylaws provided instructions that stated: “[t]he ID form will be separated from your ballot when it reaches the credit union, and before any ballots are opened.” Federal Credit Union Standard Bylaw Amendments and Guidelines, Sample Ballot, p. 41, October 1991.

The Board is interested in comments on whether this bylaw should be revised to address the secrecy requirement in conjunction with what constitutes a “properly designed” ballot. One issue to consider is the manner in which an FCU can establish an election

process that assures members their votes remain confidential and secret from all interested parties when an independent third-party teller reviews the ballots with the members' signatures.

In another matter related to properly designed ballots, the Board is considering a change that would allow names printed on ballots to be placed in alphabetical order as an alternative to determining the order by drawing lots. The Board seeks comment on this suggestion and other alternatives to a fair and properly designed ballot.

Article V, Section 4. This section currently reads: "Members cannot vote by proxy, but a member other than a natural person may vote through an agent designated in writing for the purpose. A trustee, or other person acting in a representative capacity, is not as such, entitled to vote." The Board proposes deleting the second sentence. The second sentence reflects a prior legal view when FCU authority to establish trust accounts was limited to trust accounts for minors. Among other restrictions on these accounts at the time, the trustee had to be a member but was not entitled to vote. The provision is now outdated because a trust is recognized as a legal entity and may qualify for membership in its own right. Also, formal trust agreements generally provide that a trustee has the power to vote on behalf of a trust when the trust holds shares or stock that entitle the owner to vote.

Article V, Section 7. The Board seeks comment on whether to include a provision that sets a minimum age as a qualification for eligibility to vote and hold office, as an second

option to Section 7, which currently allows an FCU's board to establish the age by resolution.

Article IX, Section 1. The FCU Act precludes the director who is the “compensated officer” from being the director who can also be on the supervisory committee. 12 U.S.C. 1761(b). The bylaw currently states that “[t]he supervisory committee is appointed by the board from among the members of this credit union, one of whom may be a director other than the financial officer.” The bylaw incorrectly assumes that the financial officer is the “compensated officer.” We propose replacing “financial officer” with “compensated officer” so that the bylaw is consistent with the FCU Act.

The Board is seeking comment on all of the above mentioned proposed changes and also suggestions on other ways to update, clarify and simplify the existing FCU Bylaws. For example, NCUA has encouraged FCU managers and directors to consider improvements in matters relating to corporate governance and auditing in a manner similar to the requirements imposed on public companies under the Sarbanes-Oxley Act of 2002. NCUA Letter to Federal Credit Unions 03-FCU-07 (October 2003). The Board believes that sound corporate governance practices begin with prepared directors and managers. The Board welcomes comments on whether particular corporate governance practices or related issues should be added to the FCU Bylaws, such as board training or ethics. Based upon the comments, the Board will issue a notice with proposed bylaws and request for comment.

By the National Credit Union Administration Board on September 23, 2004.

Mary Rupp

Secretary of the Board