

# NCUA 2019 Bylaws

**Presented by**

Brandy Bruyere, NCCO

NAFCU VP of Regulatory Compliance



# Roadmap

- Background
- Special account issues:
  - Joint Account
  - Trust Accounts
  - Par Value
- Meetings
- Board of Directors Issues:
  - Meetings
  - Emeritus and Associate Directors
- Problem Members
  - Expulsion
  - Member in Good Standing
  - Limitation of Services
- FAQs



# Bylaws - Background

- 2007 – NCUA incorporated its model bylaws into regulations
  - FCU Act only has two tools for bylaws enforcement:
    - Suspension or revocation of FCU's charter
    - Placing FCU into conservatorship
  - If the bylaws are in the regulations, NCUA can use other tools like exam findings, DORs, etc.



# Bylaws - Background

- 2013 – NCUA Office of General Counsel consulted the industry on the bylaws
  - Bylaws amendments were rumored in 2014 but the efforts stopped
  - Agency issued an Advanced Notice of Proposed Rulemaking in March 2018
- October 2018 – Agency issued proposed bylaw amendments considering both the 2013 feedback and information gathered with the ANPR



# Bylaws – Proposal

- Proposal in many ways tracked existing NCUA legal opinion letters on bylaws
- Some problematic items as well
  - Proposal would not have counted FCU employees or officials to meet quorum requirements for annual or special meetings
  - Nonparticipation policy did not provide alternatives to the expulsion process that the industry sought



# Bylaws – Final

- September 19, 2019 – NCUA finalized the new version of its model bylaws
- Changes are not huge, mostly incorporates existing guidance found in years of legal opinion letters
- Does add clarity in some areas including the process for seeking nonconforming amendments



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# Joint Accounts

- To be a member, must have par value on deposit with the FCU
- Two methods for joint accounts so both people are members of the FCU
  - Two par values held in one account
  - Separate account to hold joint member's par
- NCUA did not change this despite feedback that allowing married couples to jointly own/establish par would be helpful





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# Trust Accounts

- FCUs reported confusion on how to handle trust accounts
- Revocable versus irrevocable trusts – eligibility
  - Revocable: can be changed after establishment
    - Person who established the trust (settlor) must be a member
  - Irrevocable: cannot be changed after establishment
    - Either the settlor or the beneficiaries of the trust can be a member
- Par can be held in the trust account itself
- How does a trust become a member in its own right?
  - All parties to the trust must be within the FOM



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# Par Values for Different Classes of Members

- FCUs sometimes ask if different par value can be created for different kinds of accounts
- Several legal opinion letters on this
  - Some past letters indicate different par values for different accounts is permissible
  - Warn against creating “different classes of members”
  - Advised that there be a rational basis for the practice
  - NCUA [legal opinion letter 04-1205](#)



# Par Values for Different Classes of Members

- 2019 bylaws incorporate some past guidance and confirm this is permissible
- Bylaws include sample clauses:
  - Students
  - Minors
  - Non-natural persons (e.g. businesses)
- New commentary: Can establish a higher par value for new members or those with only a share account
- Be careful not to violate any antidiscrimination laws



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# FCU Meetings

- Bylaws permit FCUs to allow virtual attendance and participation in annual & special meetings
  - Must still have an in-person meeting in the county where the FCU is located or within 100 miles of an office
- Staff commentary “encourages” posting a live webcast of annual & special meetings
- Also encourages posting a video of the annual meeting on the FCU’s website
- Quorum is still 15, includes CU staff, directors

- Adds a requirement to broadly publicize the nomination process including posting on the website
- Would also need to post information about nominations by petition on the FCU website
- Bylaws continue to have four options for elections





# Elections

1. In-person elections; nominating committee & nominations from the floor
2. In-person elections; nominating committee and nominations by petition
3. Election by ballot boxes or voting machine; nominating committee and nomination by petition
4. Election by electronic device or mail ballot; nominating committee and nominations by petition



# Elections

- Voting by “electronic device” can include voting by phone or electronic mail
- Preamble, staff commentary are clear that there are many permissible forms of electronic voting
- Electronic-only voting is not permitted
  - Concerns that this would disenfranchise some members like those without devices or without reliable internet
- Will consider bylaw amendments that allow electronic only voting on a case by case basis



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# Board of Directors – Monthly Meetings

- BOD must still meet monthly
- At least one meeting a year must be in person
  - Only a quorum needs to be present, remaining board members can participate by teleconference
- Can vote to remove a board member who misses:
  - 3 consecutive meetings
  - 4 meetings in any 12 consecutive months; or
  - 4 meetings in any calendar year



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# Board of Directors – Emeritus Positions

- Legal opinion letters allow director emeritus positions & provide guidance
- Bylaws incorporate this past guidance
- Former directors would be permitted to be named director emeritus
- Could attend, participate in board meetings but may not vote or exercise official duties
- Subject to confidentiality, conflict of interest standards



# Board of Directors – Associate Directors

- Legal opinions also permit associate director positions
- Can give qualified individuals an opportunity to essentially be trained without full BOD responsibilities
- NCUA describes this as an “apprenticeship”
- Associate directors may have access to sensitive information so similar to emeritus role, confidentiality and conflict of interest provisions apply



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# Expulsion

FCU Act:

*“...a member may be expelled **by a two-thirds vote of the members of a Federal credit union** present at a special meeting called for the purpose, but only after opportunity has been given him to be heard.”*

12 U.S.C. § 1764



# Expulsion

FCU Act exception to the special meeting – expulsion by “nonparticipation”

*“The [BOD] of a [FCU] may, by majority vote...adopt and enforce a policy with respect to expulsion from membership based on nonparticipation by a member in the affairs of the credit union. In establishing its policy, the [BOD] should consider a member’s failure to vote in annual [CU] elections or failure to purchase shares from, obtain a loan from, or lend to the [FCU]...”*

- Requires advance notice to the members

# Expulsion

- Statutory language seems to give NCUA discretion
  - Shouldn't egregious behavior (failing to positively be a participant in the FCU) be nonparticipation?
- NCUA declined to read “nonparticipation” more broadly to include actions like habitual default on loans, violent/disruptive acts or member misconduct
- Preamble: the “most reasonable interpretation” – not being involved with or participating in something



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# Member in Good Standing

- New section 5 to Article II clarifies what it means to be a member in good standing
  - Maintain minimum par value
  - Not “significantly delinquent” on loans (not just *any* delinquency like only having one missed payment but instead is “substantial & material”)
  - No accounts have been closed due to abuse or negligence



# Member in Good Standing

- New section 5 to Article II clarifies what it means to be a member in good standing
  - Has not caused a loss to the FCU
  - Has not engaged in objectionable activities (violence, harassment of staff, disruptive, belligerent, etc.)
- Non-exhaustive examples in the commentary



# Member in Good Standing

- Members in good standing retain all rights & privileges of FCU membership such as:
  - Maintain membership status and a share account
  - Access to FCU facilities
  - Participate in elections and attend meetings
  - Petition for removal of directors and committee members
- Not in good standing? FCU may limit the member's services



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# Limitation of Services

- What can we do with problem members?
  - Limit their services
- Multiple legal opinion letters on this permitting FCUs to limit services to members
- Theme: FCU must have a rational basis between the member's conduct and the services limited
  - Example: Cause the FCU a loss, not eligible for loans



# Limitation of Services

- 2019 bylaws incorporate guidance provided by past legal opinion letters
- Intent is to provide clarity
- FCUs still have “broad discretion” on how to handle problematic members through a limitation of services policy



# Limitation of Services – Policy Requirement

- FCU's BOD may vote to adopt a policy
- Must provide written notice to members at least 30 calendar days before its effective date
- New members must also be provided with a written notice of the policy
- Not a prescriptive notice requirement
  - May be a good idea to provide some detail
  - Prevent complaints, possible UDAAP type claims
  - May help make the policy contractually enforceable



# Limitation of Services

- What rights does a member who is NOT in good standing retain?
  - Attend, participate in, and vote at FCU meetings
  - Maintain a share account
- Legal opinion letters referred to this as “basic” or “fundamental” member rights



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# FAQ – Must Our FCU Adopt the Bylaws?

**NO**

- FCUs can keep their current bylaws
- It is also permissible to adopt the 2019 bylaws in part but beware adopting conflicting provisions



# FAQ – Must Our FCU Adopt the Bylaws?

*“...the NCUA Board encourages FCUs to adopt the revised bylaws....FCUs may also adopt portions of the revised bylaws and retain the remainder of previously approved bylaws, but the [NCUA] cautions FCUs to be extremely careful...because they run the risk of having inconsistent or conflicting provisions...”*



# FAQ – How Can We Amend Our Bylaws?

- Still have some “fill in the blank” options
  - Continue to require 2/3 vote of the FCU’s directors
  - Do not need to submit these changes to NCUA
- Want to deviate from the bylaws and adopt nonconforming amendments?
- Can apply to NCUA for other amendments through the Office of Credit Union Resources & Expansion (CURE)





# FAQ – How Can We Amend Our Bylaws?

- Request to CURE must include the following:
  1. Section of bylaws the FCU wants to amend;
  2. Reason for/purpose of the amendment;
  3. Explanation of why this amendment is desirable and what it will accomplish for the FCU; and
  4. Specific wording of the proposed amendment.
- CURE will advise whether the amendment is approved within 60 days



# FAQ – How Can We Amend Our Bylaws?

- What if CURE does not issue a decision within 60 days? The proposed amendment is considered denied *unless*
  - CURE requests an extension of time; and
  - The FCU agrees to the request
- If the amendment is denied or CURE still does not reach a decision, the FCU can appeal



# FAQ – How Can We Amend Our Bylaws?

- If CURE does not reach a timely decision, it must give the FCU written notice within 30 days
- Must include a statement of any concerns CURE has with the FCU's request
- NCUA recommends reviewing [previously approved bylaw amendments](#) before submitting requests
  - Opinions issued after April 2006 include the bylaw text
- These are case-by-case decisions



## FAQ –If Adopting, Do We Need to Submit to NCUA?

- It is clear that adopting “fill in the blank” provisions only require BOD vote, not NCUA approval
- The bylaws and the commentary do not explicitly state a process for replacing a FCU’s current bylaws with the 2019 bylaws
- Preamble says “If an FCU elects to adopt the new version, that FCU only needs to adopt a board resolution to that effect...”
- NAFCU has asked NCUA to clarify

# Key Takeaways

- For the most part, the 2019 bylaws are the 2007 bylaws with more clarity
- Most differences are incorporating many of the key legal opinion letters on various topics
- Does clarify that more modern election voting options and meeting options are available
- Requires posting the bylaws on the FCU's website and encourages posting other information online



# Questions

Brandy Bruyere, NCCO  
NAFCU VP of Regulatory Compliance  
703-842-2241  
[bbruyere@nafcu.org](mailto:bbruyere@nafcu.org)