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NATIONAL CREDIT UNION ADMINISTRATION

12 CFR Part 701

[NCUA-2022-0132]

RIN: 3133-AF51

Federal Credit Union Bylaws

AGENCY: National Credit Union Administration (NCUA).

ACTION: Notice of proposed rulemaking.

SUMMARY: On March 15, 2022, Congress enacted the Credit Union Governance Modernization Act of 2022 (Governance Modernization Act). Under the statute, the NCUA has 18 months following the date of enactment to develop a policy by which a federal credit union (FCU) member may be expelled for cause by a two-thirds vote of a quorum of the FCU's board of directors. The NCUA Board (Board) is now proposing to amend the standard FCU bylaws (FCU Bylaws) to adopt such a policy.

DATES: Comments must be received by [**INSERT DATE 60 DAYS AFTER DATE OF PUBLICATION IN THE FEDERAL REGISTER**].

ADDRESSES: You may submit written comments, identified by RIN 3133-AF51, by any of the following methods (**Please send comments by one method only**):

- Federal eRulemaking Portal: https://www.regulations.gov. The docket number for this proposed rule is NCUA-2022-0132. Follow the instructions for submitting comments.
- Mail: Address to Melane Conyers-Ausbrooks, 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 may view all public comments on the Federal eRulemaking Portal at https://www.regulations.gov, as submitted, except for those we cannot post for technical reasons. The NCUA will not edit or remove any identifying or contact information from the public comments submitted. Due to social distancing measures in effect, the usual opportunity to inspect paper copies of comments in the NCUA's law library is not currently available. After social distancing measures are relaxed, visitors may make an appointment to review paper copies by calling (703) 518-6540 or emailing OGCMail@ncua.gov.

FOR FURTHER INFORMATION, CONTACT: Lisa Roberson, Deputy Director, Office of Consumer Financial Protection; Paul Dibble, Consumer Access Program Officer, Office of Credit Union Resources and Expansion; or Rachel Ackmann, Senior Staff Attorney, Office of General Counsel, 1775 Duke Street, Alexandria, VA 22314-3428. Lisa Roberson can also be reached at (703) 548-2466, Paul Dibble can be reached at (703) 664-3164, and Rachel Ackmann can be reached at (703) 548-2601.

SUPPLEMENTARY INFORMATION:

I. Background

Under the Federal Credit Union Act (FCU Act) and standard FCU Bylaws, there are currently only two ways a member may be expelled: (1) A two-thirds vote of the membership present at a special meeting called for that purpose, and only after the individual is provided an opportunity to be heard; and (2) for non-participation in the affairs of the credit union, as

specified in a policy adopted and enforced by the board.[1] These requirements are set out in the standard FCU Bylaws in Appendix A to part 701 of the NCUA's regulations.[2]

The FCU Bylaws were last amended by the NCUA Board in 2019 (2019 Bylaws Final Rule).[3] The 2019 Bylaws Final Rule was a comprehensive update that sought to modernize, clarify, and simplify the FCU Bylaws and was the culmination of several years of engagement between the NCUA and FCUs. During the 2019 Bylaws Final Rule rulemaking, several commenters expressed concern that the FCU Act expulsion provisions discussed previously made it difficult to proactively limit security threats or financial harm caused by violent, belligerent, disruptive, or abusive credit union members. Specifically, commenters were concerned about the burden from requiring members to call a special meeting to seek to expel such members.

The 2019 Bylaws Final Rule, however, did not modify the procedures for expelling an FCU member as the procedures for expelling a member are governed by the FCU Act. Instead, the 2019 Bylaws Final Rule added a new section to the FCU Bylaws on limiting services for certain members. The 2019 Bylaws Final Rule created the concept of a "member in good standing."[4] So long as a member remains in good standing, that member retains all of the rights and privileges associated with FCU membership. A member not in good standing, however, may

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[1] 12 U.S.C. 1764.

[2] 12 CFR part 701, app. A. Section 108 of the FCU Act requires the Board to prepare periodically a form of bylaws to be used by FCU incorporators and to provide that form to FCU incorporators upon request. 12 U.S.C. 1758. FCU incorporators must submit proposed bylaws to the NCUA as part of the chartering process. Once the NCUA has approved an FCU's proposed bylaws, the FCU must operate according to its approved bylaws or seek agency approval for a bylaw amendment that is not among permissible options in the standard FCU Bylaws. 12 CFR 701.2(a).

[3] 84 FR 53278 (Oct. 4, 2019).

[4] 12 CFR part 701, app. A. Art. II, sec. 5.

be subject to an FCU's limitation of services policy. For example, an FCU may limit all or most credit union services, such as ATM services, credit cards, loans, share draft privileges, preauthorized transfers, and access to credit union facilities to a member who has engaged in conduct that has caused a loss to the FCU or that threatens the safety of credit union staff, facilities, or other members in the FCU or its surrounding property.

The 2019 Bylaws Final Rule was clear that, without question, certain actions warrant immediate limitation of services or access to credit union facilities, such as violence against other credit union members or credit union staff in the credit union facility or the surrounding property. The Board also stated clearly that an FCU may immediately take actions such as contacting local law enforcement, seeking a restraining order, or pursuing other lawful means to protect the credit union, credit union members, and staff. Nothing in the FCU Act or the FCU Bylaws prevents an FCU from using whatever lawful means it deems necessary to address circumstances in which a member poses a risk of harm to the FCU, its members, or its staff.

Even a member deemed not in good standing, however, retains fundamental rights as a credit union member. For example, a member not in good standing has the right to attend, participate, and vote at the annual and special meetings of the members and the right to maintain a share account.[5] Those rights may only be terminated through a member's expulsion, and the Board explained in the 2019 Bylaws Final Rule that it cannot amend the statutorily prescribed expulsion procedures for members.

In March 2022, however, Congress enacted the Governance Modernization Act to revise the FCU Act procedures for expelling members.[6] The legislative history of the Governance Modernization Act focused on FCUs' concerns that their ability to address violent and aggressive behaviors of certain members was inadequate. Similar to comments raised during the

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[5] Assuming there is no restraining or protective order from a court in place.

[6] Pub. L. 117–103 (Mar. 15, 2022).

2019 Bylaws Final Rule rulemaking, the legislative history included concerns that FCUs lacked the tools to adequately protect employees and other members from violent and abusive members and included concerns that members had threatened the life of an employee or in another case physically attacked a service representative. To address these concerns, Congress modified the FCU Act to provide FCUs with an option for expelling a member for cause by a two-thirds vote of a quorum of the board of directors. Additionally, the legislative history also described the need for using this authority as a rare option and focused on more extreme examples of member behavior. This statutory authority, however, is not self-enacting. The legislation gave the Board 18 months following the date of enactment of the statute to develop and promulgate pursuant to a rulemaking a policy that FCUs may adopt to expel members for cause.

The Board notes that it is focused on improving access to financial services, in part, through its Advancing Communities through Credit, Education, Stability and Support (ACCESS) initiative.[7] As part of this initiative, the NCUA is working to expand the availability of credit to stimulate economic growth and improve the financial well-being of all Americans. The Board believes that the expulsion of members is an extreme remedy that may have the effect of denying individuals access to financial services. In addition, as financial cooperatives, the expulsion of a member-owner by a credit union is an expressly significant action. Therefore, the Board concurs with certain statements in the legislative history that use of the authority under the Governance Modernization Act should be rare and saved for egregious examples of member behavior.

II. The Proposed Rule

The NCUA is now issuing a proposed rule to adopt a policy by which an FCU member may be expelled for cause by a vote of two-thirds of a quorum of an FCU's board of directors. The proposed rule would also make conforming changes to Article II of the FCU Bylaws regarding members in good standing. These proposed changes are discussed in detail below.

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[7] https://www.ncua.gov/support-services/access.

Member in Good Standing

As discussed previously, the 2019 Bylaws Final Rule codified the concept of a "member in good standing." So long as a member remains in good standing, that member retains all of the rights and privileges associated with FCU membership.[8] A member not in good standing, however, may be subject to an FCU's limitation of services policy. The primary reason for permitting FCUs to adopt a limitation of services policy was to provide FCUs with an alternative to holding a special meeting to address certain egregious member behavior.[9] The passage of the Governance Modernization Act, however, has provided FCUs' boards of directors with direct authority (subject to the NCUA Board promulgating a policy) to expel a member for cause.

The proposed rule would retain the member in good standing provisions. The Board believes including both authorities in the FCU Bylaws provides additional flexibility for FCUs to address certain disruptive member behaviors. First, through a limitation of service policy, an FCU may pursue a more targeted approach to deal with certain disruptive behaviors that may not otherwise warrant expulsion. As the Board noted in the 2019 FCU Bylaws Final Rule, expulsion from membership is a very serious remedy, and it may be beneficial for FCUs to have the option of choosing other remedies short of expulsion to deal with certain disruptive member behaviors. For example, a member may have caused losses due to credit card delinquencies. An FCU could limit such a member's access to certain credit products, but otherwise allow the member to maintain access to share accounts. If the FCU expels the same member, their access to both types of accounts would be terminated. Or, for example, a member may have repeatedly cursed at credit union employees such that the member is prohibited from physical access to a branch, but otherwise may electronically access the FCU's products and services.

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[8] 12 CFR part 701, app. A. Art. II, sec. 5.

[9] 84 FR 53278 (Oct. 4, 2019).

Second, an FCU may use the limitation of services policy in the case of a violent or abusive member who has yet to be expelled. The Governance Modernization Act requires certain procedures before a member's expulsion, including a 60-day period in which the member may request a hearing. As stated in the 2019 Bylaws Final Rule, without question, certain actions warrant immediate limitation to FCU services or access to credit union facilities, such as violence against other credit union members or credit union staff in the credit union facility or the surrounding property.[10] So an FCU may use its limitation of services policy, in conjunction with its ability to expel a member for cause, to immediately address circumstances in which a member poses a risk of harm to the FCU, its staff, or its members. Therefore, the proposed rule has retained the member in good standing provisions in Article II, Section 5 of the FCU Bylaws. Finally, use of a limitation of service policy does not require a board vote. Therefore, it may be easier and more expeditious for FCUs to exercise these restrictions.

The proposed rule would include a few substantive changes to the member in good standing provisions. Specifically, the current definition of a member not in good standing would be removed. This definition includes a list of behaviors that if engaged in by a member could trigger limitation to FCU services. However, the Governance Modernization Act also includes a list of behaviors that may warrant termination of membership. Instead of including two separate lists of disruptive, abusive, or violent behaviors, the proposed rule would define a member not in good standing as a member who has engaged in any of the conduct listed in the Governance Modernization Act, as implemented in Article XIV of the FCU Bylaws. The proposed rule would also make other technical conforming changes. For example, the proposed rule would amend the requirement that the disruptive, violent, or abusive behavior have a logical relationship between

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[10] Further, an FCU may immediately take actions such as contacting local law enforcement, seeking a restraining order, or pursuing other lawful means to protect the FCU, its members, and staff, and nothing in the FCU Act nor the FCU Bylaws prevents an FCU from using whatever lawful means it deems necessary to address circumstances in which a member poses a risk of harm to the FCU, its members, or its staff.

the objectionable activities and the services to be suspended. This provision would be removed because it is not included in the Governance Modernization Act. The Board expects an FCU board of directors to use appropriate discretion and only limit services when necessary; however, the proposed rule would remove the express provision related to the nexus between the behavior and the limitation of services for consistency.

Question 1. The Board seeks comments on whether the limitation of services policy should remain in the FCU Bylaws. Should the Board retain the current language regarding a member not in good standing or should the Board reference the for-cause termination provision in Article XIV? Should the Board retain the current language regarding a logical relationship between the objectionable behavior and limitation of services? Should the final rule require the conduct to occur at the FCU? Depending on the input the Board receives, it may modify this provision in the final rule under one of these alternatives.

Expulsion and Withdrawal

Under the Governance Modernization Act, a member may be expelled for cause by a two-thirds vote of a quorum of the FCU's board of directors. An FCU may only use this process to expel a member after the NCUA has developed and promulgated pursuant to a rulemaking a corresponding policy for expulsion and implemented such policy through rulemaking within 18 months following the date of enactment and the credit union has adopted the standard Bylaw amendment. The proposed policy for member expulsion is discussed below.

Notice of the Expulsion Policy

Under the Governance Modernization Act, an FCU's directors may expel a member only if the FCU has provided, in written or electronic form, a copy of NCUA's expulsion policy to each member of the credit union. As such, before an FCU expels a member under these provisions, it must send a copy of its Article XIV to each member. It would be insufficient for an FCU to post a copy of Article XIV on its website, as the Act states the FCU must provide the policy to "each member" and also uses the phrase "distribution of policy to members."

Additionally, the Governance Modernization Act states that the policy has to be provided in written or electronic form. Under the proposed rule, an FCU could only provide a copy of the policy electronically if the member has elected to receive electronic communications from the FCU. The Board believes this requirement is a reasonable balance between burden on FCUs and transparency to members. Members who have not elected to receive electronic communications from the FCU may not expect important communications being received electronically and therefore may be less inclined to read the notice.

The proposed rule does not include a standard disclosure form of the NCUA expulsion policy outside of the language in Article XIV of the FCU Bylaws. However, the proposed rule states that the communication of the expulsion policy, along with all notices required under the proposed rule, must be legible, written in plain language, and reasonably understandable by ordinary members. The Board is not including a standard disclosure form in the proposed rule to provide FCUs with additional flexibility. The Board understands FCUs may adopt variations to their Article XIV. For example, some FCUs may provide additional information to members on how the FCU would conduct a hearing before the FCU's board of directors and may permit in-person attendance at the hearing. Any variation to NCUA's expulsion policy, or Article XIV, would constitute a bylaw amendment and is subject to NCUA approval.

Question 2. The Board seeks comments on whether the final rule should include a standard disclosure for all FCU members separate and apart from the language in Article XIV. The Board requests comments on whether FCUs should be required to get NCUA approval for all bylaw amendments related to expulsion procedures. Should certain modifications be considered fill-in-the-blank type provisions and therefore not require NCUA approval? For example, if an FCU opts to permit an in-person hearing, should NCUA approval be required? Should the Board also consider requiring both mail and electronic delivery of notices, even if the consumer has elected to receive electronic communications?

<u>Expulsion Vote and Notice of Pending Expulsion</u>

The Governance Modernization Act provides that an FCU's board of directors may vote to expel a member for cause by a two-thirds vote of a quorum of the directors of the credit union. Under the proposed rule, if an FCU's board votes to expel a member, the member must be notified of the pending expulsion, along with the reason for such expulsion.[11] Such notice shall be provided in person, by mail to the member's address, or electronically. Electronic delivery is only permitted if the member has elected to receive electronic communications from the FCU. The proposed rule would require that the reason for the expulsion be specific and not just include conclusory statements. For example, a general statement saying the member's behavior has been deemed abusive and the member is being subject to expulsion procedures would be insufficient as an explanation. Instead, the FCU should include a date of the interaction(s) and specific information describing the interaction, including a general description of the member's conduct. Likewise, a notice stating the member violated the membership agreement would also be insufficient as an explanation for the expulsion. The notice should include specific information about the how the member violated the agreement and include other relevant information as appropriate. The Board notes that the member would be relying on the provided notice if a hearing is requested. As such, the notice must include sufficient detail for the member to understand why he or she is being subject to expulsion so that the member has a meaningful opportunity to present his or her case against expulsion and an opportunity to respond to the FCU's concerns in a requested hearing. The notice must also tell the member that any complaints related to their potential expulsion should be submitted to the NCUA's website.[12] Finally, the notice must also clearly state the member's right to request a hearing, but if a hearing is not requested, membership will automatically terminate after 60 calendar days.

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[11] As discussed previously, in the case of a violent member or a member who threatens violence, the FCU should take immediate action to protect its staff, other members, or its premise. An FCU may use its limitation of services policy to restrict access to FCU facilities or may contact local law enforcement as appropriate.

[12] Currently complaints can be submitted to the NCUA at either mycreditunion.gov or ncua.gov.

Question 3. How prescriptive should the NCUA expulsion policy be regarding the content of the notice of expulsion? Would additional requirements on the specificity of the notice be necessary or useful to include in the policy? It is the Board's intent to balance the potential burden to FCUs with concerns regarding transparency and fairness for members subject to expulsion.

Hearing

Under the Governance Modernization Act, a member has 60 calendar days from the date of receipt of a notification to request a hearing from the board of directors of the FCU. The proposed rule further provides that the FCU must maintain a copy of the notice provided for its records. The Board notes that the member has 60 calendar days from the date of receipt, not the date the FCU provides the notice. The member also has 60 calendar days to provide the FCU with their intent to have a hearing. Therefore, the member may mail the notice 60 days after the notice is received. As such, the FCU may not receive the notice within 60 calendar days. Therefore, the Board recommends that FCUs provide sufficient time for both the member's receipt and the FCU's receipt before expelling a member.

Question 4. Should the Board require the FCU to maintain a copy of the notice provided? Is this proposed requirement burdensome for FCUs?

If a member does not request a hearing, the member is automatically expelled after the end of the 60-day period. If a member requests a hearing, the board of directors must provide the member with a hearing. The statute is silent on whether the hearing must be in person.[13] The

[13] The Board notes that in other contexts, the use of the term "hearing" under federal law does not necessitate that the hearing must be held in person. See generally, Jeremy Graboyes, Legal Considerations for Remote Hearings in Agency Adjudications, Administrative Conference of the United States (June 2020). As such, the Board does not believe that the statute requires an in-person hearing. However, as discussed previously, the Board is proposing to require that the hearing must provide the member with an opportunity to present their case and is soliciting comments on whether the final rule should provide for a default mandate that FCUs provide in-person hearings, with limited exceptions.

Board does not believe it is necessary to require FCUs provide an in-person hearing and is concerned that an in-person hearing may be problematic in cases of expulsion due to violence or threatened violence. Additionally, the Board believes a virtual hearing that provides the opportunity for the member to orally present their case is sufficient, but FCUs may permit in-person attendance at the hearing.

Question 5. The Board is proposing that the hearing may take place other than in person, but the Board solicits comments on whether fairness or other principles or other law may call for an in-person hearing. Depending on the input it receives, the Board may modify this requirement in the final rule to account for any compelling basis to require in-person hearings.

Under the proposed rule, the FCU may not raise any rationale or reason for expulsion that is not explicitly included in the notice to the member. This requirement is intended to ensure members are given a fair opportunity to present their case against expulsion and an opportunity to respond to the FCU's concerns. If additional conduct that may warrant expulsion occurs after the expulsion notice is provided to the member, then the FCU may either not discuss the subsequent conduct at the expulsion meeting or provide the member a new notice with a 60-day window to request a hearing that includes the subsequent conduct.

The proposed rule would not include prescriptive requirements related to the structure and procedure for the hearing. The only requirements included in the proposed rule related to the hearing are that it permits the meaningful opportunity for the member to orally present their case to the board and that the FCU board does not raise any new fact or cause for expulsion. Instead, the Board believes that each FCU should have the flexibility to conduct a hearing as it deems appropriate. Additionally, the Board expects hearings to be held in a fair, reasonable, and consistent manner that provides members a reasonable opportunity to present their case. Finally, the member may choose to provide a written submission to the credit union board instead of a hearing with oral statements.

Question 6. Should the proposed rule include additional requirements related to the structure and procedure of an expulsion hearing? Should the rule specifically provide that a member may request to provide a written response instead of a hearing with oral submissions? Should the final rule include any requirements related to appropriate safety procedures for FCUs choosing to do an in-person hearing? The Governance Modernization Act does not include an explicit appeal right for the member. Should the final rule consider adding an appeal right for members? For example, should the supervisory committee be required to review records related to expelled members?

FCU Board Vote

After the hearing, the FCU board of directors must hold a vote in a timely manner on expelling the member. The proposed rule defines a timely manner as within 30 calendar days.

Question 7. The Board invites comments on whether the rule is too prescriptive and instead of a 30-day timeframe for the board vote following a hearing, should the timeliness be left to FCUs' discretion?

The Board notes that if a member requests a hearing or provides a written statement, the FCU board must vote twice on the member's expulsion. The board of directors would first vote to expel the member, which initiates the 60-day period after receipt of the notice, and then would vote again after the requested hearing. If a hearing is not requested, then the member would automatically be expelled 60-days after receipt of the notice and a second board vote would not be required.

Notice of Expulsion

If a member is expelled, either automatically at the end of the 60-day period after receipt of the notice or after the board votes to expel the member after a hearing, the FCU must provide notice of the expulsion. Under the proposed rule, the notice must provide information on the effect of the expulsion, including information related to account access and any withdrawals by the FCU related to amounts due. Specifically, the notice should include pertinent information to

the member, including that expulsion does not relieve a member of any liability to the FCU and that the FCU will pay all of the member's shares upon their expulsion less any amounts due. The notice should include a line-by-line accounting of any deductions related to amounts due. The notice should also include when and how the member will receive any money in their accounts. The notice must be provided to the member in person, by mail to the member's address, in written form or, if the member has elected to receive electronic communications from the credit union, may be provided electronically.

Question 8. The FCU Act does not require FCUs to call the members' outstanding loans or other obligations if the member is expelled. Should the final rule include a minimum amount of time before an FCU is permitted to call in an existing obligation or offset amounts owed to the FCU? For example, should the rule prohibit any offsets or calling of credit for 90 days following a member's expulsion?

For Cause

Under the Governance Modernization Act, an FCU's board may expel a member for cause, which means: (A) a substantial or repeated violation of the membership agreement of the credit union; (B) a substantial or repeated disruption, including dangerous or abusive behavior (as defined by the National Credit Union Administration Board pursuant to a rulemaking), to the operations of a credit union; or (C) fraud, attempted fraud, or other illegal conduct that a member has been convicted of in relation to the credit union, including the credit union's employees conducting business on behalf of the credit union.

Regarding a repeated non-substantial violation of the membership agreement, under the proposed rule the FCU must have provided written notice to the member at least one time prior to the notice of expulsion, and the member must have repeated the violation after having been notified of the violation. Further, under the proposed rule, the written notice must state the specific nature of the violation and that if the conduct occurs again the member may be expelled from the FCU. The Board believes this is necessary to ensure members are aware that they may

be expelled for repeated, non-substantial violations of the membership agreement. The Board notes that this warning notice before the notice of expulsion is only for potential expulsions related to repeated violations that are not deemed substantial. The FCU's board may act to expel a member immediately for substantial violations of the membership agreement and does not need to provide a warning notice for substantial violations of the membership agreement.

Question 9. Should there be a limit on the time between the FCU's notice of a violation and the repeated behavior? Should the Board provide, for example, that the repeated behavior must occur within two years of the notice? Or should the Board consider another period designed to ensure that repeated but insubstantial violations that are remote in time do not lead to expulsion under this provision?

Question 10. What are typical violations of a membership agreement that cause concern for FCUs? Do FCUs consider causing a loss to be a substantial violation of their membership agreement? Would FCUs consider any loss a substantial violation? Or would only material losses be considered a substantial violation? If so, the Board is interested in commenters' opinions on what threshold constitutes a material loss?

Question 11. Should the Board try to define substantial violations versus more minor or immaterial violations? An earlier version of the Governance Modernization Act expressly permitted expulsion for causing material losses to FCUs. This express authority was removed, which may imply that FCUs cannot expel a member for causing a loss. However, under the current version of the Governance Modernization Act, members may be expelled for substantial or repeated violation of the FCU's membership agreement.

The Board understands that it is customary for membership agreements to prohibit members from causing a loss to the FCU. Therefore, under the proposed rule, FCUs may expel a member for causing a loss. Should the Board consider prohibiting FCUs from expelling members for causing a loss outside of fraudulent or other criminal acts? The Board understands that FCUs currently may expel a member for causing a loss after holding a special meeting of

the members. This authority would not be impacted by the proposed rule. However, the authorities in the Governance Modernization Act provide an expedited process for expelling members for more egregious conduct.

If FCU boards of directors are permitted to expel members for causing a loss, should the Board require FCUs to adopt a policy such that it is applied consistently across members? If the final rule does prohibit FCU board of directors from expelling a member for causing a loss, should the Board change the proposed member in good standing provision to expressly permit members to be denied services for causing a loss? Are there violations of the membership agreement other than causing a loss for which FCUs would seek to expel a member?

Under the proposed rule, a member may also be expelled by an FCU board for a substantial or repeated disruption, including dangerous or abusive behavior, to the operations of a credit union. The proposed rule would define dangerous or abusive behavior as: (1) Violence, intimidation, physical threats, harassment, or physical or verbal abuse of officials or employees of the credit union, members, or agents of the credit union (this includes actions while on FCU premises and through use of telephone, mail, e-mail or other electronic method); (2) Behavior that causes or threatens damage to FCU property; and (3) Unauthorized use or access of FCU property. The proposed rule would further provide that expressions of frustration with the FCU or its employees through elevated volume and tone; expressions of intent to seek lawful recourse, regardless of perceived merit; or repeated interactions with FCU employees are insufficient to constitute dangerous or abusive behavior. This definition is derived from the current definition of a member not in good standing.

Similar to repeated violations of the membership agreement, if the FCU's board acts to expel a member for repeated disruptions that are not substantial, the FCU must have first provided written notice to the member after an instance of such disruption. In contrast, substantial disruptions, including any conduct that would constitute dangerous or abusive behavior, may be grounds for immediate action and termination of membership. Additionally, as

discussed previously in connection with limitation of services polices, an FCU may immediately take actions such as limiting services, contacting local law enforcement, seeking a restraining order, or pursuing other lawful means to protect the credit union, credit union members, and staff, and nothing in the FCU Act or the FCU Bylaws prevents an FCU from using whatever lawful means it deems necessary to address circumstances in which a member poses a risk of harm to the FCU, its members, or its staff.

A member may also be expelled for cause if the member has engaged in fraud, attempted fraud, or other illegal conduct that a member has been convicted of in relation to the credit union, including the credit union's employees conducting business on behalf of the credit union. Under the proposed rule, a criminal conviction is not necessary for membership expulsion related to fraud or attempted fraud. The Board believes that the Governance Modernization Act does not require a conviction related to fraud and attempted fraud, and a conviction is only required for the catchall category related to any other illegal conduct. This interpretation of the Act is reasonable given the concern that many factors may affect whether a person is convicted of fraud or attempted fraud, including local prosecutorial resources. The Board is aware that local authorities are not always able or willing to prosecute every instance of fraud or attempted fraud.

Question 12. Should the Board define fraud or attempted fraud? Should FCU boards be permitted to terminate membership only when a member has been convicted of fraud or attempted fraud? If a member is convicted of other illegal conduct and the conviction is later overturned, should the rule provide for automatic reinstatement or otherwise include a required procedure to allow for reinstatement in this circumstance? Alternatively, does the Governance Modernization Act's reinstatement process (discussed in the next section) adequately cover this scenario by affording an expelled member the right to seek reinstatement?

Reinstatement

Under the Governance Modernization Act, a member expelled by a two-thirds vote of an FCU's board of directors must be given an opportunity to request reinstatement of membership.

The member may be reinstated by either a majority vote of a quorum of the directors of the FCU or a majority vote of the members of the FCU present at a meeting. Under the proposed rule, such a meeting would have to be a special meeting. A member would not be entitled to attend the meeting in person, as the Governance Modernization Act provides in a rule of construction. But the statute also does not bar the FCU from permitting in-person attendance. Accordingly, the proposed rule would allow the FCU to determine whether to permit in-person attendance. The proposed rule would also specify that an FCU is only required to hold a board vote or special meeting in response to a reinstatement request once.

Question 13. Should the Board require FCUs to vote on members' reinstatement more than once? For example, should the proposed rule state that FCU boards need to reconsider reinstatement requests only every six, twelve, or eighteen months?

Class of Members

Under the Governance Modernization Act, an expulsion of a member by an FCU's board of directors must be done individually, on a case-by-case basis. Further, neither the NCUA Board nor any FCU may expel a class of members. All anti-discrimination laws and regulations are applicable, and expulsions of a class of members based on any class or characteristic such as, but not limited to, race, religion, national origin, gender, sexual orientation, age, familial status, or disability status, are strictly prohibited. An FCU may have liability if it exercises its discretion in a manner that has a discriminatory purpose or effect under anti-discrimination laws. In addition, members cannot be expelled solely due to or in retaliation for their complaints to the NCUA or any other regulatory agency, such as the Consumer Financial Protection Bureau, and members who are employees or former employees of the FCU cannot be expelled for any protected whistleblower activities.[14]

[14] See 12 U.S.C. 1790b.

Further, under the proposed official staff commentary, the prohibition on expelling a class of members would explicitly include an FCU board acting to remove all members who engaged in a certain violation of the membership agreement, or all delinquent members or a class of delinquent members in one action. For example, an FCU board may not remove all members who have caused a loss of $500 to the FCU or have been delinquent for 90 days or more. The Board would interpret such action as removing a class of members and therefore prohibited by the statutory requirement that expulsions through a vote of directors of the credit union be done individually, on a case-by-case basis.

FCUs also should be aware of the potential for disparate treatment among members. An FCU must ensure that its implementation of the authority to expel members for cause is done consistently and does not violate anti-discrimination laws or regulations. FCUs may consider adopting a policy related to when its board should expel members, especially if the FCU intends to expel members for violations of the membership agreement. To enable NCUA examiners to review relevant information related for cause expulsions, the proposed rule would require FCUs to maintain records relating to expelled members for five years. The rule would not specify necessary documents for the record, but the Board notes it would expect a record to include general documents related to the member, such as their last known contact information, membership agreement, or loan files, and specific documents related to the cause of the member's termination.

Question 14. Should the possibility of FCUs expelling some members but not others for engaging in certain behavior be a cause for concern?

Question 15. Should the Board include a record retention requirement related to expelled members? Do commenters suggest any alternative to a record retention requirement? Should the Board choose a shorter or longer retention period than five years? If so, how long should the Board require FCUs to retain their expulsion records, and why? The Board seeks comments on whether it should specify certain documents or information that FCUs are required to maintain.

Implementation

If the proposed rule is issued as a final rule, FCUs will have the option to amend their bylaws to provide their boards of directors with authority to expel members for cause. FCUs seeking to adopt these authorities would amend their bylaws through a two-thirds vote of their boards of directors. Such FCUs would not need to submit the amendment to the NCUA for its approval provided the amendment is identical to the language included in any final rule issued by the Board. However, the amendment included in the proposed rule is optional, and FCUs would not need to amend their bylaws or take any other action in response to any final rule issued.

Past Member Conduct as Grounds for Expulsion

FCUs cannot use member conduct that occurred prior to the effective date of the final rule as grounds for expelling members. For example, if a member caused a loss to the FCU before the effective date of the final rule, the FCU may not expel the member due to that loss. The FCU could only expel the member if additional conduct that warrants expulsion occurs after the effective date of the final rule.

Question 16. Should the Board consider alternative dates for which member conduct may be considered as grounds for expulsion? Should the date be related to when notice of the policy is provided to members, when the FCU board adopts the Bylaws, or when the Governance Modernization Act was enacted?

III. Request for Comments

The Board welcomes comment on all aspects of the proposal.

IV. Regulatory Procedures

Paperwork Reduction Act

The Paperwork Reduction Act of 1995 (PRA) applies to rulemakings in which an agency creates a new or amends existing information collection requirements.[15] For purposes of the PRA, an information collection requirement may take the form of a reporting, recordkeeping, or a third-party disclosure requirement. The NCUA may not conduct or sponsor, and the respondent is not required to respond to an information collection unless it displays a valid Office of Management and Budget (OMB) control number. The current information collection requirements for FCU Bylaws are approved under OMB control number 3133–0052.

The notice requirements to be provided to the member are: (1) the notice of potential expulsion for cause, (2) the notice of expulsion, and (3) the notice of expulsion due to repeated, non-substantial violations of the membership agreement or repeated disruptions for non-substantial conduct. These notices will be provided to the member by the FCU as prescribed by proposed Sections 2 and 3 of Article XIV of Appendix A to Part 701. The information collection requirements associated with these disclosure notices vary depending on the number of respondents. It is estimated a total number 3,997 responses will be generated, taking an hour per response, for a total of 3,997 burden hours associated with the notice requirements. Additionally, FCUs are required to retain and maintain all records associated with the proposed expulsion policy and is estimated average 30 minutes per FCU for a total annual burden of 1,230 hours. Therefore, there is a total burden of 5,227 hours associated with this proposed rulemaking. The total burden associated with *OMB Control Number:* 3133–0052 is as follows:

OMB Control Number: 3133–0052.

Title of information collection: Federal Credit Union Bylaws, Appendix A to Part 701.

Estimated number respondents: 3,076.

Estimated number of responses per respondent: 347.

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[15] 44 U.S.C. 3507(d); 5 CFR part 1320

Estimated total annual responses: 1,066,603.

Estimated total annual burden hours per response: 0.35.

Estimated total annual burden hours: 376,033.

The NCUA invites comments on: (a) Whether the proposed collection of information is necessary for the proper performance of the functions of the agency, including whether the information will have practical utility; (b) the accuracy of the agency's estimate of the burden of the proposed collection of information, including the validity of the methodology and assumptions used; (c) ways to enhance the quality, utility and clarity of the information to be collected; and (d) ways to minimize the burden of the collection of information on those who are to respond, including through the use of appropriate automated, electronic, mechanical, or other technological collection techniques or other forms of information technology; and (e) estimates of capital or start-up costs and cost of operation, maintenance, and purchase of services to provide information.

All comments are a matter of public record. Interested persons are invited to submit written comments to (1) www.reginfo.gov/public/do/PRAMain. Find this particular information collection by selecting the Agency under "Currently under Review" and to (2) Dawn Wolfgang, National Credit Union Administration, 1775 Duke Street, Suite 6032, Alexandria, Virginia 22314-3428; Fax No. 703-519-8579; or email at PRAComments@ncua.gov. Given the limited in-house staff because of the COVID-19 pandemic, email comments are preferred.

Regulatory Flexibility Act

The Regulatory Flexibility Act (RFA) generally requires that when an agency issues a proposed rule or a final rule pursuant to the Administrative Procedure Act or another law, the agency must prepare a regulatory flexibility analysis that meets the requirements of the RFA and publish such analysis in the *Federal Register*. Specifically, the RFA normally requires agencies to describe the impact of a rulemaking on small entities by providing a regulatory impact analysis. For purposes of the RFA, the Board considers credit unions with assets less than $100

million to be small entities.[16] A regulatory flexibility analysis is not required, however, if the agency certifies that the rule will not have a significant economic impact on a substantial number of small entities and publishes its certification and a short, explanatory statement in the *Federal Register* together with the rule.

The Board does not believe the proposed rule will result in any burden to small entities. First, adoption of the flexibilities included in the proposed rule is optional, and FCUs would not be required to amend their bylaws. Additionally, even if FCUs revise their bylaws in response to the proposed rule, it is within FCUs' discretion to exercise the authority provided in the proposed rule to expel a member. As such, the proposed rule includes no affirmative requirements for small credit unions and will not affect the competitive balance between small and large credit unions. Therefore, the Board certifies that the proposed rule will not have a significant economic impact on a substantial number of small entities.

Executive Order 13132

Executive Order 13132 encourages independent regulatory agencies to consider the impact of their actions on state and local interests. The NCUA, an independent regulatory agency as defined in 44 U.S.C. 3502(5), voluntarily complies with the executive order to adhere to fundamental federalism principles.

This proposed rule only applies to FCUs and would not have substantial direct effects on the states, on the relationship between the National Government and the states, or on the distribution of power and responsibilities among the various levels of government. The NCUA has therefore determined that this rule does not constitute a policy that has federalism implications for purposes of the executive order.

Assessment of Federal Regulations and Policies on Families

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[16] NCUA IRPS 15–1, 80 FR 57512 (Sept. 24, 2015).

The NCUA has determined that this proposed rule would not affect family well-being within the meaning of section 654 of the Treasury and General Government Appropriations Act, 1999.[17]

List of Subjects in 12 CFR Part 701

Credit, Credit Unions, Federal Credit Union Bylaws.

By the NCUA Board on September 22, 2022.

Melane Conyers-Ausbrooks,

Secretary of the Board.

[17] Pub. L. 105–277, 112 Stat. 2681 (1998).

For the reasons discussed in the preamble, the Board proposes to amend 12 CFR part 701 as follows:

PART 701—ORGANIZATION AND OPERATION OF FEDERAL CREDIT UNIONS

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

Authority: 12 U.S.C. 1752(5), 1755, 1756, 1757, 1758, 1759, 1761a, 1761b, 1766, 1767, 1782, 1784, 1785, 1786, 1787, 1788, 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. In Appendix A to part 701:

a. Revise Article II, Section 5;

b. Revise Article XIV;

c. Revise Official NCUA Commentary - Federal Credit Union Bylaws, Article II(iii); and

d. Revise Official NCUA Commentary - Federal Credit Union Bylaws, Article XIV.

The revisions read as follows:

Appendix A to Part 701—Federal Credit Union Bylaws

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Article II. Qualifications for Membership

Section 5. *Member in good standing.* A member in good standing retains all their rights and privileges in the credit union. A member not in good standing may be subject to a policy that limits credit union services. A member not in good standing is one who has engaged in any of the conduct in Article XIV, Section 3 related to for-cause termination of membership. In the event of a suspension of service, the member will be notified of what accounts or services have been discontinued. Subject to Article XIV and any applicable limitation of services policy

approved by the board, members not in good standing retain their right to attend, participate, and vote at the annual and special meetings of the members and maintain a share account.

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Article XIV. Expulsion and Withdrawal

Section 1. *Expulsion procedure.* A credit union may expel a member in one of three ways. The first way is through a special meeting. Under this option, a credit union may: call a special meeting of the members, provide the member the opportunity to be heard, and obtain a two-thirds vote of the members present at the special meeting. The second way to expel a member is under a nonparticipation policy given to each member that follows the requirements found in the Act. The third way to expel a member is by a two-thirds vote of a quorum of the directors of the credit union for cause. A credit union can only expel a member through a vote of the directors of the credit union if it follows the policy for expulsion in section 2.

Section 2. A credit union's directors may vote to expel a member for cause only if the credit union has provided, in written or electronic form, if the member has elected to receive electronic communications from the credit union, a copy of this Article to each member of the credit union. The communication of the policy, along with all notices required under this section, must be legible, written in plain language, and reasonably understandable by ordinary members.

If a member will be subject to expulsion, the member shall be notified of the expulsion, along with the reason for such expulsion. The notice must include sufficient detail for the member to understand the grounds for expulsion and cannot include only conclusory statements regarding the reason for the member's expulsion. The notice must also tell the member that any complaints related to their potential expulsion should be submitted to the NCUA's website. The FCU must maintain a copy of the provided notice for its records. The notice must clearly state the member's right to request a hearing, and if a hearing is not requested membership will automatically terminate after 60 calendar days. The notice shall be provided in person, by mail to

the member's address, or, if the member has elected to receive electronic communications from the credit union, may be provided electronically.

A member shall have 60 calendar days from the date of receipt of a notification to request a hearing from the board of directors of credit union. A member is not entitled to attend the hearing in person, but the member must be provided a meaningful opportunity to orally present their case to the FCU board. The member may choose to provide a written submission to the Board instead of a hearing with oral statements. If a member does not request a hearing, the member shall be expelled after the end of the 60-day period after receipt of the notice. If a member requests a hearing, the board of directors must provide the member with a hearing. At the hearing, the board of directors may not raise any rationale or reason for expulsion that is not explicitly included in the notice to the member.

After the hearing, the board of directors of the credit union must hold a vote within 30 calendar days on expelling the member. If a member is expelled, either through the expiration of the 60-day period or a vote to expel the member after a hearing, notice of the expulsion must be provided to the member in person, by mail to the member's address, in written form or, if the member has elected to receive electronic communications from the credit union, may be provided electronically. The notice must provide information on the effect of the expulsion, including information related to account access and any deductions by the credit union related to amounts due. The notice must also tell the member that any complaints related to their potential expulsion should be submitted to the NCUA's website. The notice must also state that the member has an opportunity to request reinstatement by either a majority vote of a quorum of the directors of the credit union or a majority vote of the members of the credit union present at a special meeting.

A member expelled under this authority must be given an opportunity to request reinstatement of membership and may be reinstated by either a majority vote of a quorum of the directors of the credit union or a majority vote of the members of the credit union present at a

special meeting. An FCU is only required to hold a board vote or special meeting in response to a member's first reinstatement request following expulsion. FCUs are required to maintain records related to any member expelled through a vote of the directors of the credit union for five years.

Section 3. The term cause in this Article means (A) a substantial or repeated violation of the membership agreement of the credit union; (B) a substantial or repeated disruption, including dangerous or abusive behavior, to the operations of a credit union, as defined below; or (C) fraud, attempted fraud, or other illegal conduct that a member has been convicted of in relation to the credit union, including the credit union's employees conducting business on behalf of the credit union.

If the FCU is considering expulsion for a member due to repeated non-substantial violations of the membership agreement or repeated disruptions to the credit union's operations, the credit union must provide written notice to the member at least one time prior to the notice of expulsion, and the violation or conduct must be repeated after having been notified of the violation.

The written notice must state the exact nature of the violation or conduct and that if the violation or conduct occurs again the member may be expelled from the credit union.

Dangerous or abusive behavior includes: (1) Violence, intimidation, physical threats, harassment, or physical or verbal abuse of officials or employees of the credit union, members, or agents of the credit union. This includes actions while on credit union premises and through use of telephone, mail, email, or other electronic method; (2) Behavior that causes or threatens damage to credit union property; or (3) Unauthorized use or access of credit union property. Expressions of frustration with the credit union or its employees through elevated volume and tone; expressions of intent to seek lawful recourse, regardless of perceived merit; or repeated interactions with credit union employees is insufficient to constitute dangerous or abusive behavior.

Section 4. Expulsion or withdrawal does not relieve a member of any liability to the credit union. The credit union will pay all of the member's shares upon their expulsion or withdrawal less any amounts due to this credit union.

Section 5. An expulsion of a member pursuant to section 2 shall be done individually, on a case-by-case basis, and neither the NCUA Board nor any credit union may expel a class of members.

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Official NCUA Commentary - Federal Credit Union Bylaws

Article II. Qualifications for Membership

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(iii) *Violent, belligerent, disruptive, or abusive members:* Many credit unions have confronted the issue of handling a violent, belligerent, disruptive, or abusive individual. Doing so is not a simple matter insofar as it requires the credit union to balance the need to preserve the safety of individual staff, other members, and the integrity of the workplace, on one hand, with the rights of the affected member on the other. In accordance with the Act and applicable legal interpretations, there is a reasonably wide range within which FCUs may fashion a policy that works in their case.

Thus, an individual who has become violent, belligerent, disruptive, or abusive may be prohibited from entering the premises or making telephone contact with the credit union, and the individual may be severely restricted in terms of eligibility for products or services. So long as the individual is not barred from exercising the right to vote at annual meetings and is allowed to maintain a regular share account, the FCU may fashion and implement a policy that is reasonably designed to preserve the safety of its employees and the integrity of the workplace. The policy need not be identical nor applied uniformly in all cases; there is room for flexibility and a customized approach to fit the particular circumstances. In fact, the NCUA anticipates that in some circumstances, such as violence or a credible threat of violence against another member or credit union staff in the FCU or its surrounding property, an FCU may take immediate action to

restrict most, if not all, services to the member. This may occur along a parallel track as the credit union begins the process of expelling the member under Article XIV. In other situations, such as a member who frequently writes checks with insufficient funds, the FCU may attempt to resolve the matter with the member before limiting check writing services. Once a limitation of services policy is adopted or revised, members must receive notice. The FCU should disclose the policy to new members when they join and notify existing members of the policy at least 30 days before it becomes effective. The credit union's board has the option to adopt the optional amendment addressing members in good standing.

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Article XIV. Expulsion and Withdrawal

As noted in the commentary to Article II, there is a fairly wide range of measures available to the credit union in responding to abusive or unreasonably disruptive members. A credit union can limit services under Article II for a member not in good standing. A credit union may also expel the member for cause after two-thirds vote of the credit union's directors.[11] Dangerous and abusive behavior is considered any violent, belligerent, unreasonably disruptive, or abusive behavior. Examples of dangerous and abusive conduct include, but are not limited to, a member threatening physical harm to employees, a member repeatedly purchasing gifts for or asking tellers on dates, a member repeatedly cursing at employees, and a member threatening to follow a loan officer home for a denying loan.

A credit union must provide notice to the member of the expulsion. The notice must include the reason for the expulsion. The notice must be specific and not just include conclusory statements regarding the reason for the member's expulsion. For example, a general statement that the member's behavior has been deemed abusive and the member is being subject to expulsion procedures would generally be insufficient as an explanation. A credit union is

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[11] See 12 U.S.C. 1764.

prohibited from expelling a class of members under this provision. That would include a board acting to remove all delinquent members or class of delinquent members.

If a special meeting of the members is called to expel the member, only in-person voting is permitted in conjunction with the special meeting, so that the affected member has an opportunity to present their case and respond to the credit union's concerns. However, an in-person meeting is not required if a member is expelled by a two-thirds vote of the board of directors. In addition, FCUs should consider the commentary under Article XVI about members using accounts for unlawful purposes.

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