

7535-01-U

NATIONAL CREDIT UNION ADMINISTRATION

12 CFR Part 701

RIN: 3133-AF51

Federal Credit Union Bylaws

AGENCY: National Credit Union Administration (NCUA).

ACTION: Final rule.

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 issuing this final rule to amend the standard FCU bylaws (FCU Bylaws) to adopt such a policy.

DATES: The final rule is effective [**INSERT DATE 30 DAYS AFTER DATE OF PUBLICATION IN THE FEDERAL REGISTER**].

FOR FURTHER INFORMATION, CONTACT: John Tamashiro, Director, Division of Consumer Access; Paul Dibble, Consumer Access Program Officer, Office of Credit Union Resources and Expansion; Lisa Roberson, Deputy Director, Office of Consumer Financial Protection; Rachel Ackmann, Senior Staff Attorney; or Ian Marena, Associate General Counsel, Office of General Counsel; 1775 Duke Street, Alexandria, VA 22314-3428. John Tamashiro can be reached at (703) 548-2577, Paul Dibble can be reached at (703) 664-3164, Lisa Roberson can be reached at (703) 548-2466, Rachel Ackmann can be reached at (703) 548-2601, and Ian Marena can be reached at (703) 518-6554.

SUPPLEMENTARY INFORMATION:

I. Background

Under the Federal Credit Union Act (FCU Act) and standard FCU Bylaws prior to the effective date of this final rule, there were two ways a member may be expelled, namely: (1) by 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 were 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 FCU Bylaws Final Rule).³ The 2019 FCU 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 factoring in an assessment of stakeholder input. During the 2019 FCU 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.

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 for use 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).

The 2019 FCU 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 FCU Bylaws Final Rule added a new section to the FCU Bylaws on limiting services for certain members. The 2019 FCU 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 the rights and privileges associated with FCU membership. A member not in good standing, however, may 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 FCU Bylaws Final Rule was clear that 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 property, its members, or its staff and officials.

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,

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

participate in, and vote at the annual and special meetings of the members and the right to maintain a share account.⁵ Those rights may be terminated only through a member's expulsion, and the Board explained in the 2019 FCU 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. Like comments raised during the 2019 FCU 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. 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-executing. 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)

⁵ The Board understands that a restraining or protective order from a court would bar a member from attending such meetings in person.

⁶ Pub. L. 117-103 (Mar. 15, 2022).

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. This work also aims to ensure that the credit union system achieves its statutory mission of meeting the credit and savings needs of people, especially those of modest means.⁸

The Board believes 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, a credit union's expulsion of a member-owner is a particularly significant action resulting in financial exclusion. Therefore, consistent with certain statements in the legislative history, use of the authority under the Governance Modernization Act should be rare and used only for egregious member behavior.

II. The Proposed Rule

At its September 22, 2022, meeting, the Board issued a proposed rule to amend the FCU Bylaws to adopt an expulsion policy consistent with the Governance Modernization Act.⁹ The proposal provided for a 60-day comment period, which ended on December 2, 2022. The Board received 26 comments from FCUs, credit union leagues and trade associations, and a law firm. All commenters were generally supportive of increased flexibility for FCU boards of directors to expel members for cause. Almost all commenters, however, raised additional considerations for the Board, and several commenters recommended specific changes to the proposed rule. The comments are discussed in detail in the next section.

⁷ <https://www.ncua.gov/support-services/access>.

⁸ Public Law 105-218, 112 Stat. 912 (Aug. 7, 1998).

⁹ 87 FR 59740 (Oct. 3, 2022).

III. The Final Rule

The NCUA Board is now issuing a final 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 final rule also makes conforming changes to Article II of the FCU Bylaws regarding members in good standing.

Member in Good Standing

As discussed previously, the 2019 FCU 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 the rights and privileges associated with FCU membership.¹⁰ 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.¹¹ The enactment of the Governance Modernization Act, however, has provided FCUs' boards of directors with direct authority (subject to the NCUA Board promulgating a rule, described in the legislation as a policy) to expel a member for cause.

The proposed rule retained the provisions on limitation of services. The proposed rule discussed several reasons for retaining these provisions, including additional flexibility for FCUs to address certain disruptive member behaviors through less severe restrictions, the ability of FCU boards to restrict access and services in the case of a violent or abusive member who has

¹⁰ 12 CFR part 701, app. A, Art. II, sec. 5.

¹¹ 84 FR 53278 (Oct. 4, 2019).

yet to be expelled,¹² and to provide FCUs an easier and more expeditious tool to address abusive and disruptive members. A board vote is not required under the limitation of services policy. All commenters who discussed the issue supported retaining the limitation of services policy in the FCU Bylaws. The Board agrees and continues to believe retaining the limitation of services policy provides important flexibility to FCU boards, and the final rule includes the limitation of services policy as proposed.

The proposed rule also included a few substantive changes to the limitation of services provisions. Specifically, the definition of a member not in good standing was removed. This definition included a list of behaviors that if engaged in by a member could trigger limitation of 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 defined 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.

Commenters differed on whether the final rule should include the same set of “for cause” behaviors for both expulsion and limitation of services. Many commenters thought the same behaviors should be used for both actions. Other commenters recommended a more expansive list of behaviors available to trigger a limitation of services. For these commenters, expulsion is a more extreme remedy than the limitation of services and the conduct triggering each remedy should not be synonymous. The Board has not made changes in response to these commenters.

¹² 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 property, its members, or its staff or officials.

The Board believes the list of “for cause” behaviors is already expansive and includes the types of actions that are reasonable grounds for limiting services or expulsion.

The proposed rule also made other technical conforming changes. For example, the proposed rule amended the requirement that the disruptive, violent, or abusive behavior have a logical relationship between the objectionable activities and the services to be suspended. This provision was removed because it is not included in the Governance Modernization Act. The Board sought comment on whether it should retain the existing language regarding a logical relationship between the “for cause” behavior and limitation of services. Many commenters recommended removing this qualification as it is not included in the Governance Modernization Act. The final rule does not include the express provision related to the nexus between the behavior and the limitation of services; however, the Board expects each FCU’s board of directors to use appropriate discretion and only limit services when necessary.

The proposed rule also included a question on whether the abusive or disruptive conduct must occur at the FCU. Many commenters objected to limiting expulsion to behaviors that occur at the FCU. Some of these commenters discussed electronic communications. For example, one commenter stated in an increasingly digital world with more channels for members to interact with an FCU, abusive behavior can occur over the phone, on social media, or through other channels that may not fit this physical location definition. These communications would likely be covered under the proposed rule, which stated dangerous or abusive behavior includes conduct while on credit union premises and through the use of telephone, mail, email, or other electronic method.

Other commenters raised concerns about certain abuses that would not likely be covered under the proposed definition. Some examples of behavior that would not likely be included

under the proposed rule include threats made at a location other than the credit union (such as a community event), stalking or assaulting of an employee that occurs at another location, or a violent crime committed by a member. The Board agrees with the commenters that these behaviors should be grounds for expulsion, and the final rule includes a catchall category of other behaviors related to credit union activities. Therefore, any conduct that is dangerous or abusive and related to a credit union's activities, regardless of the location of the conduct, may be grounds for limitation of services or expulsion. The catchall category would not include violent crime or dangerous or abusive behavior that is unrelated to the credit union's activities. The Board believes conduct that is unrelated to credit union activities should not be grounds for limitations of services or expulsion and is more appropriately handled through law enforcement.

Finally, a few commenters suggested the final rule should clarify that limitation of services does not require a notice or hearing. The Board is clarifying that use of the limitation of services policy does not require notice or a hearing.

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 Board has developed a corresponding policy for expulsion and implemented such policy through rulemaking within 18 months following the date of enactment (March 15, 2022), and the FCU has adopted the related standard Bylaw amendment. The final 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. The proposed rule sought comment on whether the final rule should include a standard disclosure form of the NCUA expulsion policy outside of the language in Article XIV of the FCU Bylaws. Many commenters stated the final rule should include an optional model standard disclosure. A few commenters characterized a potential model as a safe harbor. In response to commenters' request, the Board has provided an optional standard disclosure. The disclosure is provided at the end of the standard FCU Bylaws.¹³

A few commenters also requested that the Board clarify that FCUs may add the expulsion policy notice to the membership/account terms and conditions. The Board has no objection to FCUs adding the policy to membership and account terms and conditions.

One commenter stated that the final rule should specify that the requirement for "each" member to receive a copy of the expulsion policy does not permit members to avoid expulsion by an operational error as to whether another member has received a copy of the policy. However, the requirement for "each" member to receive the policy is from the Governance Modernization Act, and the Board may not modify the requirement.

The proposed rule also sought comment on whether FCUs should be required to get NCUA approval for all bylaw amendments related to expulsion procedures. Specifically, should certain modifications be considered fill-in-the-blank type provisions and therefore not require NCUA approval. Most commenters who discussed this issue believed the final rule should include some fill-in-the-blank type options for FCUs to customize their expulsion procedures

¹³ The optional standard disclosure has been added for FCUs' convenience. However, it may not serve as a "safe harbor" as requested by commenters in all cases. Use of the standard disclosure would provide a "safe harbor" from potential NCUA action; however, members may have rights and potential remedies they could pursue under other laws than the Governance Modernization Act.

without receiving NCUA approval. For example, a few commenters stated that if an FCU decides to allow an in-person hearing, NCUA approval should not be required.

The final rule does not require NCUA approval to require an in-person hearing. Additionally, as discussed subsequently, the NCUA will not consider hearing procedures such as the order of speakers or the length of the hearing as amendments to an expulsion policy. Therefore, hearing procedures do not require NCUA approval, provided the procedures are not inconsistent with the terms of NCUA's expulsion policy. Any variation to the express terms of NCUA's expulsion policy, or Article XIV, constitutes a bylaw amendment and is subject to NCUA approval.

Finally, the Board sought comment on whether it should require both mail and electronic delivery of notices, even if the member has elected to receive electronic communications. No commenters who discussed this issue supported both mail and electronic delivery of notices, and the final rule does not require both mail and electronic delivery of notices for those members electing to receive electronic communications.

Expulsion Vote and Notice of Pending Expulsion

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. If a member will be subject to expulsion, the member shall be notified of the pending expulsion, along with the reason for such expulsion. The Board sought comment on how prescriptive the final rule should be regarding the content of the pending expulsion notice. A few commenters stated the proposed requirements are too prescriptive or vague and may lead to conflict with examiners, and a few commenters requested the Board provide a standard disclosure for the notice of pending expulsion. One commenter stated that the Board should outline the categories

of information required to be included in a pending expulsion notice and do so by a published form document.

The Board does not believe a standard disclosure is appropriate for the notice of pending expulsion as the Board expects each notice to be tailored to the specific member and their pending expulsion. In response to commenters, however, the final rule does include additional clarifying information on what is expected in the notice. Specifically, the final rule provides that relevant dates, sufficient detail for the member to understand the grounds for expulsion, how to request a hearing, the procedures related to the hearing and, if applicable, a general statement on the effect of expulsion related to the member's accounts or loans at the credit union must be included in the pending expulsion notice.

The proposed rule required that the reason for the pending 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 is insufficient as an explanation. Instead, the FCU should include the date(s) of the interaction(s) and specific information describing the interaction(s), including a description of the member's conduct. Likewise, a notice stating the member violated the membership agreement also is insufficient as an explanation for the pending expulsion.

One commenter stated that the pending expulsion notice should not require the identification of any specific FCU employee and instead generic terms such as "loan officer" should be sufficient. The Board agrees and is clarifying that FCUs do not need to identify any employee by name or branch location and generic terms such as "customer service representative," "loan officer," or "teller" are sufficient.

The notice should, however, include specific information about how the member violated the agreement or engaged in dangerous or abusive behavior and include other relevant information as appropriate. The member is 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 their 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 NCUA's website if the complaint cannot be resolved directly by the credit union.¹⁴ Several commenters expressed concerns with this proposed requirement. One commenter questioned how this process would align with the general process to forward certain complaints to the Consumer Financial Protection Bureau, or CFPB. One commenter questioned the NCUA's authority for this requirement. One commenter requested specific timelines for when the NCUA receives the complaint compared to the hearing date and whether the NCUA would share the complaint with the FCU. One commenter asked that the NCUA only accept complaints after the hearing.

The Board has made two changes in response to these comments. The final rule provides that complaints should be raised with the NCUA only if the member has first tried to resolve the complaint directly with the credit union and clarified complaints should be sent to NCUA's Consumer Assistance Center. The Board believes credit unions should have an opportunity to address members' complaints first. However, the Board believes contacting the NCUA is an

¹⁴ Currently complaints can be submitted to the NCUA at either <https://mycreditunion.gov/consumer-assistance-center> or <https://ncua.gov/consumers>.

appropriate avenue for members' concerns or complaints. Therefore, the Board has not removed the requirement to notify the members of their right to complain to the NCUA. Additionally, the Board notes that notifying members of their right to complain is not providing members any new rights, and the notice is intended solely to remind members of their existing rights.

Additionally, the Board does not believe notification of the right to file complaints is novel when considering routine FCU activity. For example, loan denial notices also include similar language regarding member complaints. The Board also does not believe including the statement on complaints presents a burden to FCUs. Finally, the NCUA generally has the right to remedy violations of laws, rules, or regulations, which would include the Governance Modernization Act and this rule, under 12 U.S.C. 1786.

Hearing

Under the Governance Modernization Act, a member has 60 calendar days from the date of receipt of a notification of pending expulsion to request a hearing from the board of directors of the FCU. The proposed rule discussed that the member has 60 calendar days from the date of receipt, not the date the FCU provides the notice. Further, the proposed rule stated that the member has 60 calendar days to provide the FCU with a request for a hearing. Therefore, the member may mail the notice 60 days after receiving the notice. As such, the FCU may not receive the notice within 60 calendar days, and the Board recommended that FCUs provide sufficient time for both the member's receipt and the FCU's receipt before expelling a member.

Many commenters had concerns about these provisions and requested that the Board incorporate a presumption of receipt by the member. Suggestions for this presumption ranged from three to five business days after the FCU mailed the expulsion letter to the address on file. One FCU expressed concerns about situations in which the FCU does not have a current address

on file. Another commenter raised concerns if the member denied receipt of a mailing, and another recommended that a Certificate of Mailing should satisfy this requirement.

The Board has not amended the final rule to add a presumption of receipt. A member who objects to an expulsion due to the lack of receipt of a notice may either file a complaint with the NCUA or pursue a private right of action in court.¹⁵ The NCUA would consider a letter that was properly addressed and mailed as received by its intended recipient absent conclusive evidence it was not received, but local jurisdictions may have their own procedures regarding presumptions of receipt. These are evidentiary issues related to due process that the Board encourages FCUs to consider in developing their procedures, to reasonably ensure they withstand potential legal challenges.¹⁶

Another commenter objected to the proposed policy to provide the member 60 days to mail a hearing request, instead of 60 days for the FCU to receive a hearing request. This commenter recommended the final rule provide that the deadline for requesting a hearing is past if the FCU has not received the notice within 60 days after the member's receipt of the notice. The Board has not made any changes to the final rule in response to this comment.

While rules in each jurisdiction may vary, often items postmarked by deadlines are considered timely. Further, any formal appeal by the member would likely be in the form of a private right of action and not to the NCUA, as the Governance Modernization Act does not include appeal rights to the NCUA. The Board suggests FCUs consider consulting with local

¹⁵ The NCUA will not investigate matters that are the subject of a pending lawsuit or offer legal assistance. Additionally, the NCUA will not represent consumers in settling claims or recovering damages.

¹⁶ The FCUs have the option of sending notices by certified or registered mail as an additional step to preemptively address potential legal challenges from a member on the adequacy of notice.

counsel regarding the requirements in their jurisdiction regarding receipt and timeliness of mailings.

Other commenters generally objected to the Governance Modernization Act's requirement that a member has 60 days to request a hearing. A few commenters recommended this period be reduced. Some commenters recommended 30 days. Other commenters recommended the Board allow FCUs to expel certain members immediately. Another commenter recommended the Board interpret the Governance Modernization Act to allow for an immediate expulsion and then a 60-day period after expulsion to request a hearing.

The Governance Modernization Act provides that the FCU must provide "Notification of pending expulsion." The statute also uses the term "in advance of the expulsion" and then provides for expulsion after 60 days if the member does not request a hearing. Therefore, the Board finds no authority in the statute to permit immediate expulsions or to allow a shorter timeframe than 60 days to request a hearing.

The proposed rule provided that the FCU must maintain a copy of the notice provided for its records. The Board sought comment on whether this requirement is burdensome. In response, two credit unions stated that this requirement is not a burden, one commenter stated state law should determine this requirement, and one commenter generally stated if the notice is not retained, then the FCU should maintain a written record of the facts. The Board has not made any changes to the final rule in response to commenters as it believes the requirement represents only a small burden to credit unions and would assist examiners in any review of an FCU's expulsions. It also ensures an FCU has records available in the event of legal disputes over an expulsion.

Form of the Hearing

Under the Governance Modernization Act, 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, and the proposed rule permitted in-person or virtual hearings and permitted members an option to offer only written testimony. The Board sought comments on whether fairness, other principles, or other laws may call for an in-person hearing or other hearing procedures. No commenter expressed support for mandatory in-person hearings.

Commenters had wide ranging suggestions on the form of the hearing. Several commenters stated the final rule should permit FCUs to choose between in-person, virtual, and hearings conducted solely through written submissions (referred to as on-the-paper hearing), especially in cases of a violent or abusive member. Some commenters stated that there should be no hearing, just a written response if the member is dangerous or abusive. A few commenters recommended permitting telephonic hearings. For example, if a violent member does not have access to a computer to conduct a videoconference hearing, then the FCU should offer a telephonic hearing. One commenter recommended requiring members to appear virtually (and not permitting only written testimony as is permitted under the proposed rule). Another commenter, however, recommended requiring written testimony in addition to any oral testimony.

In response to commenters, the final rule does not require in-person hearings, as the Board continues to believe it is not necessary and may be problematic in cases of expulsion due to violence or threatened violence. Further, the Board agrees with commenters that a telephonic

hearing would be appropriate if a member cannot participate by videoconference.¹⁷ Therefore, the final rule has been amended to permit the option of a telephonic hearing if the member cannot participate through a virtual hearing.

The Board continues to believe that telephonic hearings and written hearings should not be the primary means of conducting hearings and are more appropriate forums for a hearing only if a virtual or in-person hearing is not a viable option. Therefore, the Board is not amending the rule to permit FCUs to offer members only telephonic hearings or written hearings. Members who are potentially subject to expulsion should have the option of orally presenting their case through a virtual hearing, or in-person if there are no safety concerns.

Hearing Procedures

The proposed rule did not include many prescriptive requirements related to the structure and procedure for the hearing and included only general principles related to the fairness of the hearing, such as the FCU could not raise any reason or rationale for expulsion that is not explicitly included in the notice to the member. The proposed rule did not, for example, include provisions for the order of testimony at the hearing, time limits for members, or whether the member or board members may ask questions.

Several commenters stated that the Board has provided sufficient guidance in the proposal regarding the structure and procedure of an expulsion hearing, and no further guidance is necessary. Other commenters objected to the proposed requirements not found in the Governance Modernization Act and characterized these elements as turning the expulsion process into something closer to the due process afforded a student facing expulsion at a public

¹⁷ For clarity, the final rule uses the terms videoconference and telephonic instead of the term virtual.

university than the termination of a consumer finance relationship. One commenter requested that the Board clarify that hearings do not need to follow the parliamentary procedure noted in Article IV, Section 4(k) of the FCU Bylaws. One commenter suggested that the final rule include time limits for members at the hearing, such as 15 minutes. This commenter also requested that the final rule state FCU boards have no evidentiary burden.

The Board agrees with the commenters who stated the proposed rule included sufficient guidance regarding the structure and procedure of an expulsion hearing and no further guidance is necessary. The Board believes that each FCU should have the flexibility to conduct a hearing as it deems appropriate and standard procedures across all FCUs are unnecessary. As requested by a commenter, the Board is clarifying that the hearings do not need to follow the same procedures as meetings of the members.

To simplify the requirements for the hearing, the Board has also removed the proposed requirement that subsequent conduct cannot be raised at the hearings. Commenters discussed that subsequent conduct is relevant to the hearing, this requirement is not part of the Governance Modernization Act, and the hearing is not a criminal trial. Therefore, subsequent conduct could be discussed at an expulsion hearing; however, the subsequent conduct must be related to the conduct outlined in the notice for fairness reasons. For example, if the original conduct and rationale for proposed expulsion was abusive personal conduct, and the person repeated abusive conduct after the notice was sent that could be discussed at the hearing.

But, at the hearing the credit union should not raise a violation of the membership agreement related to a loan loss as that is a new unrelated rationale for the expulsion and the member would not be on notice of the new rationale. A member should not be expected to address new rationales not discussed in the notice of pending expulsion. In adopting their own

hearing procedures, FCUs should do their best to ensure they adopt procedures they reasonably expect are defensible under any applicable law and are consistent with the intent of the Governance Modernization Act.

Additionally, the Board is clarifying that hearing procedures are not considered amendments to NCUA's expulsion policy and do not require Board approval. For example, procedures related to the order, amount of time members have to speak, or whether questions will be asked are not governed by NCUA's expulsion policy. Each credit union may determine its own hearing procedures.

The final rule generally only requires that hearings provide members a meaningful opportunity to present their case to the FCU's board orally. The Board expects hearings to be held in a fair, reasonable, and consistent manner that provides members a reasonable opportunity to present their case, but the final rule does not include prescriptive procedures. These general principles are intended to guide credit unions and ensure members are given a fair opportunity to present their case against expulsion and an opportunity to respond to the FCU's concerns without limiting FCU boards from determining the structure of their own hearings. Finally, the Board notes that members can file complaints with the NCUA if the complaint cannot be resolved directly with the credit union or consider the possibility of independent legal action if the FCU does not provide fair and reasonable hearing procedures.¹⁸

One commenter also requested that if a member does not attend a hearing, the final rule should state the FCU may proceed with the expulsion vote. The Board agrees. If a member requests a hearing and does not attend, the FCU board may proceed with the expulsion vote.

¹⁸ The NCUA will not investigate matters that are the subject of a pending lawsuit or offer legal assistance. Additionally, the NCUA will not represent consumers in settling claims or recovering damages.

Appeal Rights

The Board also sought comment on whether the final rule should include an appeal right for members. No commenters expressed support for an appeal right, and several stated that a request for reinstatement is a form of an appeal. A few commenters also explicitly stated that the final rule should not require supervisory committees to review records related to expulsion, but it would make sense for the FCU to review expulsions as part of an internal audit. A few commenters mentioned that there may be a private right of action related to expulsion, and therefore, formal appeal rights are unnecessary.

The Board has not adopted formal appeal rights in the final rule. As discussed previously, a member's concern about fairness can be addressed through complaints to the NCUA or consideration of private rights of action. The Board encourages FCUs to discuss the potential of private rights of action with local counsel, particularly when they are inclined to adopt more restrictive hearing procedures.

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 defined a timely manner as within 30 calendar days. A few commenters stated that this timeline was reasonable, several thought the final rule should provide discretion to boards of directors, and two commenters thought 90 days is a more appropriate timeline.

The final rule provides 30 calendar days for the Board vote. The Board believes 30 days represents a reasonable time to hold a vote and that 90 days would be too long to provide the member with a resolution to the notice of pending expulsion. In addition, a three-month delay in

an expulsion vote may undermine the board of director's position on the severity of the member's activity that the Board expects as justification for the potential expulsion.

Notice of Expulsion

Under the proposed rule, once a member is expelled the FCU must provide notice to the member. The notice should state the reason for the member's expulsion, and if a hearing was conducted or written testimony provided, the FCU should provide a response to the member's statements. The notice must also provide information on the effect of the expulsion, including information related to account access and any deductions related to amounts due.

One commenter recommended the Board provide model language for the expulsion notice. The Board is declining to provide model language covering these aspects of an expulsion. The Board believes each termination notice should be tailored to the specific member subject to expulsion. For example, the effect of expulsion may depend on the accounts held by the member at the FCU and the contract terms of those accounts. Additionally, without a standard form it is more likely FCUs would be intentional about articulating the grounds for expulsion in a manner that best protects the credit union and provides appropriate rights and notice to the member. Therefore, the Board does not believe this type of disclosure is appropriate for a standard form.

Under the final rule, if a member is expelled, either after the board votes to expel the member following a hearing or 60 days after receipt of the notice if no hearing is requested, the FCU must provide written notice of the expulsion. 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 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 written notice must be provided to the member in person, by mail to the member's address, or electronically if the member has elected to receive electronic communications from the credit union.

The proposed rule explicitly asked whether the final rule should include a minimum amount of time before an FCU is permitted to call an existing obligation or offset amounts owed. Many commenters stated that the final rule should leave the option to call the member's outstanding loans or other obligations to the FCU. Commenters generally stated that an option to freeze any available funds would prevent the member from withdrawing funds and leaving the FCU with a potential loss. One commenter stated that FCUs should call closed-end secured credit (such as an auto loan) and offset any available funds, assuming the contract permitted such an action. The final rule does not include any restrictions on calling or offsetting existing obligations. Instead, the Board believes this is a matter that should be left to state contract law, consumer protection laws, and FCU boards' discretion.

For Cause

Under the Governance Modernization Act, an FCU's board may expel a member for cause, which means the following: (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 NCUA 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 in connection with the credit union's employees conducting business on behalf of the credit union.

For repeated violations of the membership agreement that are non-substantial, the proposed rule required prior notice to the member. A few commenters disagreed on the need for repeated notice for non-substantial violations. One commenter stated that members have already received the expulsion policy and a member can raise exculpatory information at the hearing. The same commenter also stated that the Governance Modernization Act does not specify that the same provision of the membership agreement needs to be repeatedly violated to trigger expulsion. Therefore, the Board should permit an FCU to expel a member who violates any provision or combination of provisions of the membership agreement repeatedly.

The Board has not made changes in response to these comments, and the final rule requires notice for repeated non-substantial violations of the membership agreement. First, FCU boards have considerable discretion to determine what violation is non-substantial, and an initial notice is only required for non-substantial violations. If an FCU board determines a violation is non-substantial, then it is likely the member would be unaware the conduct could result in expulsion. Second, the Board believes an initial notice is necessary to ensure members are aware that they may be expelled for repeated, non-substantial violations of the membership agreement.

The warning notice before the notice of expulsion is only for potential expulsions related to repeated violations that are deemed non-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. The Board does not believe the added burden or time required by an extra notice is outweighed by the potential benefit to members who may be unaware that their conduct is grounds for expulsion.

The Board also specifically sought comment on whether the final rule should limit the time between the FCU's notice of a violation and the repeated behavior. Many commenters

stated any repeated behavior should be grounds for expulsion regardless of the time between the events. One commenter favored a maximum amount of time for non-substantial repeated violations to qualify as grounds for expulsion. The commenter noted, however, the FCU should retain the flexibility to limit services prior to that time. The Board agrees, and the final rule includes a two-year limit on the amount of time that may occur between non-substantial repeated violations to qualify as grounds for expulsion. The Board believes that non-substantial conduct that occurs less frequently than every two years does not present sufficient disruptions to the FCU's operations to warrant expulsion.

The Board also solicited comments on typical violations of a membership agreement that cause concern for FCUs and whether FCUs consider causing a loss to be a substantial violation of the membership agreement. One commenter recommended examples of substantial violations of the membership agreement. FCUs provided many examples of potential grounds for expulsion related to violating the membership agreement, including red flags for money laundering, participation in restricted activities (for example, personal share draft accounts being used for business transactions), causing property damage or engaging in fraudulent activities, causing physical or mental harm to an employee, members sharing account access devices with unauthorized individuals, account service abuse, engaging in conduct that would give rise to a bond or insurance claim, and causing a financial loss to the credit union (or conduct that would have caused a loss but for the FCU's loss prevention).

A few FCUs raised examples of concerns that the Board does not universally agree should be grounds for expulsion. The Board is commenting on these examples to provide guidance to FCUs in how the agency will interpret and administer the final rule. One credit union stated failing to keep accounts secure (for example, keeping the PIN with the debit card) should

be grounds for expulsion. In such a case, the Board recommends limiting services and access to debit cards if the credit union believes access should be limited. The Board has intentionally kept the limitation of services policy for credit unions to have a variety of remedies available for problematic conduct. One FCU stated that a member filing bankruptcy should be considered *per se* or automatic material loss, and another commenter stated that the final rule should permit FCUs to expel people who could target credits unions after being forced out of a bank.¹⁹ The Board disagrees.

The Board considers both examples to be sources of potential harm to the FCU and, without more, not actual disruptions or violations. Additionally, the Board is concerned a policy that states filing bankruptcy is *a per se* loss might unfairly impact members who have prioritized loan payments to the FCU. For example, a member who has prioritized paying an auto loan should not be subject to expulsion due to filing bankruptcy from overwhelming medical debt.

The final rule, however, provides FCU boards discretion to determine what behaviors constitute substantial violations of the membership agreement or dangerous or abusive behaviors. The Board believes such a determination would be dependent on the particular facts and would be difficult to determine through a universal policy applicable to all FCUs. Therefore, the final rule does not define or otherwise limit an FCU's discretion to determine what behavior or violation of the membership agreement is substantial.

One commenter also discussed that not all FCUs have a document called a "membership agreement," and many read the term as a combination of several documents. The Board believes

¹⁹ The Board notes that there may be statutory restrictions outside of the FCU Act on FCUs taking certain actions based on a member's bankruptcy filing. The Board recommends FCUs consult with counsel before engaging in any expulsion solely due to a member's bankruptcy filing.

the term should generally be defined as any documents customarily provided to the member at account opening that include terms and conditions of FCU membership and terms and conditions of the account being opened.

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 defined dangerous or abusive behavior as follows: (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, through use of telephone, mail, email, or other electronic method, or otherwise related to the credit union's activities); (2) behavior that causes or threatens damage to FCU property; or (3) unauthorized use or access of FCU property.

The proposed rule generally relied on the current definition of a member not in good standing to define dangerous or abusive behavior. The proposed rule also stated that expressions of frustration with the FCU or its employees through elevated volume and tone or repeated interactions with employees are insufficient to constitute dangerous or abusive behavior. One trade association urged the Board to remove this statement. The commenter stated that depending upon the facts and circumstances, these behaviors may well constitute harassment or verbal abuse and a valid basis for restricting services as harassment.

The Board wants to be clear that racist, sexist, personally insulting, or otherwise offensive language is grounds for limiting access to FCU employees or expulsion. However, the Board also wants to be clear that members who are upset, frustrated, or otherwise agitated with an FCU should not be expelled on that basis alone. The Board believes this determination is likely dependent on the context and should be considered on a case-by-case basis. Deciding

which side of the line a member is on 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 with the rights of the affected member.

As with repeated violations of the membership agreement, if the FCU's board acts to expel a member for repeated disruptions that are non-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.

This distinction and requirement to put a member on notice of conduct that, if repeated, may lead to expulsion, stem from the Governance Modernization Act, which defines "cause" in part as "a substantial or repeated disruption." Additionally, as discussed previously in connection with limitation of services policies, 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, its property, credit union members, staff and officials, 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 been convicted of other illegal conduct in relation to the credit union, including in connection with the credit union's employees conducting business on behalf of the credit union. The Board solicited comments on whether it should define fraud or attempted fraud. Many commenters stated the Board does not need to define the term fraud. The final rule does not include a definition of fraud or attempted fraud. One commenter suggested clarifying in the

regulatory text that a conviction is not necessary for fraud or attempted fraud. The Board agrees and has made this clarification.

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, which the proposed rule said must be a special meeting. Two commenters recommended the Board clarify how the determination is made between the two options. These commenters recommended that the decision be at the sole discretion of the FCU. The Board agrees and is clarifying that FCU boards have discretion to choose between the two options.

One commenter stated that if an FCU opts for a member vote the final rule should permit the vote to occur at an annual meeting. The Board agrees. Under the final rule, the FCU may act on a reinstatement request through a majority vote of a quorum of the directors of the credit union, a majority vote of the members of the credit union present at a special meeting, or majority vote of members at an annual meeting provided that the annual meeting occurs within 90 days of the member's reinstatement request.

The final rule requires that if the FCU addresses the reinstatement request through an annual meeting, this meeting must occur within 90 days of the reinstatement request. The Board believes a previously expelled member should not have to wait up to one year (which may be necessary if an annual meeting occurs just before the member requests reinstatement) for a resolution to their reinstatement request. Finally, the rule clarifies that an in-person vote is not required if the FCU holds a meeting of the members to vote on the reinstatement request.

The proposed rule also specified that an FCU is required to hold a board vote or special meeting in response to a reinstatement request only once. Many commenters agreed that FCU boards should not have to vote on reinstatement more than once. Some commenters suggested the final rule provide a minimum amount of time before an FCU must act on a reinstatement request (for example, one year after expulsion). The final rule does not include a minimum amount of time for a reinstatement request. Members are only entitled to one reinstatement request, and the Board believes each member should be able to make that request based on that member's own circumstances.

Finally, the Board solicited comments on whether a member convicted of other illegal conduct should be automatically reinstated if the conviction is later overturned. No commenters who discussed this issue were in favor of automatic reinstatement. The final rule does not include automatic reinstatement if the conviction is overturned. Each FCU board could take this into consideration if a member requests reinstatement. The overturning of a conviction might cause the FCU to reconsider its expulsion decision, but the underlying conduct that led to expulsion may still be relevant. In this area, the Board believes that FCUs should exercise sound judgment and consult with counsel if they need further guidance.

Class of Members

Under the Governance Modernization Act, an expulsion of a member by an FCU's board of directors must be done on an individual, case-by-case basis. Further, neither the NCUA Board nor any FCU may expel a class of members. The proposed rule stated that a class of members included a class of members that have caused a loss. One commenter was opposed to this

interpretation. The Governance Modernization Act, however, is clear that expulsion must be done individually on a case-by-case basis.²⁰

Further, all anti-discrimination laws and regulations remain applicable, and expulsions of a class of members based on any class or characteristic such as, but not limited to, race, color, religion, national origin, gender, sexual orientation, gender identity, 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 or disparate impact under anti-discrimination laws. In addition, members cannot be expelled due to or in retaliation for their complaints to the NCUA or any other regulatory agency or law enforcement, such as the CFPB, and members who are employees or former employees of the FCU cannot be expelled for any protected whistleblower activities.²¹

The proposed rule also sought comment on whether the possibility of FCUs expelling some members but not others for engaging in certain behavior is a cause for concern. A few FCUs stated this concern would likely be addressed through adoption of policies on expulsions. Another commenter, however, stated FCUs should not be required to adopt any policy on expulsion. One commenter generally thought this would not likely be an issue because FCUs are focused on growing membership and would not arbitrarily expel members. One commenter thought private rights of actions would address this concern.

FCUs should be aware of the potential for discrimination, including disparate impacts on and arbitrary treatment of members. An FCU must ensure that its implementation of the

²⁰ 12 U.S.C. 1764(e).

²¹ See 12 U.S.C. 1790b. The final rule clarifies that retaliation is impermissible even if other reasons motivate the expulsion. In particular, the relevant text in appendix A has been revised to remove the qualifier “solely.”

authority to expel members for cause is done consistently and does not violate anti-discrimination laws or regulations. The Board recommends each FCU 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. Each FCU should periodically review its past expulsions to ensure there is not a disparate impact created from its expulsion policy.

To enable NCUA examiners to review relevant information related to expulsions, the proposed rule required FCUs to maintain records relating to expelled members for five years. Commenters provided a variety of responses to this proposed requirement. One stated any record retention policy should align with other member documents that must be retained after account closing. One commenter suggested setting the requirement at seven years as that should meet or exceed most statutes of limitation. One stated the proposed five-year retention period is reasonable and not a compliance burden. This commenter recommended FCUs retain evidence of the member behavior leading up to the expulsion decision, all formal written communications to the member related to the behavior and the expulsion decision, and documents used or introduced in the hearing. One commenter recommended that the retention of clear copies (and not originals) is sufficient.

The final rule has increased the retention period to six years. The Board agrees with the commenter who recommended aligning the retention period with state statute of limitation laws. The Board believes that six years is likely the most common statute of limitations for contracts under state law. The Board also wants FCUs to retain records over a sufficient period so

examiners can review the records and have the necessary data to ensure expulsions do not have a disparate impact on a protected class.²²

The rule does not specify necessary documents for the record or the format for retention, but the Board expects a record to include general documents related to the member, such as the member's last known contact information, membership agreement, loan files, and specific documents related to the cause of the member's expulsion, including written communications from the credit union regarding the expulsion, the board's decision to expel the member, any written response from the member, and information or minutes relating to any hearing, should one occur.

Past Member Conduct as Grounds for Expulsion

The proposed rule discussed whether FCUs may only expel members for conduct that occurs after a certain date, such as when notice of the policy is provided to members, when the FCU board adopts a bylaw amendment, or when the Governance Modernization Act was enacted. A few commenters stated that the final rule should provide the option of reviewing past behavior of the member. Many offered the date the Governance Modernization Act was signed into law.

The final rule does not prescribe a date after which member conduct must occur for the conduct to serve as grounds for expulsion. The Board agrees there are some reasonable examples of past conduct that could serve as grounds for expulsion and does not want to remove the option for FCUs to expel these members. The Board, however, recommends that FCUs consider

²² FCUs should be aware that any minimum retention period required by regulation may be extended if litigation develops, and the final rule does not purport to preempt the requirements of judicial forums with respect to ongoing record preservation for reasonably anticipated litigation.

fairness issues and litigation risk when considering past conduct as grounds for expulsion. For example, expelling a member who currently is subject to a limitation of services for a violent action would be more reasonable than expelling someone for past conduct that has not led to a limitation in services.

More broadly, while Congress did not specifically constrain an FCU's reliance on past conduct, the legislation requires each FCU to provide a copy of its expulsion policy to each member before an FCU may implement it. Relying on conduct that occurred before an FCU provides the policy to each member may raise legal risks for the FCU.

Other Comments

A few commenters raised issues with aspects of the proposal that were from the Governance Modernization Act and outside of the Board's discretion. One commenter stated that FCU management, and not FCU boards of directors, should make the member expulsion decision. One FCU recommended that the expulsion procedures mirror or be significantly similar to that of state-chartered credit unions.

One commenter requested that the Board provide a flow chart to help FCUs understand the expulsion process. The Board does not believe the rule is sufficiently complex that a flow chart is warranted as part of this final rule.

One commenter stated that there should be no private right of action under the Governance Modernization Act. The Board notes that the Act does not include an express private right of action. The Board neither intends to establish a private right of action with this final rule nor preclude a private right of action that may be available under existing law. FCUs should consider legal risks when establishing their policies.

Finally, one commenter discussed whether FCUs could take steps to address delinquencies without invoking the limitation of services policy. The commenter asked that Article II provide either of the following: (a) the standard is not “significantly delinquent” but rather the old standard of “loss,” or (b) the concept of limitation of services for members not in good standing does not prohibit day-to-day collections activities, actions resulting from the creditworthiness of members, or targeted responses to abuse in a single account or communications channel. The Board is clarifying in this preamble that the limitation of services policy is not intended to limit day-to-day collections activities, actions resulting from the creditworthiness of members, or targeted responses to abuse in a single account or communications channel.

Implementation

After the effective date of this final rule, FCUs 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 must amend their bylaws through a two-thirds vote of their boards of directors. Such FCUs do not need to submit the amendment to the NCUA for its approval provided the amendment is identical to the language included in this final rule or only includes additional language on hearing procedures as discussed in the preceding paragraphs. FCUs may adopt amendments immediately after the effective date of the final rule or at any point in the future. However, the amendment included in this final rule is optional, and FCUs do not need to amend their bylaws or take any other action in response to this final rule. Those FCUs electing not to act in response to this final rule, however, could expel a member solely through a special meeting of the members or on the basis of a violation of a nonparticipation policy.

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.²³ 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 proposed rule included an estimated burden of 5,227 hours associated with the rulemaking. The Board received and considered comments on the estimated burden.

Under the final rule, the notice requirements to be provided to the member are as follows: (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. An estimated total of 5,227 responses will be generated, taking an hour per response, for a total of 5,227 burden hours associated with the notice requirements. Additionally, FCUs are required to retain and maintain all records associated with the expulsion

²³ 44 U.S.C. 3507(d); 5 CFR part 1320.

policy, and it is estimated to average 30 minutes per FCU for a total annual burden of 1,230 hours. Therefore, there is a total burden of 6,457 hours associated with this 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 of respondents: 3,076.

Estimated number of responses per respondent: 347.

Estimated total annual responses: 1,067,833.

Estimated total annual burden hours per response: 0.35.

Estimated total annual burden hours: 377,263.

The total annual burden hours increased due to the disclosure requirements.

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.²⁴ 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

²⁴ NCUA Interpretive Ruling and Policy Statement 15–1, 80 FR 57512 (Sept. 24, 2015).

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 final rule results in any burden or other significant economic impact to small entities. First, adoption of the flexibilities included in the rule is optional, and FCUs are not required to amend their bylaws. Additionally, even if FCUs revise their bylaws in response to the rule, it is within FCUs' discretion to exercise the authority provided in the final rule to expel a member. The Board also believes that expulsion will continue to be rare, and thus, any impact from the rule will be limited. Further, the final 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 final rule does 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 final rule applies to FCUs only and does 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. Any effect the final rule might have on state-chartered credit unions or development of state law on expulsion would be purely speculative and attenuated. 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

The NCUA has determined that this final rule will not affect family well-being within the meaning of section 654 of the Treasury and General Government Appropriations Act, 1999, Public Law 105-277, 112 Stat. 2681 (1998). In particular, the NCUA has reviewed the criteria specified in section 654(c)(1) of that act, by evaluating whether this rule (1) impacts the stability or safety of the family, particularly in terms of marital commitment, (2) impacts the authority of parents in the education, nurture, and supervision of their children, (3) helps the family perform its functions, (4) affects disposable income or poverty of families and children, (5) only financially impacts families, if at all, to the extent such impacts are justified; (6) may be carried out by State or local government or by the family, or (7) establishes a policy concerning the relationship between the behavior and personal responsibility of youth and the norms of society. Under this statute, if the agency determines the rule may negatively affect family well-being, then the agency must provide an adequate rationale for its implementation.

The NCUA has determined that the implementation of this proposed rule would not affect family well-being within the meaning of the statute. Of the seven factors in the statute, the factors on disposable income and financial impact appear most relevant. Removing access to financial services at an FCU may negatively affect a member and their family. These actions, however, would be unlikely to affect disposable income or poverty directly, so the NCUA finds that the rule does not have a negative effect as described in the statute. Moreover, the final rule implements a statutory mandate, and the NCUA cannot decline to implement the legislation. The NCUA has taken potentially adverse effects on members into account in designing the rule.

Small Business Regulatory Enforcement Fairness Act—Congressional Review Act

The Congressional Review chapter of the Small Business Regulatory Enforcement Fairness Act of 1996 (SBREFA) generally provides for congressional review of agency rules.²⁵ A reporting requirement is triggered in instances where the NCUA issues a final rule as defined in the Administrative Procedure Act.²⁶ Besides being subject to congressional oversight, an agency rule may also be subject to a delayed effective date if it is a “major rule.” The NCUA does not believe this rule is a “major rule” within the meaning of the relevant sections of the statute. As required by the statute, the NCUA will submit this final rule OMB for it to determine if this final rule is a “major rule” for purposes of the statute. The NCUA also will file appropriate reports with Congress and the Government Accountability Office so this rule may be reviewed.

List of Subjects in 12 CFR Part 701

Credit, Credit Unions, Federal Credit Union Bylaws.

By the NCUA Board on July 20, 2023.

Melane Conyers-Ausbrooks,

Secretary of the Board.

For the reasons discussed in the preamble, the Board amends 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.

²⁵ 5 U.S.C. 551.

²⁶ *Id.*

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

* * * * *

Article II. Qualifications for Membership

Section 5. *Member in good standing.* Members in good standing retain 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 expulsion. 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.

* * * * *

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 must 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 to expel a member. 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. A credit union can only expel a member for cause and 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 if the credit union has provided a written copy of this Article or the optional standard disclosure notice 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, reasonably understandable by ordinary members, and may be provided electronically only in the case of members who have elected to receive electronic communications from the credit union.

If a member will be subject to expulsion, the member shall be notified in writing in advance, along with the reason for such expulsion. The notice must include, at minimum, (i) relevant dates, (ii) sufficient detail for the member to understand the grounds for expulsion, (iii) the member's right to request a hearing, (iv) how to request a hearing, (v) the procedures related to the hearing, (vi) notification that, if a hearing is not requested, membership will terminate after 60 calendar days, and (vii) if applicable, a general statement on the effect of expulsion related to the member's accounts or loans at the credit union. The notice 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 the member's potential expulsion should be submitted to NCUA's Consumer Assistance Center if the complaint cannot be resolved directly with the credit union. The FCU must maintain a copy of the provided notice for its records. 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 the credit union. A member is not entitled to attend the hearing in person, but the member must be provided a meaningful opportunity to present the member's case orally to the FCU board through a videoconference hearing. The member may choose to provide a written submission to the Board instead of a hearing with oral statements. If a member cannot participate in a videoconference hearing, then the FCU may offer a telephonic hearing. If a member does not request a hearing or provide a written submission, 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 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, written notice of the expulsion must be provided to the member 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. 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 expulsion should be submitted to NCUA's Consumer Assistance Center if the complaint cannot be resolved directly with the credit union. The notice must also state that the member has an opportunity to request reinstatement.

A member expelled under this authority must be given an opportunity to request reinstatement of membership. The FCU may act on a reinstatement request through a majority vote of a quorum of the directors of the credit union, a majority vote of the members of the credit union present at a special meeting, or a majority vote of members at an annual meeting, provided the annual meeting occurs within 90 days of the member's reinstatement request. If the FCU holds a meeting of the members to vote on the reinstatement request, an in-person vote is not required. 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 six 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 conviction of other illegal conduct 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 of 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 once prior to the notice of expulsion, and the violation or conduct must be repeated within two years after having been

notified of the violation. The written notice must state the specific 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 the following: (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 only includes (a) actions while on credit union premises or otherwise related to credit union activities, and through use of telephone, mail, email, or other electronic method; (b) behavior that causes or threatens damage to credit union property; or (c) 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 are insufficient to constitute dangerous or abusive behavior. Additionally, members cannot be expelled due to or in retaliation for their complaints to the NCUA or any other regulatory agency or law enforcement, and members who are employees or former employees of the FCU cannot be expelled for any protected whistleblower activities.

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 the member's expulsion or withdrawal less any amounts due to the 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 addresses these interrelated responsibilities.

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 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 calendar days before it becomes effective. The credit union's board has the option to adopt the 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 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 a 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 and unwelcomely giving gifts to or asking tellers on dates, a member repeatedly using racial or sexist language towards employees, and a member threatening to follow a loan officer home for denying a loan.

A credit union must provide notice of the expulsion to the member. The notice must include the reason for the expulsion, and if a hearing was conducted or written testimony provided, the credit union should provide a response to the member's statements. 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 be insufficient as an explanation. A credit union is prohibited from expelling a class of members under this

¹¹ See 12 U.S.C. 1764.

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 the member's 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.

Optional Standard Disclosure of Expulsion Policy

We may terminate your membership in [name of FCU] in one of three ways. The first way is through a special meeting. Under this option, we may call a special meeting of the members, provide you an opportunity to be heard, and obtain a two-thirds vote of the members present at the special meeting in favor of your expulsion. The second way to terminate your membership is under a nonparticipation policy given to each member that follows certain requirements. The third way to terminate your membership is by a two-thirds vote of a quorum of the directors of the credit union for cause.

Cause is defined as follows: (A) a substantial or repeated violation of [name of membership agreement] with [us]; (B) a substantial or repeated disruption, including dangerous or abusive behavior, to the credit union's operations; or (C) fraud, attempted fraud, or a conviction of other illegal conduct that a member has been convicted of in relation to [us], including in connection with our employees conducting business on behalf of us.

Before the board votes on an expulsion, [we] must provide written notice to your mail address (or email, if applicable) on record or personally provide the written notice. [We] must

provide the specific reasons for the expulsion and allow you an opportunity to rebut those reasons through a hearing if you choose. It is your responsibility to keep your contact information with [us] up to date, and to open and read notices from [us]. Unless [we] determine to allow otherwise, there is no right to an in-person hearing with the board. If you fail to request a hearing within 60 calendar days of receipt of the notice, you will be expelled. You may submit any complaints about your pending expulsion or expulsion to NCUA's Consumer Assistance Center if the complaint cannot be resolved with the credit union.

[We] will confirm any expulsion with a letter with information on the effect of the expulsion and how you can request reinstatement. Expulsion or withdrawal from membership does not relieve a member of liability to the credit union, and we may demand immediate repayment of the money you owe to us after expulsion, subject to any applicable contract terms and conditions.

For additional information on expulsion and a copy of our expulsion policy, see [Article XIV of our Bylaws].