

## The Case for Guidance in the Bylaws

*Phil Kenkel*

*Bill Fitzwater Cooperative Chair*

The common wisdom as to what to put or retain in the bylaws is: “If in doubt, leave it out of the bylaws and cover it in board policy.” That is driven by the fact that changing or updating the cooperative bylaws requires a member information effort and a membership vote at the annual meeting. The case for including or retaining items, beyond the bare minimum, in the bylaws is less often discussed.

Issues involving quorums, membership requirements, membership termination, membership meetings, membership voting procedures and the removal of a board member can become quite heated. If a controversy arises involving any of those member issues it is preferable to be able to go to the bylaws, and not board policy, for clarification. While not all cooperatives post their bylaws on their websites, (a practice I would recommend), the bylaws are at least in theory available for member inspection. When tension arises over membership issues the bylaws are front and center. Members do not have access to board policy making them less transparent and less easily accepted as the final authority on member governance issues.

Many issues including profit distribution and equity retirement are at the discretion of the board of directors and their assessment of the financial condition of the cooperative. While there are advantages in maintaining the board’s flexibility, there are also advantages in having structures explicitly approved by the membership. I visited with a cooperative that made a bylaw change to raise the portion of earnings that could be retained as unallocated reserves. They preferred defining a limit to simply changing the bylaws to state that profit allocation was at the board’s discretion. The bylaw provision limited their discretion but also documented the support of the membership for retention within the guideline. There are similar pros and cons for describing the general system of equity redemption in the bylaws. It is inadvisable to describe equity redemption specifics in the bylaws, but information beyond the fact that equity redemption is at the board’s discretion can be useful if a member questions redemption practices.

Another criterion for bylaw content is to consider what contingencies might arise. For example, the bylaws likely describe board size and election procedures but many bylaws are silent on how a board seat vacancy is handled. If the board vacancy came from the removal of a board member (another issue often not addressed in the bylaws) decisions on if, when and how to fill the vacancy will be highly scrutinized. When the bylaws are silent on those issues the board has more flexibility but they are also operating without a safety net in terms of member perception.

Your cooperative’s legal council is obviously the best source of expertise on bylaw content. While your attorney can assist with the nuts and bolts, it can be useful to first consider your philosophy as to the tradeoffs between discretion and guidance.