

OGC/CJL:bhs  
05-0713R

TO:

FROM: Sheila A. Albin, Associate General Counsel

SUBJ: [ ] Nonstandard Bylaw Amendment

DATE: August 9, 2005

You have asked us to review several proposed nonstandard bylaw amendments from [ ] Federal Credit Union (FCU). Below are our comments on each of the proposed changes.

Article VI, Section 2

The FCU proposes to amend this section in several ways. First, it proposes to prohibit paid employees from serving on the board or the supervisory committee. The FCU Bylaws issued by NCUA in 1999 permit an FCU to prohibit credit union employees from serving on the board or on any committee so an FCU is permitted to make this change to its bylaws without NCUA approval. The proposal, however, only restricts paid employees from the supervisory committee and does not include a policy for other committees. We believe the FCU should address whether members of other committees may include paid credit union employees.

Second, the proposal attempts to bar former employees from serving on the board or supervisory committee. While we have no objection to barring former employees from the supervisory committee because that committee may be required to investigate activities of former employees, the FCU cannot bar them from serving on the board. The FCU Act sets forth the only eligibility requirements for serving on the board. Those sections provide that, as long as an individual is a member and has not been convicted of a crime involving dishonesty or breach of trust --or if convicted of such a crime, the NCUA Board has waived the prohibition-- then the individual is eligible for board membership. 12 U.S.C. § 761, 1785(d). Article V, Section 7 of the FCU Bylaws also permits the board of directors to set a minimum age requirement. An FCU may not impose other limitations on eligibility for election. See OGC Legal Opinion Letter 94-1011, dated October 18, 1994.

We note a board of directors may establish reasonable criteria, in addition to the eligibility requirements, for a nominating committee to follow in making its nominations. The board's criteria could require certain financial experience or years of membership or prohibit former employees. The board's nomination criteria, however, applies only to individuals nominated by the nominating committee; they cannot be imposed on individuals who meet the eligibility requirements and are properly nominated from the floor or by petition.

Finally, the proposal bars immediate family members, as they are identified in the proposal, and individuals living in the same household, from serving on the board together. We have no objection to extending the currently permitted family member prohibition under Article VI, Section 2 of the FCU Bylaws to cohabitants.

With regard to the proposal's description of immediate family members, we note the 1999 version of the FCU Bylaws does not specifically define "immediate family members" other than in the field of membership context. FCU Bylaws, Art. XVIII, Sec. 2(b). The NCUA Board, however, has proposed to amend the FCU Bylaws to define "immediate family members" to mean spouse, child, sibling, parent, grandparent, grandchild, stepparents, stepchildren, stepsiblings, and adoptive relationships. 70 Fed. Reg. 40924, 40941 (July 15, 2005). We believe the definition used in NCUA's proposal is more specific than the proposed amendment and includes grandparents and grandchildren. We recommend that the FCU use NCUA's proposed definition but include in-laws as requested because it expands on the definition. Alternatively, the FCU might consider waiting until the NCUA Board approves a final version of the FCU Bylaws and then insert the definition finally adopted by NCUA.

#### Article VI, Section 5

We have no objection to a revision to this provision that removes the board's ability to conduct its regular meetings through audio or video teleconference methods. We believe the change is unnecessary because the FCU Bylaws merely provide options to in-person meetings and do not mandate teleconferences for regular meetings, but we do not object to the proposed amendments. We note the FCU has retained the option of using teleconferences for the board's special meetings.

#### Article VII, Section 2

We agree with your inclination to deny the FCU's proposal to increase the number of days between a board's reorganization meeting and the annual meeting from seven to thirty days. During the process to amend the FCU Bylaws, a commenter asked the NCUA Board for the same change. In the proposal to amend the FCU Bylaws, published on July 15, 2005, the NCUA

Board declined to accept the recommended change. The proposal's preamble states the following:

Many FCUs hold the first board meeting of the newly elected board immediately following the annual meeting. FCU boards may also conduct meetings by teleconference. NCUA believes it is unnecessary to change the seven-day limit in light of these options and the necessity for board officers to be elected as soon as possible to prevent interruptions in the board's operation. NCUA, however, seeks comment to determine whether the seven-day limit is a problem for FCUs.

70 Fed. Reg. 40928. We believe that, consistent with the Board's articulated position, you should deny the requested amendment to expand the time period for a reorganization meeting. In the event the NCUA Board extends the seven-day time frame when it adopts the final FCU Bylaws, the FCU can amend its bylaws accordingly.

#### Article IX, Sections 5 and 6

We agree with your inclination to deny the two proposals that would condition the supervisory committee's ability to suspend an individual or call a special meeting on providing an individual or the board notice and an opportunity to meet with the supervisory committee first. The Federal Credit Union Act states that the supervisory committee:

[M]ay by a unanimous vote suspend any officer of the credit union or any member of the credit committee or of the board of directors, until the next members' meeting, which shall be held not less than seven nor more than fourteen days after any such suspension, at which meeting any such suspension shall be acted upon by the members; and may call by a majority vote a special meeting of the members to consider any violation of this chapter, the charter, or the bylaws, or any practice of the credit union deemed by the supervisory committee to be unsafe or unauthorized.

12 U.S.C. §1761d. We agree that the conditions placed in the proposed amendments hinder the supervisory committee from exercising its statutory responsibilities when it is necessary for the committee to act. The supervisory committee may conduct audits and, as part of that process, choose to discuss matters with the individuals who are the target of its investigation. If, at the completion of the audit, the committee suspends an officer, credit committee member or director, or determines the FCU is engaging in an unsafe or unauthorized practice, an opportunity to be heard will be provided at a special

meeting of members called to address the matter. FCU Bylaws, Art. IV, Sec. 2 and Art. XVI, Sec. 3.

Article XVIII, Section 2(b)

We believe you cannot approve the FCU's request to change the definition of "immediate family member" in this section as proposed because, unlike the proposed amendment to Article VI, Section 2, this section only defines the term when used in the certificate of charter's field of membership article.

Article XVIII, Section 2(b) has defined "immediate family member" for the sole purpose of establishing which family members are eligible for membership in the FCU. NCUA's Chartering and Field of Membership Manual (Chartering Manual) now defines this term. NCUA Interpretive Ruling and Policy Statement 03-1, pg. A-2. In fact, NCUA's proposal to amend the FCU Bylaws removes the definition in Art. XVIII, Section 2(b) as it is no longer necessary. 70 Fed. Reg. 40929. Instead, the NCUA Board proposes to move the definition to Section 1 to define the term when it is used in the bylaw provision that addresses who may serve on the board, Article VI, Section 2. Id.

While an FCU may adopt a more restrictive definition in its field of membership article and bylaws to limit the types of family members that qualify for membership, it cannot add new individuals to the definition. Chartering Manual, Ch. 2, II, H. The FCU's proposal impermissibly adds in-laws to the definition in Article XVIII, Section 2 because the Chartering Manual does not authorize these individuals to join an FCU through their relationship to someone who qualifies as a primary member.

cc: Regional Directors