

GC/RMM
11-0980

TO: [],
[]

FROM: Hattie Ulan, Associate General Counsel, Office of General Counsel (OGC)

SUBJ: Proposed Bylaw Amendments — [] Federal Credit Union (FCU)

DATE: March 22, 2012

Under NCUA's Delegations of Authority, Supervision 12, OCP requires OGC's concurrence to approve or disapprove a request for bylaw amendments. The FCU's proposed bylaw amendment would provide for indemnification of officials by the state law of []. It also would add non-standard wording you do not believe is necessary. You are inclined to deny the FCU's request and we agree. The proposed amendments are unnecessary.

The FCU uses the revised 2007 NCUA FCU Bylaws. 72 Fed. Reg. 61495, 61500 (Oct. 31, 2007) (codified at 12 C.F.R. Part 701, Appendix A). The FCU seeks NCUA approval to amend the sentence in the current FCU Bylaws, Article XVI, Section 8, highlighted below:

Section 8. *Indemnification.* (a) The credit union ~~may elect to~~ shall indemnify to the extent authorized by (check one)
 law of the state of []:
 Model Business Corporation Act:
the following individuals from any liability asserted against them and advance expenses reasonably incurred by them in connection with judicial or administrative proceedings to which they are or may become parties by reason of the performance of their official duties (check as appropriate)
This provision is subject to the limitations of the [] Code and if adopted 12 CFR Section 701.33(c)(5).
 current officials
 former officials
 current employees
 former employees

The FCU is requesting to modify its bylaws because its board believes the current bylaws do not provide adequate protection to directors, officers, and employees. The FCU believes the amendment would allow it to continue to attract quality directors and

officers who might otherwise be deterred because of liability concerns, and that it will assure existing officers, directors, and employees that they are protected.

You have thoroughly reviewed the requested changes and we concur with your analyses as follows:

- deleting “may elect to” and inserting “shall.” This proposed amendment would require the FCU board to provide indemnification. Your research indicated that NCUA previously has denied similar, but not exact, requests (e.g., [] FCU, Mar. 16, 2010; [] Valley FCU, Feb. 21, 2008). We concur with your decision to deny this request;
- inserting the word []. We concur this is unnecessary. We recommend in the future you refer an FCU making this type of request to the Bylaws Introduction:

C. Bylaw amendments. 1. The FCU Bylaws contain several provisions allowing FCU boards to select from an option or range of options and fill in a blank. Changes to “fill-in-the-blank” provisions are, in fact, changes to the FCU’s bylaws and require a two-thirds vote of the board. As long as the FCU selects from the permissible options for completing the blank, the FCU need not submit the change for NCUA approval using the process outlined below.

12 C.F.R. Part 701, Appendix A, Introduction, C.1;

- inserting the word advance. You explain that general accounting principles would not permit for the advance of funds for an incurred expense. Thus, the request is grammatically incorrect, uses improper terminology, and is unnecessary. We note that the board likely wants to be able to advance funds in cases where, for example, a court has not yet reached a decision and there are attorneys’ fees due, or fees for discovery, etc. You should refer the FCU to the applicable NCUA regulations already addressing these types of indemnification situations. See 12 C.F.R. §§ 701.33(c)(6), 750.5(a).
- adding the sentence: “This provision is subject to the limitations of the [] Code and if adopted 12 CFR Section 701.33(c)(5).” We agree that this sentence is unnecessary because these other provisions will apply even absent this sentence. We note that the FCU had proposed using the terms “if adopted,” but NCUA issued the final rule amending 12 CFR §701.33 adding paragraphs (c)(5) through (7), effective in 2011.

Feel free to contact Staff Attorney Regina Metz or me with any questions.