

GC/MRS:sg

SSIC 3700

90-0520

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FROM: Hattie M. Ulan, Associate General Counsel

SUBJ: Nomination by Petition []

(Your May 10, 1990, Memorandum)

DATE: June 1, 1990

This responds to your request for our opinion concerning [] practice of requiring that petitions nominating candidates for the board of directors be signed by at least one percent of the members. A member of [] has complained about the practice and you are wondering whether the relevant bylaw should be changed and whether the board can be compelled to make such a change.

You posed three specific questions in your memorandum. We will respond only to questions two and three, as question one can properly be answered only by regional directors.

BACKGROUND

Article VI, Section 1 of the [] bylaws calls for nomination of board members by petition signed by one percent of the members of the credit union. Due to the size of the [] FCU, under the current bylaw a petition would have to be signed by over 1100 members. A member (and former board member) of [] contacted you, complaining that obtaining such a large number of signatures is time consuming and expensive, and that it discourages free election and virtually assures the reelection of incumbents who choose to run. We assume that incumbents have been nominated by the nominating committee, and therefore need not submit petitions.

You agree with the member, but are unsure as to what step if any, can or should be taken. You would like to see amend its bylaws to include a signature requirement cap of 500 members, as provided in Article VI, Section 1 the Standard FCU Bylaw Amendments and Guidelines. However, you believe that the board is unwilling to amend its bylaws at this time.

ANALYSIS

Your specific questions and our answers follow.

2. Do you believe that the one percent requirement without a cap is justifiable? Please explain our rationale.

Answer. We support implementation of a signature cap, rather than the current requirement of a straight one percent of all members. As the [] situation illustrates, a straight one percent requirement without any cap can make it almost impossible for interested members not nominated by the nominating committee to become candidates for a board of directors; this would be particularly true in credit unions whose membership is not only large, but geographically dispersed. We note that the bylaw is neither the standard bylaw, which provides for nomination by a nominating committee and nominations from the floor, nor the standard bylaw amendment which, as stated above, require a 500-signature cap in cases where nomination is by petition. We agree that a change to the current bylaw is desirable, since, in its present form, it appears likely to lead to restricted elections and dissatisfaction among members.

3. What alternatives would be available other than the obvious one, i.e., writing the credit union requesting that its board voluntarily amend the bylaw to conform to the standard bylaw amendment?

Answer. We do not believe that it would be possible to force [] to change its bylaws, nor do we consider it advisable to attempt to do so. As you noted in your memorandum, we have in the past stated that a court would have to resolve dispute of this nature; we are still of that opinion. Nonetheless, we offer the following observations, which may assist you in attempting to convince the [] board to make the change to the standard amendment.

First, we note that the bylaw currently in place at [] is a nonstandard bylaw amendment. All nonstandard bylaw amendments require written NCUA approval. We do not have any record of having given such approval and your memorandum does not discuss the approval question. In the event that [] did not obtain NCUA approval, the amendment would be technically invalid. You may wish to investigate this issue further.

We have briefly reviewed general corporate law for a majority position on this question. As a general rule, reasonable and necessary bylaw provisions as to nominations will be upheld; however, patently unreasonable bylaws will be struck down. Of course, whether a given provision is reasonable and necessary or patently unreasonable is a question of fact for a court to determine. You may wish to make the argument that the one percent provision is patently unreasonable and would not withstand a court challenge should a member choose to bring one. However, we are not suggesting that you should bring any type of administrative action to force a change in the bylaw, or that such an action would succeed.