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FROM: Hattie M. Ulan, Associate General Counsel

SUBJ: Nonstandard Bylaw Amendment - [] (Your August 3, 1990, Memorandum)

DATE: September 26, 1990

You requested our opinion as to the legality of two proposed nonstandard bylaw amendments submitted by the []. Both proposed amendments, which would revise Article V, Section 3, of the FCU's bylaws, provide that all special meetings will be conducted by mail. They also set forth procedures to be followed for expulsion of members and removal of directors, officers, committee members, or employees of the FCU. The two proposals are basically the same, except that version A provides for the right to require an actual special meeting, whereas version B does not. For the reasons set forth below, we recommend disapproval of both proposed amendments.

Expulsion of Members

Insofar as the proposed amendments address expulsion of members by the membership, it is our opinion that they violate the Federal Credit Union Act (the "Act"). Section 118(a) of the Act (12 U.S.C. §1764(a)) provides:

Except as provided in subsection (b) of this section, a member may be expelled by a two-thirds vote of the membership of a Federal credit union present at a special meeting called for the purpose, but only after opportunity has been given him to be heard.

The exception provided by subsection (b) is not relevant to this discussion, as it does not concern expulsion by the membership.

Section 118(a) clearly requires that the FCU hold a special meeting and that the member in question have an opportunity to be heard at that meeting. Version B of the proposed amendment, which eliminates the right of the member to insist on an "actual special meeting" (as opposed to a special meeting conducted entirely by mail) at which he may be heard, violates this section of the Act.

Version A provides that an actual special meeting will be called if, and only if, the member in question elects to address the membership at such meeting. In our view, this proposal unfairly puts the burden on the member to (1) determine in advance of the meeting whether he will address the membership and (2) make the proper election to have a meeting called, and see that his election is acted upon. In view of the fact that the member has an unquestionable statutory right to be heard by the membership seeking to expel him, we view the procedure suggested by the proposed bylaw as both unfair and statutorily invalid. We do not believe that the FCU may impose additional requirements, such as those in this proposed amendment, which could have the effect of abrogating the member's right to be heard. Nor are we persuaded that the opportunity to file a "position paper" (see, version A, proposed Article V, Section 3(b)(B)(iv); version B, proposed Article V, Section 3(b)(B)(i)) is an adequate substitute for the right to address the meeting in person. Not only the member's right to defend himself, but also the membership's right to full information, would be limited by this proposal.

Removal of Directors and Others

We note at the outset that the only express removal authority granted FCU members by the Act is that over the supervisory committee. Section 115 of the Act (12 U.S.C. §1761d) gives the membership authority to remove supervisory committee members, but requires that the decision be made "at a meeting." In the absence of statutory

permission to eliminate the holding of an actual meeting and opportunity to be heard, we believe that the individual whose removal is sought is entitled to those protections.

The Act does not provide for membership removal of employees, board officers, members of other committees, or directors. The general common law rule as to removal is that those who elected, appointed, or hired an individual, have the power to remove him. The Act provides that the membership elect the board of directors (Section 111(a), 12 U.S.C. 1761(a)) and the board of directors appoints the supervisory committee (Section 111(b), 12 U.S.C. §1761(b)) and other committees (Section 113(13), 12 U.S.C. §1761b(13)), elects the board officers (Section 112, 12 U.S.C. §1761a) and hires officers and employees (Section 113(12), 12 U.S.C. §1761b(12)). The credit committee is either appointed by the board or elected by the members (Section 114, 12 U.S.C. 1761c). Under the common law, the board of directors would have the sole removal authority over such persons (except in the case of an elected credit committee, whose members would be removed by the FCU membership). Any power of the membership to remove individuals elected, appointed, or hired by the board of directors would have to be granted by the Act (in the case of the supervisory committee), by the FCU's bylaws, or by state statute, if such statute were expressly applicable.

We have briefly reviewed the Georgia nonprofit corporations statute and, while it is not expressly applicable to federal credit unions, we note its removal provisions for informational purposes. Ga. Code. Ann. Section 22-2602(d) provides that a director "may be removed from office by any procedure provided therefore in the articles of incorporation or the bylaws." Ga. Code. Ann. Section 22-2610(a) permits removal of an officer "by the person or persons authorized to elect or appoint such officer whenever in their judgment the best interest of the corporation will be served thereby." There are no specific provisions of the Georgia act relating to removal of other individuals. While we do not consider the Georgia act controlling in this case, even if the statute were applicable, it does not grant the membership any greater removal authority than that provided by the common law. Unless the FCU's bylaws empower the membership to remove other individuals, the membership's only removal power relates to the board of directors, supervisory committee, or to members of an elected credit committee, if the FCU has such a committee. The only remaining issue is the extent of the removal authority granted by the bylaws, and the procedures to be followed thereunder.

While the Act is largely silent on the issue of who may remove and what procedures must be followed, the Standard FCU Bylaws (the "Bylaws") contain several pertinent provisions. Article XIX, Section 3 of the Bylaws states:

Notwithstanding any other provisions in these bylaws, any director, committee member, officer, or employee of this credit union may be removed from office by the affirmative vote of a majority of the members present at a special meeting called for that purpose, but only after an opportunity has been given him to be heard.

We assume that the FCU has this bylaw in place. The proposed bylaw amendments relate only to Article V, Section 3, of the Bylaws; there is no indication of an intent to revise Article XIX, Section 3 as well. We note the availability of a standard amendment to Article XIX, Section 3, eliminating the membership's authority to remove employees (see, change 2 to the Standard Bylaw Amendments and Guidelines).

The standards in Article XIX, Section 3, are in keeping with corporate common law principles relative to removal of directors by the membership. Under corporate common law, directors elected by the membership may be removed by the membership only after notice and hearing or opportunity to be heard. Although when the board of directors has been authorized to appoint directors it may be empowered to remove them without a member meeting, the membership may remove them only at a meeting for which the removal is at least one of the stated purposes, and after opportunity to be heard.

Although Article XIX, Section 3, does not invalidate other bylaw provisions for removal, we are of the opinion that it sets minimum standards for removal by an FCU's members. While other bylaw provisions grant the board of directors removal power under certain circumstances (see, e.g., Article VIII, Section 7 (board removal of those it employs); Article VII, Section 7 (board declaration of vacancies in director or credit committee member offices and removal of executive officers)), Article XIX, Section 3, is the only standard bylaw that expands and sets forth the procedures for the membership's common law right of removal. In view of the fact that Article XIX, Section 3, grants the membership removal rights that it otherwise would not have under the Act or the common law and specifically sets certain procedures for removal under the Act or common law, it is our opinion that, where the removal is by the members, the

procedures detailed in Article XIX, Section 3, must be followed.

We are not convinced that, at least in removal and/or expulsion cases, a special meeting by mail can ever satisfy the requirement for a meeting. The term "meeting" suggests, at a minimum, some discussion of the issue at hand. Such discussion cannot be accomplished when the only contact with the membership is by mail. Moreover, it seems to us that in a removal/expulsion situation, no useful purpose is served, and no fair procedure accomplished, by a "meeting" at which the accused is not permitted to address those voting on his removal/expulsion and the membership is not able to engage in a full discussion of the issues. In our opinion, both the membership and the individual sought to be removed/expelled are best served by an actual meeting which affords an opportunity for expression and discussion by all parties. Therefore, in the absence of compelling reasons to limit the right to be heard at an actual meeting, we believe it wise to reject any proposal that would do so. We see no such compelling reason in the facts and arguments presented by the [] and therefore recommend that you deny both of the FCU's requests for a nonstandard bylaw amendment.