

GC/MFR/RSS:bhs

SSIC 6100

95-0417

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FROM: Richard S. Schulman, Associate General Counsel

SUBJ: Nonstandard Bylaw Amendment [] -

(Your March 22, 1995, Memorandum)

DATE: April 28, 1995

You have requested our comments on the proposed nonstandard bylaw amendment to Article XIX, Section 8 of the FCU Standard Bylaw Amendments providing for indemnification of officials and directors ("official"). The proposal requires the credit union to prepay an official's expenses. As explained below, we concur with your conclusion that the proposal should be denied.

The proposal requires indemnification without discretion. Both the standard bylaw amendment and state law permit indemnification on a case-by-case basis. Section 701.33(c) of NCUA's Rules and Regulations requires indemnification to be consistent with either the applicable state law or the Model Business Corporation Act and that the FCU specify which law it is following. The standard bylaw amendment is based on this regulatory requirement and should be adopted by the FCU if it wishes to indemnify its officials.

The credit union's legal counsel fails to clearly state how officials would be prejudiced under the existing bylaw amendment. In our opinion, it is the credit union that will suffer prejudice if it adopts this proposed bylaw. The proposal's first paragraph establishes a legal presumption that an official acted in good faith. The credit union could only deny payment if it could meet the "burden of proving otherwise." It is our opinion that this burden could only be conclusively established in a court and at the credit union's expense. The proposal's third paragraph states that the right of indemnification is a "contract." Translated, if the credit union denies indemnification, it can be sued for indemnification payments and breach of contract. Under both the Model Business Corporation Act and Ohio law, the credit union has the opportunity to consider the actions of the official requesting indemnification before it makes any payments. See, Ohio Revised Code Section 1701.13(E)(4). The proposal is in conflict with NCUA's regulation and should be denied.