

GC/MFR:bhs
SSIC 3000
03-0626

TO:

FROM: Sheila A. Albin, Associate General Counsel

SUBJ: Nonstandard Bylaw Amendment

DATE:

You have asked for our comments on several proposed nonstandard bylaw amendments. We appreciate the way you have grouped the bylaws into two categories, those you are recommending for approval and those you are recommending for disapproval. We will review the proposed amendments in the order you have presented them.

This is an unusually large request and you are recommending denying most of the amendments. In cases like this, it might be helpful to work informally with the FCU, encouraging it to withdraw some of the requests if you are certain they will not be approved. Some of the regions have used this approach, and it significantly reduces the amount of material for review by OGC and the regions.

Several of the requested amendments you have recommended approving are cosmetic. By cosmetic, we mean that it does not change the meaning of the provision. We agree with Region V's comments that bylaw amendments should be substantive and the FCU should provide a valid reason why the amendment is desirable or necessary. In addition, we note the FCU Act requires NCUA to prepare form bylaws, "which shall be used by Federal credit union incorporators." 12 U.S.C. §1758. For those reasons, we have recommended against approving amendments that are merely cosmetic.

Amendments the Region Is Inclined Not To Approve

Article IV, Section 2

The FCU proposes adding a sentence to the provision governing the requirements for the notice of the annual meeting. The sentence reads, "The notice must include a brief statement of qualifications and biographical data for each nominee in a form approved by the board of directors." You suggest disapproving this request "because it applies to a matter governed by Article V." We note that, because the FCU has elected Option A1 in Article V, the language governing biographical information about the candidates is not included. We have no legal concerns with allowing the FCU to provide the members with information about the nominees and recommend approving this request.

Article IV, Section 4

The FCU proposes changing the suggested order at the annual meeting. You suggest disapproving this request since the bylaw states that the board is authorized to establish the order as long as it complies with Robert's Rules of Order. We agree with your recommendation.

In addition, the FCU proposes combining the supervisory committee report with other committees' reports. You recommend disapproving this request because the FCU Act requires the supervisory committee to submit a summary of its annual audit report to the members at the annual meeting. 12 U.S.C. §1761d. We agree with your recommendation.

Article V, Section 2

The FCU proposes revising Option A1 by eliminating nominations from the floor. As explained in the attached OGC legal opinion 94-1209, dated December 29, 1994, it is impermissible to allow only for nominations by the nominating committee. If the FCU does not wish to permit nominations from the floor, it must adopt one of the other options that permit nominations by petition. The FCU's rationale for eliminating nominations from the floor is that its "nominees must have good credit . . . and must be willing to complete volunteer achievement courses." This office has issued numerous letters stating that all members, except those convicted of a crime, are eligible for election. Attached is OGC legal opinion 97-0105, dated June 5, 1997, that deals specifically with the issue of credit worthiness and OGC legal opinion 95-0207, dated March 29, 1995, that discusses the permissibility of educational requirements for directors following the election. The nominating committee has the right to set criteria, but a member that does not meet that criteria always has the right to seek nomination either from the floor or through the petition process, depending on the procedure in the FCU's bylaws.

The FCU also proposes amending this section to have the supervisory committee serve as election tellers. You suggest denying this amendment because the supervisory committee has oversight authority if problems arise during the election. We agree with your recommendation to deny this amendment.

Article V, Section 6

The FCU wants to require including the names and addresses of the asset liability committee with the other committees and officials that must be forwarded to NCUA "in accordance with the Act." You recommend denying this request since the FCU Act does not require providing this information to NCUA. We agree with your recommendation.

Article VI, Section 2

Although not discussed in your memo under either the approved or disapproved sections, the FCU has requested deleting the last two sentences of this section because its "President/CEO (management official) and Vice Presidents (assistant management officials) are paid employees of the credit union, not volunteers." We believe it is important to retain these provisions that state that the board selects the management officials and whether or not the management officials are permitted to serve on the board.

Article VI, Section 3

The FCU proposes deleting "either 2 or" and "as the board determines: provided, however, that all regular terms must be for the same number of years." You recommend denying this request because the current bylaw provides sufficient flexibility for the FCU to establish three-year terms. We agree with your recommendation.

Article VI, Section 4

This provision addresses the board filling vacancies on the board, credit committee, if applicable, and the supervisory committee. The FCU wants to delete credit committee and replace it with asset liability committee (ALCO). You object to including the ALCO because you believe it is unnecessary based on who serves on the ALCO. Under Article VII, Section 11 of the FCU's proposed bylaws, which we are recommending denying, the ALCO is comprised of the CFO and two directors. Since we are recommending denying the amendment to Article VII, Section 11, that specifies who serves on the ALCO, we recommend denying this request for a different reason than stated in your memo. Article VII, Section 11 allows the board to establish board policy for the replacement of the ALCO and therefore, an amendment to the bylaws is not necessary.

This provision also provides that appointed directors serve until the next annual meeting and appointed supervisory committee members serve until the first regular meeting of the board following the next annual meeting of members, at which the regular term expires. The FCU wants to replace the highlighted language with "until June 30 when the regular term expires." You object to June 30 because the time line in the bylaws is "is associated with the annual meeting." We agree and note that using the time frame of a board meeting to fill the positions is preferable to a date certain since the action must take place at a board meeting.

Article VI, Section 8

The FCU proposes adding supervisory committee members and replacing “investment committee member” with “asset liability committee member” to this provision that provides for temporarily filling a position when an individual is absent, disqualified or otherwise unable to perform the duties of office. We have no objection to replacing the investment committee with the ALCO since they mean the same thing.

You object to including the supervisory committee in this section because the requirements for suspension of the supervisory committee are covered by the bylaws and the FCU Act. 12 U.S.C. §1761d; FCU Bylaws, Article VI, Section 9. We do not believe this provision conflicts with the suspension provisions you have cited, but rather, is intended to address the situation where an individual is “temporarily” unable to serve and it makes sense to “temporarily” fill the position so that the business of the FCU can continue uninterrupted.

Article VI, Section 10

The FCU proposes adding a section limiting who can serve on the board. This is a permissible policy for a nominating committee, but as explained in the letters referenced under Article V, Section 2 of this memo, a bylaw that limits who can be nominated to the board is not permissible.

Article VII, Section 1

The FCU wants to make several cosmetic changes to this section dealing with board officers and compensation. You recommend allowing the changes with one slight modification. Because these changes are cosmetic, and the bylaws, as currently worded, are flexible enough to allow for the operations and titles the FCU operates under, we recommend denying this bylaw amendment in its entirety. We note that on page 8 of this memo, we recommend denying amendments to this section that you have recommended approving.

Article VII, Section 2

The FCU proposes replacing “board meeting” with “organizational meeting.” We agree with your recommendation to deny this request because organizational meeting, which is addressed in Article X, only applies to the first meeting after the charter is granted.

We also concur with your decision to deny the request to add “to serve on the Executive Committee” after board officers. The FCU’s rationale for this request is that this is how it “designates its board officers.” The FCU Act requires the Board to elect its board officers. 12 U.S.C. §1761a. If the FCU wants to have a policy that the board officers serve on the executive committee, we have no legal objection, but making the election of the executive committee part of the same vote as the election of the officers confuses the issue and we would object.

Article VII, Section 4

In the proposed amendment, the board delegates to the CEO the authority to approve individuals authorized to sign notes and checks on behalf of the FCU. You object to this on safety and soundness grounds. We defer to your judgment on this issue.

Article VII, Section 6

This section provides that the “financial officer” manages the FCU “unless the board has appointed a management official to act as general manager.” The FCU wants to replace “financial officer” with “President/CEO” and delete the remainder of the sentence dealing with the board appointing a management official. The FCU also want to delete the paragraph stating the board may appoint assistant financial officers. We agree with your recommendation to deny this request. The part of the first sentence that the FCU is suggesting deleting is the part that applies to its situation, i.e., the board appointing a management official. We also believe the language in that sentence and the last paragraph, clarifying that it is the board that has the authority to appoint these individuals, is important to retain.

Article VII, Section 7

The FCU wants to delete this provision that states the management official is under the direction and control of the board because it does not conform to their operational policy. We agree with your decision to deny this request and question the permissibility of an operational policy that does not require the management official, in this case, the President/CEO, to operate under the direction and control of the board.

Article VII, Section 8

This provision allows the board to “prescribe the duties of such employees . . . as may be necessary” and to “remove such employees.” It also allows the board to delegate this authority to the management official. The FCU want to change the first “such employees” to the President/CEO and the second “such employees” to “such employee” and delete the phrase that allows the board to delegate this authority. Article VII, Section 7, which we have said the FCU cannot delete, deals with the board’s hiring and supervision of the management official. This section is intended to cover the board’s relationship with nonmanagement employees and the authority of the board to delegate its duties toward those employees to the management official. We concur with your decision to deny this request.

The FCU also wants to amend the provision that prohibits the board and the management official from hiring or firing the auditing assistance used by the supervisory committee by allowing them to take part in those decisions if there is just cause. We agree with your decision to deny this request because it affects the ability of the supervisory committee to remain totally independent of the board.

Article VII, Section 10

The proposed bylaw changes the criteria for being a membership officer from an individual selected from “the membership” to “employees of this credit union” and takes away the flexibility of allowing the executive committee to approve applications for membership. We agree with your decision to deny this amendment because it limits the board’s flexibility and does not state the membership officer must be appointed by the board and be a member of the FCU as required by the FCU Act. 12 U.S.C. §1761b(1). Membership officers may be employees but the proposed last sentence is unnecessary and confusing.

Article VII, Section 11

This section permits the board to appoint an investment committee composed of at least two individuals and states the members of the committee may not be compensated as such. The FCU proposes changing the name of the committee to ALCO and requiring that the committee be composed of two directors and the Chief Financial Officer of the FCU. We do not object to changing the name of the committee to ALCO but do object to specifying in the bylaw who can serve on the committee since this limits the FCU’s flexibility and is something that should be handled through board policy. The FCU and your office have proposed alternative language concerning the prohibition on compensation. We believe the last sentence in this section is clear on the compensation issue and the FCU should be required to adopt the language

Article VIII, new Section 5

This provision addresses the duties of loan officers. The FCU proposes adding a new section addressing the appointment of loan officers. We concur with your decision to deny this request because the appointment of loan officers is covered in Article VI, Section 6(g).

Article IX, Section 1

This provision addresses the appointment of the supervisory committee. The FCU Bylaws prohibit the financial officer from serving on the committee. The FCU proposes changing the term “financial officer” to “treasurer” and permitting the treasurer to serve on the committee in an advisory capacity. You object because “no member should be appointed to serve as an advisor since all members should share similar duties and responsibilities.” In addition to your concern, we question the safety and soundness implications of having the treasurer serve on the supervisory committee in any

capacity.

We concur with your decision to deny the request to change the time frame for appointment of the supervisory committee.

Article IX, Section 2

This section provides that the secretary of the supervisory committee has custody of the records of actions taken by the committee. The FCU wants to amend the bylaws to require that the records be maintained at the FCU's corporate office. We concur with your decision to deny this request because it encroaches on the supervisory committee's independence and authority in this area.

Article IX, Section 3

The FCU proposes limiting the supervisory committee's authority to hire outside clerical assistance. We concur with your decision to deny this request because it dilutes the supervisory committee's independence and authority.

Article IX, Section 5

The FCU wants to add ALCO members to the list of whom the supervisory committee can suspend. The ALCO, like the executive committee, "serves at the pleasure of the board" and can be replaced by the board at any time. Article VII, Section 11. We do not believe having the supervisory committee handle the suspensions of the ALCO, which would then require a membership vote at a special meeting, is in the best interest of the FCU.

Article XIII, new Sections 2 and 3

This provision addresses deposit of funds. The FCU wants to add two new sections stating that all investments, borrowing and discounting operations must comply with applicable laws and regulations. We agree with your recommendation to deny this request because these are issues that should be addressed in the FCU's investment policy.

Article XVI, Section 4

The FCU wants to replace the "credit committee" with the ALCO in the last sentence of its conflict bylaw. The first sentence of the bylaw says it applies to all committee members and the last sentence clarifies how the disqualification is handled with respect to a particular committee. We agree the amendment is unnecessary.

Article XVI, Section 8(c)

The FCU wants to amend this section by specifically stating the ALCO members are officials. Currently, the bylaw only names the board of directors, supervisory committee, and credit committee, and a catchall that includes other volunteer committees. Since the ALCO members would be included as officials under "other volunteer committees," we recommend denying this amendment because it is unnecessary.

Amendments the Region Is Inclined to Approve

Article II, Section 4

The FCU wants to amend this section by changing the first use of the word "member" to "individual." This amendment is incorrect because a member is not always an "individual" but may be an organization or other legal entity. Even if this credit union only has natural persons as members, the rest of the sentence does not read properly because it later reads "until the person or organization" terminates membership. The proposed amendment is, as a result, confusing. It is unnecessary and we recommend denying the request.

Article II, new Section 5

This provision deals with operational matters and was deleted from the 1999 version of the FCU Bylaws. It was in

prior versions of the bylaws and is currently adopted by the FCU. As noted in the Foreword of the FCU Bylaws, an FCU may retain a provision from its current bylaws without NCUA approval. We concur with your recommendation to approve this request.

Article III, Section 5(c); Article V, Section 3; Article VI, Section 8; and Article IX, Section 1

The FCU has requested deleting references to the “credit committee” in all of these provisions. We object to granting this request, since the reference only applies if the FCU has a credit committee. This is a cosmetic change that is not necessary.

Article IV, Section 2

This provision requires that notice of the annual meeting be sent to the members at least 30 days before the meeting but no more than 75 days. The FCU is requesting that “75 days” be changed to “60 days.” We concur with your recommendation to approve this change.

Article V, Section 1 Option A1

The FCU is requesting changing the time frame for appointing the nominating committee from 30 to 60 days before the annual meeting. This is because the FCU has proposed including biographical data about its nominees in its notice of annual meeting which must be sent at least 30 but not more than 60 days before the annual meeting. We concur with your decision to approve this amendment. We suggest the requirement that the annual notice include the nominees and biographical data about them, be in Article IV, the notice of annual meeting section as the FCU proposed.

Article VI, Section 5 and Article VII, Section 5

The FCU wants to delete the reference to “ranking” in front of vice chair. This is a cosmetic change. We object to purely cosmetic changes for the reasons stated above.

Article VII, Section 1

The FCU proposes several changes to this section governing board officers that are either cosmetic or should be handled through board policy. We recommend denying all of these proposed changes.

Article IX, Section 4

The FCU proposes changing “financial officer” to “treasurer.” We recommend denying this change since the Addendum to Article VII allows the FCU to list its board officers and titles.

Article VII, Section 6(a)

The FCU proposes changing “have” to “maintain.” This is a cosmetic change. We object to purely cosmetic changes for the reasons stated above.

Article X

The FCU, because it is not newly chartered, proposes deleting this section that establishes procedures for the organizational meeting and the initial appointment of officers and committee members. You recommend approving this deletion because the section only applies to newly chartered credit unions. Although this section applies to the organization of an FCU, we recommend retaining it as it provides a record of how the FCU was initially organized.

Article XI, new Sections 3-8

The FCU proposes retaining the operational provisions relating to loans that were deleted from Article XII when the

bylaws were revised in 1999. As explained above, an FCU does not need NCUA's permission to retain previously adopted bylaws.

Article XII, new Section 2

FCU proposes retaining the operational provision relating to dividends that was deleted from Article XIV, Section 3 when the bylaws were revised in 1999. As explained above, an FCU does not need NCUA's permission to retain previously adopted bylaws.

Article XIII

The FCU is requesting deleting the language in this section that exempts petty cash and change funds from the requirement that all funds be deposited in qualified depositories. The FCU also proposes deleting the language that exempts receipts under a certain amount from the requirement to deposit all funds not later than the second banking day after their receipt. We concur with your recommendation to allow this amendment.

Article XVI, Section 5

You recommend approving the FCU's request to change "chairmen" to "chairs" in this section. We concur with your recommendation since "chair" is the term used throughout the bylaws.

Article XVI, Section 6

The FCU want to replace a "reasonable" fee for copying the charter and bylaws with a "\$25" fee. We recommend denying this amendment since the setting and changing of fees is something that should be handled by board policy and not amendments to the bylaws.

If you have any questions about our comments, please feel free to contact Staff Attorney Mary Rupp at ext. 6553.

Attachments