

TO:

FROM: Sheila A. Albin, Associate General Counsel

SUBJ: Nonstandard Bylaw Amendments, [ ] FCU

DATE: November 4, 2004

You have asked this office to review several proposed nonstandard bylaw amendments from [ ] Federal Credit Union. Below are our comments on each proposal.

#### Article III, Sections 1 and 5

The Federal Credit Union (FCU) Bylaws provide that members may pay their initial membership share either in full or in installments. FCU Bylaws, Article III, Section 1. The FCU proposes eliminating the option of paying in installments. We agree with your decision to deny this amendment because the FCU Act permits members to pay their initial share in installments. 12 U.S.C. §1759(a). This issue is further discussed in the attached OGC Legal Opinion 01-0255, dated March 19, 2001.

#### Article III, Section 4

We agree with your inclination to deny the FCU's proposal to disallow transferred shares to carry dividend credits under this section. Under the FCU Act, the board of directors has the power to authorize the payment of dividends on shares. 12 U.S.C. §§1757(6); 1763. Neither the FCU Act nor the NCUA Rules and Regulations require that an FCU declare a dividend. Shares that accrue dividend credits, however, retain those credits even when they are transferred from one member to another. The member who receives the transferred shares is entitled to dividends, if declared, based on the total shares the member owns, including those transferred. The FCU, therefore, cannot amend its bylaws to remove the dividend credits on the transferred shares.

#### Art. III, Sec. 5(c); Art. IV, Sec. 4(e); Art. V (Option A4), Sec. 3(b); Art. VI, Secs. 4 and 8; Art. VII, Sec. 8

You are inclined to deny the FCU's proposal to eliminate all references to a credit committee from its bylaws because the FCU does not have a credit committee. You suggest that the references should remain in the bylaws in the event that future boards choose to reinstate a credit committee. We support your determination and also note that we previously considered a similar request and concluded that the references in the bylaws are reasonably clear that they only apply if there is a credit committee. We also previously noted that the proposed change is cosmetic and is not necessary.

#### Article III, Section 7

In 1999, the Board clarified in the FCU Bylaws that owners of a joint account may be members of the FCU without opening separate accounts if they each purchase at least one share. Because the FCU does not want to allow more than one person to establish membership through a joint account, it should request a bylaw provision that would allow it to require separate accounts for membership. We agree that the language proposed by the FCU is inadequate. While operationally the FCU may use a system based on the order of names on the account, the proposed language assumes that the second account owner is not a member of the FCU. We note that the NCUA Board recently issued a Notice and Request for Comment proposing the following language as an alternative to the current Article III, Section 7: "Each member must purchase and maintain at least one share in a share account that names the member as the sole or primary owner. Being named as a joint owner of a joint account is insufficient to establish membership." 69 Fed. Reg. 58203 (Sept. 29, 2004).

### Article VI, Section 2

You are inclined to deny the FCU's proposal to replace the third sentence in this section to bar employees and their family members from being directors or supervisory committee members. The FCU proposes, therefore, to delete the current provision that states "[i]n no case may employees and family members constitute a majority of the board." You are opposed to the FCU amending this section because future boards may choose to change this policy and it will cause confusion.

We agree with your determination because Section 2 already permits an FCU to make a designation in the first two sentences of the section to prohibit directors, committee members, and their immediate family members from being paid FCU employees. By making this designation, the FCU establishes an anti-nepotism policy that bars employees and their family members from serving on the board or a committee without the need for additional language in the bylaw. We note that FCUs may adopt anti-nepotism policies as discussed in attached OGC Legal Opinion 96-1024, dated October 24, 1996, and OGC Legal Opinion 91-0508, dated June 4, 1991. We also note that, a paid employee may run for a board seat even though the bylaws prohibit employees from serving on the board, provided the employee relinquishes the paid position upon election to the board. This is discussed further in the attached OGC Legal Opinion 91-1022, dated November 20, 1991.

### Article VI, Section 3

The FCU proposes replacing the first sentence of this section with "[r]egular terms of office for directors will be for a period of three years." You are not opposed to setting the terms at three years but you have concluded that the FCU should retain the phrase "provided, however, that all regular terms must be for the same number of years and until the election and qualification of successors." We concur with your recommendation. In a previous opinion, OGC Legal Opinion 03-0626, dated July 3, 2003, we supported a region's decision to deny a similar request on the region's stated basis that the current bylaw provides sufficient flexibility. We would, however, have no legal concerns if you allow the FCU to set three-year terms in the manner you have suggested. We are aware of at least one instance where a credit union failed to establish a record outside of the bylaws, either in its minutes or by a policy, as to whether the length of regular terms will be two or three years, and this has led to some confusion.

### Article VI, Section 8

You recommend approval of the FCU's proposal to limit the number of regular board meetings a director may miss to three during the calendar year and to create an appeals process for reinstatement. We concur with your recommendation because the proposal enhances accountability for attendance. We note that we supported similar nonstandard bylaw amendments in the attached OGC Legal Opinion 90-1204, dated December 11, 1990, and OGC Legal Opinion 99-0419, dated April 28, 1999.

Attachments