

OGC/CJL:bhs
05-0430R

TO:

FROM: Sheila A. Albin, Associate General Counsel

SUBJ: [] Federal Credit Union Nonstandard Bylaw Amendment

DATE: April 28, 2005

You have asked this office to review a proposed nonstandard bylaw amendment from [] Federal Credit Union (FCU) that would temporarily increase the board to accommodate a merger with another credit union. We agree with your inclination to deny the requested amendment. Alternatively, the FCU could increase the number of director seats by board resolution and appoint directors of the acquired credit union to the vacancies but those appointed directors would have to stand for election at the next annual meeting.

The FCU, the surviving credit union of a merger, proposes a temporary bylaw amendment to increase the current number of seats on its board of directors from seven to thirteen so it may add directors from the merged credit union. The FCU refers to these directors as "expansion directors." The expansion directors would serve staggered terms of one or two years and the FCU's regular directors would maintain their three-year terms. The proposed bylaw gradually reduces the size of the board to nine members within two years. It also states that "any director whose term expires March 2005 shall be appointed to serve a term of three years."

While the FCU can change the number of directors on its board by resolution, the proposed bylaw impermissibly prevents members from exercising their right to elect directors under the FCU Act and FCU Bylaws. The FCU Bylaws permit an FCU to change the number of directors to an odd number not fewer than 5 but no more than 15 by adopting a board resolution. FCU Bylaws, Art. VI, Sec. 1. When an FCU's board increases the number of seats on the board, it creates vacancies. If the increase is not timed with the FCU's annual election, the FCU Act requires the board to fill the vacancies until the membership elects successors at the next annual meeting. 12 U.S.C. §1761b(3). The proposed bylaw amendment, therefore, is contrary to the election process in the FCU Act because it would allow appointed directors to serve beyond the date of the next annual meeting.

The FCU's board could adopt a resolution to increase the number of directors to thirteen and appoint directors from the merged credit union to fill the vacant seats. When it increases the number of directors, the FCU must fix regular terms so approximately an equal number of regular terms expire at each annual meeting. FCU Bylaws, Art. VI, Sec. 3. Directors appointed to vacant seats may only hold office until the next annual meeting, at which the unexpired terms must be filled by the vote of the members. FCU Bylaws Art. VI, Sec. 4.

For your information, an attorney representing the FCU contacted our office and we have discussed our view with him. We told him the requirement that appointed directors must stand for election at the next annual meeting is a statutory requirement. We pointed out that the FCU could address some of the concerns of the directors of the acquired credit union by appointing them after the next annual meeting, which is close to the merger date. In that way, the newly appointed directors would serve for at least a year.

cc: Regional Directors