

OGC:AMT:bhs
07-0824R

TO: []

FROM: Sheila A. Albin, Associate General Counsel /S/

SUBJECT: [] Federal Credit Union
Nonstandard Bylaw Amendments

DATE: September 28, 2007

Under NCUA Delegations of Authority, Supervision 12, you have asked for concurrence regarding six proposed amendments from []. Each proposed amendment is discussed separately below.

Article III, Section 7: Voting by owners of joint accounts.

[] proposed allowing one share in a joint account to establish each joint owner as a member. There are two options under the Bylaws for joint accounts and membership requirements: one requires members open separate accounts to establish membership and the other allows owners of a joint account to become members without opening separate accounts if both owners fulfill all the membership requirements, including each member purchasing and maintaining at least one share in the account.

[] wants to change the language to reflect one share in a joint account will establish each joint owner as a credit union member.

The Federal Credit Union Act (the Act) requires members to subscribe to at least one share of its stock, and further elaborates joint account owners may not vote, obtain loans, or hold offices unless they become a qualified member. 12 U.S.C. §1759(a). A joint owner does not become a member merely because he or she is named on a joint account; therefore, OGC concurs with your inclination to deny this request as contrary to the Act.

Article V, Option A-2, Section 1: Withdrawal of nominee after notice but prior to annual meeting.

[] has Option A-2, which provides for in-person elections, a nominating committee, and nominations by petition.

[] has proposed adding three paragraphs to the end of Section 1 to deal with the situation where a nominee withdraws or a director, who is not up for election, resigns after the notice to members identifying the nominees has already gone out. You may need to clarify this point with [] but your reviewer appears to think [] intends to delete the existing provisions on nominations from the floor or petition. We read []'s letter to be suggesting adding the proposed language, not deleting the existing provisions.

The proposed amendment provides if a board member, who is not up for re-election, or a nominee withdraws after notice to members identifying the nominees is given, but more than 40 days before the annual meeting, the Nominating Committee will choose a replacement nominee. The 40-day period is significant under Option A-2 because the cut-off for submitting a petition is 40 days before the annual meeting.

If a board member, who is not up for re-election, or a nominee withdraws in the period between 40 days before the annual meeting and the annual meeting, a replacement will be chosen under the general provisions for filling vacancies in Article VI, Section 4. That replacement member's term would be until the next regular board meeting following the annual meeting date in the next calendar year. The current Bylaws do not address this situation.

The proposed amendment only deals with circumstances after the notice of nominees goes out and does not eliminate the filing of petitions. It could, however, potentially prevent nominations from the floor at the annual meeting because Option A-2 bars nominations from the floor when the number of nominees equals the number of positions to be filled. We understand []'s desire to avoid nominations from the floor at the annual meeting, but members have a right to respond to nominees by either submitting a petition or making a nomination from the floor. Preventing such nominations when the deadline for submitting nominating petitions has passed denies members their right.

We recommend the following substantive changes be made. First, we suggest modifying the proposed language to permit nominations from the floor if a nominee was replaced after initial notice to the members. Second, []'s second proposed paragraph for this section should be deleted as contrary to the Act. The proposed language permits [] to fill a vacancy on the board by appointment until the annual meeting in the following year. This is impermissible. The FCU Act and Bylaws allow an appointed board member to serve only until the next annual meeting. 12 U.S.C. §1761(a); FCU Bylaws Art. VI, section 4. Based on []'s submission, the proposed language for Article V, Option A-2, Section 1 should be changed to read as follows:

If a board member not up for re-election or a nominee withdraws after notice to members identifying the nominees is sent out, but before the annual meeting, the nominating committee will choose a

replacement nominee who meets the nominating criteria. If an election includes a replacement nominee, nominations from the floor are permitted, even if the number of nominees equals the number of positions to be filled.

The term “withdraws” includes but is not limited to: voluntary withdrawal by the director, death of the director, and removal pursuant to these by-laws.

Article VI, Section 4: Vacancies.

The Bylaws allow Directors and credit committee members appointed to fill a vacancy to hold office only until the next annual meeting. Any unexpired terms are then filled by vote of the members and until qualification of their successors.

[] proposes allowing appointed Directors and credit committee members to hold office until the next regular meeting of the board following the annual meeting. [] states its purpose is to provide adequate time to select an individual and conduct appropriate background checks.

The FCU Act states the board of directors may fill vacancies on the board of directors “until successors elected at the next annual meeting have qualified.” 12 U.S.C. §1761b(3). The proposed bylaw is impermissible because it is inconsistent with the FCU Act.

Article VI, Section 9: Suspension of supervisory committee member.

The Bylaws provide any member of the supervisory committee may be suspended by a majority vote of the board of directors. Credit union members decide, at a special meeting held between seven and fourteen days after the suspension, whether the suspended committee member will be removed or restored to the supervisory committee. [] proposes eliminating the special meeting allowing credit union members to decide removal or restoration, and allowing the board of directors to make that decision by a majority vote.

The Language in Article VI, Section 9 of the Bylaws is identical to the Act. Section 115 states the “members shall decide, at a meeting held not less than seven nor more than fourteen days after any such suspension, whether the suspended committee member shall be removed from or restored to the supervisory committee.” 12 U.S.C. §1761d. []’s proposal is inconsistent with the FCU Act and is impermissible.

Article VII, Section 1: Compensation of board members.

[] proposed to delete the third sentence of Article VII, Section 1 and replace it with the following language: No board officer shall be compensated for services to the Credit Union.

The Bylaws allow one board officer be compensated for services as determined by the board. OGC previously allowed another FCU to eliminate compensation for board officials. OGC Op. 05-0712 (August 30, 2005). Although the Act and NCUA regulations provide only one board officer may be compensated, they do not require that a board officer be compensated. 12 U.S.C. §1761(c), 1761a; 12 CFR §701.33(b). OGC concurs with your inclination to approve this amendment as proposed.

Article IX, Section 5: Notice for meetings to act on the suspension of any director or board officer.

The Bylaws allow the supervisory committee, by unanimous vote, to suspend any director, board officer, or member of the credit committee. The supervisory committee must then call a special meeting of the members to act on the suspension not fewer than seven nor more than 14 days after the suspension.

[] proposes holding the special meeting no less than 30 and no more than 75 days after the notice date. [] seeks to amend the bylaw to change the time frames to schedule a special meeting. [] further removes the requirement the committee chair acts as chair of the meeting unless members select another person to act as chair.

The Bylaws' current language parallels the Act, which provides the supervisory committee:

[M]ay by a unanimous vote suspend any officer of the credit union or any member of the credit committee or of the board of directors, until the next members' meeting, which shall be held not less than seven nor more than fourteen days after any such suspension, at which meeting any such suspension shall be acted upon by the members.

12 U.S.C. §1761d. Changing the time frames established by the Act is impermissible. OGC concurs with your inclination to deny this request as contrary to the Act.

Please contact Staff Attorney Annette Tapia or me if you have any questions.