

GC/JT:bhs
SSIC 3700

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FROM: Acting Assistant General Counsel Hattie M. Ulan

SUBJECT: Nonstandard Bylaw Amendment

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(Your January 4, 1988 Memo)

DATE: February 7, 1989

You have asked for our comments on a proposed nonstandard amendment submitted to you by the [] ("FCU"). The proposed bylaw provides for indemnification of FCU officials and employees. It is not clear to us whether the FCU has elected to indemnify its officials and employees pursuant to [] law or whether it is establishing its own standards for indemnification. Since the intent of the bylaw is unclear, we recommend that it be denied and that the FCU be encouraged to develop a bylaw similar to that described herein.

ANALYSIS

Section 701.33(c) of NCUA's Rules and Regulations authorizes an FCU to indemnify its officials and employees. Section 701.33(c)(2) provides:

Indemnification shall be consistent either with the standards applicable to credit unions generally in the state in which the principal or home office of the credit union is located, or with the relevant provisions of the Model Business Corporation Act. A Federal credit union that elects to provide indemnification shall specify whether it will follow the relevant state law or the Model Business Corporation Act. Indemnification and the method of indemnification may be provided for by charter or bylaw amendment, contract or board resolution, consistent with the procedural requirements of the applicable state law or the Model Business Corporation Act, as specified. A charter or bylaw amendment must be approved by the National Credit Union Administration.

The proposed bylaw incorporates some provisions of Nevada corporation law (Section 78.751 of the Nevada Statutes). It also contains the somewhat confusing statement that "[t]he indemnification authorized pursuant to this paragraph is in addition to any indemnification rights provided for [] directors, officers and committee members by law. We are uncertain as to whether the FCU is in fact making a determination to follow the indemnification provisions provided by Nevada law or if it is creating its own standards of indemnification. It is also unclear whether Section 78.751 of the Nevada Statutes applies to officials and employees of Nevada chartered credit unions. We suggest that in the indemnification area FCU's be encouraged to adopt a bylaw that contains only their decision to indemnify and the method of indemnification elected (i.e., pursuant to state law or to the Model Business Corporation Act) rather than attempting to incorporate substantive indemnification provisions in the language of the bylaw. FCU's should then attach a copy of the state law or Model Business Corporation Act provisions to its bylaw so that the substantive indemnification provisions are readily available and understood. We are attaching a memo that discusses an indemnification bylaw that was recently concurred with by this Office. We recommend that the FCU adopt a similar bylaw.

Attachment

GC/RD:sg
3700

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FROM: Acting Assistant General Counsel Hattie M. Ulan

SUBJ: Nonstandard Amendment, Indemnification of Officials
(Your October 21, 1988, Memorandum)

DATE: December 23, 1988

You have requested our review of [] request to adopt a nonstandard bylaw amendment concerning indemnification of their board of directors, officers and committee members. We suggest that the amendment be modified to include a reference to indemnification of state-chartered credit unions. The amendment will then be in compliance with Section 701.33 of the NCUA Rules and Regulations (12 C.F.R. §701.33). We have no objection to the amendment being designated as Article XIX, Section 8 of the FCU Bylaws. We would caution the FCU that an attorney's opinion should be obtained in choosing the correct Florida law under which the FCU officials will be indemnified.

Pursuant to the recent amendment to Section 701.33 of the NCUA Rules and Regulations, an FCU can indemnify its officials consistent with state law or with the Model Business Corporation Act. The recently amended Section 701.33 [12 C.F.R. §701.33] provides, in part:

(b)(2) Indemnification shall be consistent either with the standards applicable to credit unions generally in the state in which the principal or home office of the credit union is located, or with the relevant provisions of the Model Business Corporation Act. A Federal credit union that elects to provide indemnification shall specify whether it will follow the relevant state law or the Model Business Corporation Act. Indemnification and the method of indemnification may be provided for by charter or bylaw amendment, contract or board resolution, consistent with the procedural requirements of the applicable state law or the Model Business Corporation Act, as specified. A charter or bylaw amendment must be approved by the National Credit Union Administration. (See Change 5 to NCUA's Rules and Regulations or 53 F.R. 29640, Aug 8, 1988, attached.)

In the preamble to Section 701.33 [53 F.R. 29640 (8/8/88)], the NCUA Board stated, in part:

Under the final amendment, An FCU will be free to choose one of three options: No indemnification; indemnification under the state enabling law applicable to its neighboring state-chartered credit unions; or indemnification under the Model Business Corporation Act. The only caveat is that any FCU bylaw or charter amendment relating to indemnification, like all other such amendments, must be approved by NCUA. (Emphasis added.)

The FCU has elected to indemnify its officials pursuant to Florida law. The bylaw amendment submitted, with our recommended changes overstruck and underscored, would read as follows:

"Each person who is or was a director, officer or committee person of the credit union (including the heirs, executors, administrator or estate of such person) shall be indemnified by the credit union as of right to the full extent permitted or authorized by the Florida law for indemnification applicable to state chartered credit

unions against any liability, cost or expense asserted against him/her and incurred by him/her in his/her capacity as a director, officer or committee person. The credit union shall maintain insurance, at its expense, to protect itself and any such person against any such liability, cost or expense."

We have no objection to the amendment including a reference to "heirs, executors, administrators or estate."
We concur with the approval of the proposed bylaw as revised above.

Attachment