

April 2, 1991

James J. Kallinger,
President & CEO
Firefund Federal Credit Union
1600 Los Gamos Drive
San Rafael, California 94911-5500

Re: Bylaw Provisions for Removal (Your March 14, 1991 Letter)

Dear Mr. Kallinger:

This responds to your request for clarification of the opinions expressed in our March 1, 1991 letter to you. Although your questions are basically the same as those in your first letter, we will briefly address them. Your questions and our answers follow.

Article VII, Section 7

Article VII, Section 7 of the Standard Federal Credit Union Bylaws (Bylaws) addresses removal of directors and other officials by the board of directors.

1. What is the intent and rationale behind allowing an Executive Officer an opportunity to be heard rather than simply permitting the board to remove him "after giving the Officer reasonable notice?" Would the NCUA consider this option as a nonstandard bylaw amendment?

In our opinion, basic fairness requires that an individual be afforded an opportunity to defend himself against charges before those charges are deemed proven and he is removed. We note that the purpose of the "notice" provision is to inform the individual of the charges against him so that he may defend himself; mere notice of the removal itself does not afford adequate protection. Moreover, not only the individual whose removal is sought but the board and the FCU's membership are best served by a full discussion of relevant facts and opinions prior to removal.

In the past, we have consistently rejected proposals that would abrogate the right to be heard of persons subject to possible removal or expulsion, and in the absence of compelling reasons to the contrary we believe it wise to continue that policy. You offer no justification for eliminating the right to be heard, and we see no reason to do so. We would not recommend approval of a nonstandard bylaw amendment such as you suggest.

Article XIX, Section 3

Article XIX, Section 3 of the Bylaws addresses removal of various officials and employees by the membership.

1. Since FCU employees do not "hold office," how can they be removed?

This issue was fully addressed in our earlier response to you. As we pointed out in that letter, Article XIX, Section 3 specifically includes employees among those who may be removed as described in the bylaw. We therefore find no merit in your argument that employees may not be removed. If the Firefund FCU board of directors does not wish the membership to have the power to remove employees, it should adopt the standard bylaw amendment to Article XIX, Section 3, deleting employees from the scope of the bylaw.

2. What is the intent and rationale behind providing an opportunity to be heard? Would the NCUA consider a nonstandard bylaw amendment changing this bylaw provision to read:

Notwithstanding any other provisions in these bylaws, any director, committee member, officer, or employee of this credit union may be removed from office by the affirmative vote of a majority of the members present at a special meeting called for that purpose, but only after an opportunity has been given to be heard?

The "nonstandard amendment" that you propose duplicates the current bylaw, and your question therefore needs no answer. However, if you meant to suggest a nonstandard bylaw amendment eliminating the opportunity to be heard, we would not recommend approval of such an amendment.

The only express removal authority granted FCU members by the Federal Credit Union Act (the "Act") is that over the supervisory committee. See, 12 U.S.C. ~1761d. The Act does not provide for membership removal of employees, board officers, members of other committees, or directors. The general common law rule is that those who elected, appointed or hired an individual, have the power to remove him. Under the common law, the membership would have the right to remove only directors and, if the particular FCU has an elected (rather than appointed) credit committee, members of the credit committee. Thus, Article XIX, Section 3 significantly expands the membership's removal powers beyond those available under the Act or at common law.

The standards in Article XIX, Section 3 are in keeping with corporate common law principles. Under corporate common law, directors elected by the membership may be removed by the membership only after notice and opportunity to be heard. Although a board of directors may be authorized to remove directors without a member meeting, the membership may remove them only at a meeting for which removal is at least one of the stated purposes, and after opportunity to be heard.

Although Article XIX, Section 3 does not invalidate other by-law provisions for removal, we are of the opinion that it sets minimum standards for removal by the membership. In light of the fact that the bylaw grants the membership removal powers that it would not have under the Act or common law and specifically sets forth procedures for removal, we believe that those procedures must be followed, and should not be abrogated. Moreover, it seems to us that no useful purpose would be served, and no fair procedure accomplished, by permitting removal of an individual without the opportunity for full discussion by all parties. We would not support an amendment of the type you propose.

We hope this provides a final clarification of these issues.

Sincerely,

Hattie M. Ulan
Associate General Counsel