



NATIONAL CREDIT UNION ADMINISTRATION

WASHINGTON, D.C. 20456

August 14, 1991

Lee D. Haas
V.P. Internal Control
First Commonwealth
Federal Credit Union
450 Union Blvd.
Allentown, PA 18103

Re: Board Vacancies
(Your Letter of August 5, 1991)

Dear Mr. Haas:

You have requested an interpretation of the alternative language for Article VII, §7 of the NCUA Federal Credit Union ("FCU") Standard Bylaw Amendments and Guidelines (the "Standard Bylaw Amendments"). The Standard Bylaw Amendments provide three alternatives to the Article VII, §7 in the NCUA Standard FCU Bylaws. We state that the use of "shall" requires removal, whereas "may" gives the board some latitude in enforcement of the bylaw. The board of directors is free to choose either wording when adopting the alternatives in the Standard Bylaw Amendments. The choice is up to the discretion of the board of directors of the FCU. However, as the bylaws of an FCU are to be interpreted in accordance with the corporate common law of the state in which the FCU is located, it is conceivable that the board of directors of the FCU could use its discretion to postpone a removal decision. Local counsel should be consulted regarding such delay.

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ANALYSIS

Article VII, §7 of the NCUA Standard FCU Bylaws states in pertinent part:

If a director or a credit committee member fails to attend regular meetings of the board or credit committee, respectively, for 3 consecutive months, or otherwise fails to perform any of the duties devolving upon him/her as a director, or credit committee member, his/her office may be declared vacant by the board and the vacancy filled as herein provided. (emphasis added).

The alternatives to this language in the Standard Bylaw Amendments were propounded to prevent "board members or credit committee members from taking advantage of the 'three consecutive months' rule by attending once every three months. With the increased complexity of credit union operations, it is desirable that the board and credit committee members be 'active' and participate regularly in the meetings of those respective groups." Standard Bylaw Amendments, p.4A. The three alternatives, in pertinent part, are as follows:

Alternative One: If a director fails to attend regular meetings of the board for 3 consecutive months, or any 4 months in any calendar year, or otherwise fails to perform any duties devolving upon him/her as a director, his/her office shall be declared vacant by the board and the vacancy filled as herein provided.

Alternative Two: If a director fails to attend regular meetings of the board twice within 4 consecutive months, or otherwise fails to perform any of the duties devolving upon him/her as a director, his/her office may be declared vacant by the board and the vacancy filled as herein provided.

Alternative Three: If a director fails to attend regular meetings of the board twice within 4 consecutive months, or any 4 months in any calendar year, or otherwise fails to perform any of the duties devolving upon him/her as a director, his/her

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office shall be declared vacant by the board and the vacancy filled as herein provided.

As the commentary to the alternatives states: "The use of 'shall' requires removal, whereas 'may' gives the board some latitude in enforcement of the bylaw. The board of directors may choose either wording when adopting any of the above alternatives." Standard Bylaw Amendments, p. 6. It is the intent of the alternatives to permit the FCU board of directors adopting the alternatives to use their discretion in deciding whether to make removal mandatory or discretionary.

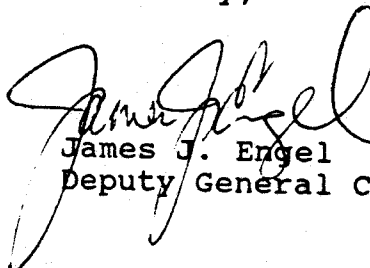
It seems that your board of directors has adopted either Alternative One or Alternative Three. A strong case can be made that removal would be mandatory under these alternatives. However, where not in conflict with federal law, the Bylaws of an FCU are to be interpreted in light of state law and general corporate law. Under general principles of law, "may" sometimes means "shall" and "shall" sometimes means "may". See 57 C.J.S. May (1948) and 80 C.J.S. Shall (1953). Therefore, it is conceivable that the FCU board has authority, even with Alternative One or Alternative Three to postpone a removal action. This would especially seem the case in the situation of a long-standing, respected director undergoing chemotherapy and radiation treatments. Local counsel should be consulted regarding whether the corporate common law of Pennsylvania would permit the FCU board to delay such removal. However, if the board wanted to clarify this authority, we would recommend adoption of Alternative Two.

As you are no doubt aware, an FCU's Bylaws function as a contract governing the relationship between the FCU and its members. Bylaws are interpreted according to the corporate common law of the state in which the credit union is located. It has long been NCUA policy not to become involved in bylaw disputes, unless the alleged bylaw violation poses a threat to the safety and soundness of the FCU in question or unless there are issues relating to the FCU Act or NCUA Rules and Regulations. The issue you raise, on its face, does not cause safety and soundness concerns or conflict with the FCU Act or NCUA Rules and Regulations. We do not believe that it

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would be appropriate for NCUA to insert itself into what is essentially an internal situation well within the credit union's power to resolve.

Sincerely,



James J. Engel
Deputy General Counsel

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