

March 12, 2004

Bruce O. Jolly, Jr., Esq.
Venable LLP
575 7th Street NW
Washington D.C. 20004-1601

Re: Secrecy of Member Ballot in Federal Credit Union (FCU) Elections.

Dear Mr. Jolly:

You have asked us to reconsider a prior legal opinion regarding the secrecy of ballots in FCU elections and, in support of your request, contend that proper procedures and the use of third-party tellers can maintain the secrecy of ballots that reveal in one document the members identity and their vote. We agree that with certain controls in place an FCU can preserve secrecy in the election process through the use of independent tellers.

In OGC Legal Opinion 03-0510, dated July 30, 2003, we determined the FCU Bylaws require a secret ballot and that a member's signature on the ballot destroys secrecy even when an independent teller is the only party with access to the ballots. While we still support the interpretation that the balloting process must remain secret, we have reconsidered our position as to whether secrecy is destroyed when third-party tellers facilitate the election process.

You suggest that an FCU can maintain a voter's confidentiality in the election process if it hires an independent teller to provide support for annual elections. You believe that confidentiality can be preserved, even though the election ballot may have the names of the candidates on one side and member identification information on the other side of the same page, if members send their completed ballots directly to the independent teller and not to the FCU. You suggest a process in which the independent teller has complete control of the ballots and merely verifies the member identification information with the FCU without relinquishing control of the ballots or otherwise permitting anyone from the FCU access to the ballots. The process you suggest also requires the independent teller to seal all the ballots received and place them in a secure storage area for one year from the date of the election.

As noted in our previous opinion, the current and former versions of the FCU Bylaws, as well as ROBERT'S RULES OF ORDER, support the interpretation that an FCU's balloting process must remain secret. ROBERT'S RULES OF ORDER states that "[e]lection by ballot is preferable, as the ballot allows the members to vote in secrecy." ROBERT'S RULES OF ORDER 172 (1983). We believe that it is critical for an FCU to design ballots properly to maintain secrecy when members submit ballots to the FCU or whenever FCU staff, officials, or other interested parties may have access to the ballots.

We believe that when an FCU retains a reputable, independent third-party teller and grants the teller sole control over completed ballots, an FCU can establish an election process that assures members their votes remain confidential and secret from all interested parties. By using an independent teller, an FCU maintains the secrecy of the ballot so its employees, officials, and members do not have access to ballots. An important aspect of preserving secrecy in the election process, therefore, depends on the FCU and the independent teller having an understanding that the teller cannot improperly divulge the ballots. We have no objection to the process you have described because it ensures that no one from the FCU has access to the completed ballots and it does not compromise the election process as contemplated by the FCU Bylaws.

This discussion regarding the use of third party tellers pertains to those circumstances where an FCU is using written ballots that, in their design, do not separate the identification of the member from the ballot, itself. The FCU Bylaws do not require the use of written ballots or the use of third party tellers but provide four options for elections, including in-person voting. Finally, we note that an FCU's election process is subject to the FCU's bylaws and applicable state laws based on the facts and circumstances of the election.

Sincerely,

Sheila A. Albin
Associate General Counsel

OGC/CJL:bhs
03-1048