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SSIC 3700

91-0118

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FROM: Hattie M. Ulan, Associate General Counsel

SUBJ: Nonstandard Bylaw Amendments - []

(Your January 18, 1991 Memorandum)

DATE: March 1, 1991

This responds to your request for our opinion on two bylaw amendments proposed by []. In our opinion, the proposed amendments conflict with Section 111 of the Federal Credit union Act, and should not be approved.

Background

[] has requested approval of two nonstandard amendments to the provisions of its bylaws dealing with appointment and election of the board of directors. The specific sections involved are Article VI, Section 2 and Article VII, Section 3. Basically, [] wishes to provide that an individual appointed by the board of directors to fill a vacancy on the board within one hundred days before the next annual meeting will serve until the second annual meeting after his appointment. [] considers the proposed amendments necessary in order to protect the integrity of the nomination and election processes and prevent a small number of members from controlling election of the board of directors.

[] states that it presently has in place the "standard mail ballot election bylaw", which provides for a nominating committee but also allows members to nominate candidates by petition. Article VI, Section 1 of a bylaws requires the nominating committee to submit its list of nominations at least 90 days before the election. Under Article VI, Section 2 of the Federal Credit Union Standard Bylaw Amendments, which [] also apparently has in place, members may make nominations from the floor at the annual meeting when sufficient nominations have not been made; nominations from the floor are voted on only by those members present. According to [] this arrangement disenfranchises all members not present at the annual meeting. The [] board of directors is concerned that should a board member die or resign unexpectedly after the mail balloting process for the next annual election has already been initiated, it would be too late for the nominating committee to nominate a candidate for election at the annual meeting, and the winning candidate would therefore be nominated from the floor and elected by the relatively small percentage of members present at the annual meeting.

[] therefore proposes to amend Article VI, Section 2 to provide that only board positions which become vacant at least 100 days prior to the annual meeting will be filled at that meeting. [] also wishes to amend Article VII, Section 3 to state that directors appointed during the 99 days prior to the next annual meeting shall serve until the second following annual meeting.

You agree with [] reasoning and are inclined to approve the request to amend Article VII, Section 3. You believe that if that amendment were made, the proposed amendment to Article VI, Section 2 would be unnecessary. You also suggest that a similar amendment to Article VII, Section 3 be incorporated into the Standard Amendments, since other FCUs may experience the same problem described by [].

Analysis

Section 111(a) of the Act (12 U.S.C. 51761(a)) states, in part, "Any vacancy occurring on the board shall be filled until the next annual election by appointment by the remainder of the directors." A board of directors is precluded by Section 111(a) from appointing a director to serve beyond the next annual election. Therefore, the proposed

amendment to Article VII, Section 3 would violate the Act, and should not be approved. The proposed amendment to Article VI, Section 2, while not violate of the Act, serves no purpose if the amendment to Article VII, Section 3 is not also made.

While we cannot support the proposed-amendments, we understand the concerns expressed in [] letter and your memorandum. We would not oppose implementation of the proposed amendment to Article VI, Section 2 (preventing nominations from the floor to fill a vacancy that arose less than 100 days before the annual meeting) if an appropriate change in Article VII, Section 3 were also made. We suggest one of the following alternatives for changes to Article VII, Section 3.

1. The board of directors would appoint someone to fill the position until the next annual meeting, and then the new board elected at that meeting would appoint an individual to serve until the following annual meeting.
2. The nominating committee would be required always to nominate at least one more individual than the number of positions to be filled at any given election. Then, if a position became vacant after the nominations had been filed, that extra nominee would be elected to fill the slot; if only the expected number of vacancies occurred, all of the expected slots would still be filled and one individual would not be elected. For example, if the board expected four vacancies, the nominating committee would nominate five individuals. I an unexpected vacancy occurred after the nominations had been filed, all five candidates would be elected; if not, the top four vote-getters would be elected. Of course, the board of directors serving at the time that the vacancy occurred would still have the power to appoint someone to fill the vacancy until the election took place. If this option were implemented, no change in Article VI, Section 2 would be necessary

In our opinion, neither of these alternatives violates the Act or the Regulations. [] may wish to draft a proposed nonstandard amendment to Article VII, Section 3 implementing one of the suggestions. Should you also wish to propose a standard amendment based on one of the suggestions, we would be happy to review the same.