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SSIC 3701

91-0413

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FROM: Hattie M. Ulan, Associate General Counsel

SUBJ: [] - Nonstandard Bylaw Amendment

(Your-February 14, 1991, Memorandum)

DATE: April 24, 1991

We apologize for the delay in our response, but we did not receive your memorandum until April 10, 1991. You have asked for our comments on the above-referenced FCU's request for a nonstandard bylaw amendment. The proposed amendment would limit the amount of overlap between the board of directors of [] and any trade association and its affiliates.

Background

The proposed amendment would revise Article VI, Section 1, of [] bylaws to provide:

The number of directors serving on the corporate board concurrently as state credit union trade association directors, officers, agents or employees (including all affiliated organizations) should be limited to one-third of the board of directors. The number of trade association affiliated candidates over the limit must agree to resign from the trade association or affiliated organization if elected, within 30 days of the election.

You initially notified [] that it would take up to 60 days to act on the proposed amendment, you could immediately approve the following amendment, as it had been previously approved:

The board shall consist of [] members elected from among the members and/or designated representatives of members, provided that at least three (3) members will not be a director, officer, employee, or agent of the state credit union league or subsidiary thereof.

You informed []:

Differences between the . . . proposed amendment and the previously approved amendment are the number of unaffiliated directors and the method in achieving the number. Your proposal is for one-third of the board members to be unaffiliated. The approved amendment requires that 3 be unaffiliated. You currently have a seven member board; the approved amendment stating 3 unaffiliated members provides a better definition than requiring 2 and one-third individuals to be unaffiliated.

The FCU responded that it wished to go forward with its proposed amendment. It-stated that the previously approved amendment did not accomplish what it wanted since it had a seven person board.

In your February 14, 1991, memorandum, you state:

The requested bylaw requests that the number of overlapped directors be limited to one-third of the total board members. The board of directors is currently comprised of seven positions. One-third of seven is two and one-third. The credit union has agreed to set policy that this would be rounded to two individuals. The reason why they would prefer to leave one-third rather than use the specified number of two is that if at some future date, they decided to change the number of directors on the board, they will still be required to have one-third of non-affiliated directors.

Analysis

As you know, our position is that the only non-age related eligibility requirements for FCU board membership are those contained in the FCU Act. That is, as long as an individual is a member, see 12 U.S.C. §1761, and has not been convicted of a crime involving dishonesty or breach of trust, see 12 U.S.C. §1785(d), he or she is eligible to be elected as a director. The same broad eligibility requirements that apply to natural person FCUs also apply to corporate FCUs. Thus, for example, although Article VII, Section 6, of the Corporate Bylaws specifies that management officials shall not be members of the board, this bylaw does not affect eligibility to be elected to the board. Instead, we believe that the bylaw requires management officials, once elected, to choose between serving on the board or in a management (employee) capacity.

While we believe that eligibility for corporate board membership cannot be restricted, we note that Article XV, Section 2, of the Corporate Bylaws attempts to prevent conflicts of interest by providing that no director (or other official or employee) shall participate in any matter affecting his/her pecuniary interest or the pecuniary interest of any corporation, partnership or association (other than the credit union) in which he/she is directly or indirectly interested. Thus, a corporate FCU director who serves in any official or managerial capacity or otherwise acts as an employee or agent of a state league would be disqualified from considering a particular matter involving the league. In an effort to limit potential conflicts of interest, corporate FCUs have proposed nonstandard bylaw amendments which restrict the number of league-affiliated Individuals who may serve on the board. Such amendments are permissible provided they, like Article VII, Section 6, do not affect eligibility to be elected to the board. Since the amendment proposed by [] does not affect eligibility to be elected to the board, it is permissible.

We note that you have somewhat misstated the effect of [] a proposed amendment. Rather than requiring that one-third of the board be unaffiliated, the bylaw would only allow one-third to be affiliated, thus requiring two-thirds to be unaffiliated. Accordingly, five members of [] seven-member board would have to be unaffiliated. Since this bylaw would do more to prevent potential conflicts of interest than even NCUA's recently-proposed Section 704.12(a), which requires corporate FCU boards to have at least three unaffiliated members, see 56 Fed. Reg. 11952 (Mar. 21, 1991), we have no legal objection to granting the amendment.