

October 27, 1997

Steven R. Bisker, Esq.
616 South Washington Street
Alexandria, Virginia 22314

Re: Supervisory Committee's Authority to Retain Legal Counsel for its Exclusive Use
Your letter of June 20, 1997

Dear Mr. Bisker:

You have asked whether a federal credit union's (FCU's) supervisory committee has the authority to retain legal counsel to assist it in performing its functions. You also have asked whether the board of directors can set budget limits which, in the opinion of the supervisory committee, interfere with the work the attorney is expected to perform. Your second question is really two questions: whether the board of directors can limit the funding and what happens if there is a dispute between the board of directors and the supervisory committee about the amount of funds that should be available.

For purposes of addressing your questions, we are assuming that there is no legal counsel already serving the FCU or that there are reasons why the supervisory committee either cannot or does not want to rely on the legal counsel who generally serves the FCU. We want to note that, when an attorney is compensated by a credit union, it is the credit union, not the board of directors, who is the attorney's client. The attorney owes a duty of loyalty to the client, the credit union, not to any individual or group within the credit union. Thus, barring some particular problem, the supervisory committee should be able to consult with legal counsel who already serves the FCU.

There may be circumstances where it is appropriate for the supervisory committee to retain its own legal counsel to assist it in carrying out its responsibilities. We think that whether it is appropriate for the supervisory committee to hire its own counsel will depend on the facts in a particular case. Assuming the circumstances are appropriate, the board of directors, nevertheless, has the authority to set funding limits because of its general responsibility for the financial management of the FCU. If the board of directors and supervisory committee disagree about the hiring of legal counsel or the amount of funding to be made available, as discussed below, the supervisory committee has various options it can consider.

Discussion

It is the duty of the supervisory committee to make or cause to be made an annual audit and such supplementary audits as it deems necessary. 12 U.S.C. §1761(d). The supervisory committee is responsible for ensuring that the credit union's management practices and procedures are sufficient to safeguard members' assets. 12 C.F.R. §701.12(b)(1)(ii). How the supervisory committee meets this responsibility is left to its discretion, but the FCU bylaws contemplate that the board will approve the compensation to be paid to anyone assisting the supervisory committee. Article X, Section 3 of FCU Bylaws. If the FCU's board of directors has already approved the

supervisory committee's budget and the fee for legal counsel is within that budget, the supervisory committee would be free to retain legal counsel to assist it in performing its functions.

If the supervisory committee does not have an established budget for its operations but wishes to employ legal counsel, the supervisory committee should obtain authorization for payment before hiring legal counsel. First, it is the board of directors that is generally responsible for paying the FCU's bills. The Federal Credit Union Act provides that the board of directors is responsible for the financial management of an FCU. 12 U.S.C. §1761(b). Also, we note that Article VIII, Section 5 of the FCU Bylaws provides that the board of directors, acting through the financial officer or management official it may appoint, has custody of the FCU's funds. Second, as a practical matter, because legal counsel might not undertake to provide services without some assurance of being paid, the supervisory committee should seek the approval of the board of directors. Assuming that the circumstances are appropriate for the supervisory committee to hire legal counsel, the board of directors should be reasonable in providing funding.

Given their roles and responsibilities, we recognize that there may be a degree of tension between the supervisory committee and the board of directors. For example, we note that, although the board of directors appoints the supervisory committee and establishes its budget, the supervisory committee has the power to suspend members of the board and to conduct investigations of the board of directors. 12 U.S.C. §1761(a),(b); Federal Credit Union Bylaws, Article X, Section 1, 5. Thus, there may be circumstances where the supervisory committee wishes to obtain its own legal counsel and the board of directors will be obligated to provide reasonable funding even where the board, itself, or one or more of its members are the object of the supervisory committee's investigation.

If the supervisory committee and board of directors are unable to resolve a dispute about funding, the supervisory committee could consider calling for a special meeting of the members under Article X, Section 6 of the FCU bylaws, assuming the grounds for such a special meeting exist. The supervisory committee could consider filing a lawsuit to obtain a judicial determination of its right to hire its own legal counsel. To do so, the supervisory committee would have to find legal counsel willing to undertake the matter based on the contingency that counsel would only be paid if the court found in favor of the supervisory committee's right to hire its own counsel. Members of the supervisory committee, themselves, could fund the litigation with the expectation that they could be reimbursed if the court found in favor of their right to hire counsel. If matters involve a threat to the safety and soundness of the FCU or involve violations of law or regulation, the supervisory committee could also consider referring the matter to the NCUA.

As a general matter, it is our opinion that, if any internal disputes over funding of this type arise, the board of directors and the supervisory committee should use their best efforts to resolve the matter among themselves keeping in mind the best interests of the FCU.

Sincerely,

Sheila A. Allbin
Associate General Counsel

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SSIC 3501
97-0649