

March 6, 2009

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Re: Board Vote on Federal Credit Union (FCU) Charter Amendment.

Dear XXX:

You have asked if the disqualification of two directors from a vote on a proposed FCU charter amendment was appropriate, and if so, whether a two-thirds vote by the remaining directors was sufficient to approve the charter amendment. Disqualification from a board vote is necessary only if the director has a conflict of interest in the matter before the board. Based on the facts you describe, it does not appear that a prohibited conflict of interest exists. Additionally, a charter amendment requires an affirmative vote of two-thirds of the total authorized number of members of the board, not merely two-thirds of the qualified directors eligible to vote.

Your letter indicates you are a duly elected member of your FCU's board of directors. Recently, the chairman of the board of directors disqualified you and another director from a board vote to amend your credit union's charter to add two, new select groups to its field of membership. Your disqualifications were based on alleged conflicts of interest due to your respective affiliations with an existing select group already within the credit union's field of membership. You state the credit union's general counsel advised that a conflict exists because the existing select group is in competition with the two, proposed select groups for membership and dues income. The gist of this analysis is that, because of your affiliation with an existing select group, you would be disinclined to approve the addition of the two, new select groups. This legal analysis and the chairman's action in disqualifying you are incorrect. While you and the other director are employees of an existing select group, neither of you would receive any personal or financial benefit from the outcome of the proposed charter amendment.

The FCU Bylaws provide that "[n]o director . . . shall in any manner, directly or indirectly, participate in the deliberation upon or the determination of any question affecting his pecuniary interest of any corporation, partnership, or association . . . in which he is directly or indirectly interested." FCU Bylaws, Article XVI, § 4. When a matter before the board conflicts with a director's financial or personal interest, the director must not participate in the board's decision-making process on that matter.

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Based on the circumstances you describe, you and the other director do not appear to have a pecuniary or personal interest in the two select groups, which were under consideration by the board. A conflict of interest exists only if a director has a direct or indirect interest in the transaction under consideration or a direct or indirect interest in an entity with an interest in the transaction. In this case, we believe you and the other director have merely a remote third-party interest in the potential select groups being considered by the credit union. The fact that the existing and potential select groups have a competitive business relationship is not sufficient to raise a prohibited conflict of interest under the FCU Bylaws.

Your letter also indicates that, subsequent to the disqualification of you and the other director, a vote of the remaining nine directors was taken resulting in a 6-3 vote in favor of the amendment. You have asked whether this vote was sufficient to approve the charter amendment.

The FCU Bylaws require an affirmative vote of two-thirds of the authorized number of members of the board for any charter amendment. FCU Bylaws Article XVII, § 1. Under this provision, the term “authorized number of members of the board” means all members of the board, that is, the total number of directors as provided in the credit union’s bylaws. We understand your bylaws provide for an eleven-member board. Thus, eight affirmative votes are required to achieve the two-thirds vote necessary to approve the proposed charter amendment. No charter amendment is effective, however, until approved by NCUA. Id. Also, the credit union may not serve members of a new select group until that group has been properly approved by the board of directors.

Sincerely,

Sheila A. Albin  
Associate General Counsel

GC/PWY:bhs  
09-0238