



GC/RJ 833
3/10

NATIONAL CREDIT UNION ADMINISTRATION
Washington, D.C. 20456

April 3, 1989

Office of General Counsel

Mr. Reuben Lansky
21-25 34th Avenue
Long Island City, New York 11106

Re: Disclosure of Bankruptcy or Loan Loss
Information of FCU Board Nominees (Your March 1,
1989, Letter)

Dear Mr. Lansky:

This is our second response to you concerning our differences in interpretation of Article XIX, Section 2, of the Federal Credit Union Bylaws. The Section directs Federal credit union ("FCU") officers, directors, employees and committee members to hold in confidence all transactions of the FCU with its members. In our opinion, this Section is waived when a member places or permits the placement of his or her name in nomination for a board of directors position. We see no violation of Article XIX, Section 2 of the FCU Bylaws where an officer, director, committee member, or an employee of an FCU opposes a nomination from the floor: (1) on the ground that the member has caused the credit union a loss through bankruptcy or (2) on the ground that the member has defaulted on a loan and thereby caused the FCU a loss. Such disclosures may be subject to other Federal and state laws (e.g., the Bankruptcy Code and state libel and slander laws).

We understand your concerns over our interpretation of Article XIX, Section 2. We have not, however, changed our position. We believe the strongest link protecting members' shares in the FCU should be the FCU's board of directors. Nominees for the FCU's board should be open to questions of their qualifications. As we stated in our prior letters (enclosed), when an FCU member places or permits the placement of his or her name in nomination for a board of directors position, that person is representing to the members a certain level of expertise in financial matters.

FOIA
Vol III Part A (4) Disclosure of final information
at name

This representation must be open to impeachment if the members are to be able to cast informed votes.

You also were concerned that the cases we cited in our earlier letter to you were not directly on point. The cases we cited generally discuss a shareholder's waiver of corporate bylaws. The cases were not meant to discuss waiver of the confidentiality protections of the standard FCU Bylaws. We are not aware of any cases specifically on point.

You asked what we meant by disclosure of "certain information" about the board nominee. We were referring to financial information as it relates to the nominee's qualifications to serve on the FCU board.

You also asked what supervisory action NCUA is prepared to take if an FCU refused to disclose information about a candidate. In our view, release of information is permissive, not mandatory. We stated that "...such information can be made available to the members...." (Emphasis added.)

We view an FCU's bylaws as a contract between the FCU and its members on how the FCU is to be governed. The NCUA issues standard bylaws and standard amendments thereto. NCUA also approves requests for nonstandard bylaw amendments. An FCU would not be permitted to adopt bylaws or a bylaw amendment which violate the FCU Act or the NCUA's Rules and Regulations. The NCUA would take action against an FCU for violations of its bylaws if the actions violated the FCU Act, the NCUA's Rules and Regulations, or safety and soundness standards. Other disputes involving the bylaws and their meaning should be resolved in another forum, usually in a state court.

Sincerely,

Hattie M. Ulan
ms:

HATTIE M. ULAN
Assistant General Counsel

RD:sg

Enclosures



← calling F:
GC/RD:sg
3700

NATIONAL CREDIT UNION ADMINISTRATION
Washington, D.C. 20456

February 17, 1989

Office of General Counsel

Mr. Reuben Lansky
21-25 34th Avenue
Long Island City, N.Y. 11106

Re: Disclosure of Bankruptcy or Loan Loss
Information of FCU Board Nominees (Your
November 14, 1988, Letter)

Dear Mr. Lansky:

Your letter to Senator Jepsen, the Chairman of the NCUA Board, was referred to this Office for a response. Reconsideration of our prior opinion has caused a considerable delay in responding. We apologize for this delay.

Your letter sets forth concerns over a previous opinion letter of this Office dated October 25, 1988 (enclosed). In that letter we expressed the opinion that FCU members have a right to cast informed votes for board of director candidates. Based on this premise, a member who places his or her name before the members as a candidate for the board is open to questions concerning his or her qualifications, including financial information on any losses the nominee has caused the FCU. The board of directors will be managing the FCU, and hence, the member's funds. We believe our interpretation provides FCU members with valuable information to be used in determining the qualifications of potential members of the FCU board of directors. Of course financial expertise is not the only qualification that makes a person a good candidate for the board of directors of an FCU. The fact that a board nominee or member has filed for bankruptcy or has caused a loss to the FCU does not disqualify the member from running for a position on the Board. The

Mr. Reuben Lansky
February 17, 1989
Page 2

remainder of this opinion will discuss several points raised in your letter.

You are concerned that our opinion does not rest on a legal precedent. We would like to assure you that the legal opinion concerning waiver of the confidentiality protections of Article XIX, Section 2, of the FCU Bylaws rests on firm legal theory. Blacks Law Dictionary (1979) defines implied waiver, in part, as follows: "[a] waiver is implied where one party has pursued such a course of conduct with reference to the other party as to evidence an intention to waive his rights or the advantage to which he may be entitled..." There are many cases discussing shareholder waiver of the protections found in a corporation's bylaws. (See, e.g. In re Roosevelt Leather Hand Bag Co., 68 N.Y.S.2d. 735 (N.Y. Sup. Ct., 1947); Calwell v. Kingsbery, 451 SW2d 247 (Tex Civ. App., 1970) and Frankel v. 447 Cent. Park West Corp., 28 N.Y.S.2d. 505, affd. 263 A.D. 950, 34 N.Y.S.2d 136 (N.Y.A.D. 1 Dept., 1942)

You also believe that our opinion letter would result in a sitting director becoming "incompetent to run for office solely because he has defaulted on a loan." Our letter should not be interpreted to arrive at such a conclusion. As you pointed out in your letter, "financial expertise is not a prerequisite for corporate directors,..." but I believe you would agree that a certain level of financial discipline is a factor to consider in choosing a board member. We did not state that an individual becomes incompetent to run for the board, but rather that certain information about him or her can be made known at a membership meeting.

You are also concerned that financial information of joint account holders, when one of those joint account holders wishes to run for the board, could become available to the FCU membership. It is the board nominee's qualifications for serving on the board which must be examined by the members, not joint account holders.

You asserted that there could be a dampening effect on volunteering for credit union service because board members could not be sure if they would default on a debt in the future. We disagree. The fact that a board nominee or sitting board member has defaulted on a debt or has filed for bankruptcy does not disqualify that person from running for or sitting on the board. We merely believe that such information can be made to the available to the members when an individual is running for the board.

Mr. Reuben Lansky
February 17, 1989
Page 3

Lastly, as we stated in our opinion letter, we caution FCU members presenting statements against board nominees that certain Federal or State laws may restrict statements made against a board nominee -- e.g., the Federal Bankruptcy Act and orders issued thereunder and state libel and slander laws.

Sincerely,

Hattie M. Ulan

HATTIE M. ULAN
Acting Assistant General Counsel

RRD:bhs
enclosure

Jacqueline A. Owens, Esq.

Page 2

October 25, 1988

the ground the member has caused the FCU a loss through bankruptcy." Several of your constituents have questioned you concerning the appropriateness of this statement in light of Article XIX, Section 2, of the FCU Bylaws, which provides:

The officers, directors, members of committees and employees of this credit union shall hold in confidence all transactions of this credit union with its members and all information respecting their personal affairs, except to the extent deemed necessary by the board in connection with:

(a) The making of loans and extending lines of credit.

(b) The collection of loans.

(c) The guarantee of member share drafts by third parties.

In accordance with the above, the board of directors may authorize participation in:

(a) A credit reporting agency if it has determined that use of such an agency is essential in the making of loans and extending lines of credit and that information supplied by the credit union concerning its members will be made available only to legitimate members belonging to the agency and persons who have a legitimate business need for information in connection with a business transaction involving a consumer.

(b) A consumer reporting agency if it has determined that information supplied by the credit union is essential to the guarantee of member share drafts by the agency.

ANALYSIS

In our view, a candidate for FCU board of directors has implicitly waived the protection of Article XIX, Section 2.

Jacqueline A. Owens, Esq.

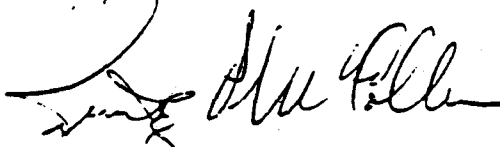
Page 3

October 25, 1988

When an FCU member places or permits the placement of his or her name in nomination for a board of directors position, that person is representing to the members a certain level of expertise in financial matters. This representation must be open to authoritative impeachment if the member's are to be able to cast informed votes. A member's bankruptcy or failure to pay a loan from the FCU is appropriate impeaching evidence of a person's financial expertise. We see no violation of Article XIX, Section 2, of the Standard FCU Bylaws, then, where an officer, director, committee member, or an employee of an FCU opposes a nomination from the floor: (1) on the ground that the member has caused the credit union a loss through bankruptcy or (2) on the ground that the member has defaulted on a loan and thereby caused the FCU a loss.

However, we caution members presenting such evidence that certain Federal or state laws may restrict statements made against a board nominee -- e.g., the Federal Bankruptcy Act and order issued thereunder and state libel or slander laws.

Sincerely



TIMOTHY P. MCCOLLUM
Assistant General Counsel

RRD:sg