

**Department of Justice
Executive Office for United States Trustees**

**Final Agency Action
Case No. 2014-1**

**Review of Decision to Remove
Hummingbird Credit Counseling and Education, Inc., Agency No. 1365,
From List of Approved Providers of Personal Financial Management
Instructional Courses and to Deny the May 17, 2013, Application
Seeking Re-Approval as a Personal Financial Management
Instructional Course Provider**

Hummingbird Credit Counseling and Education, Inc. (“Hummingbird”), seeks review of a December 18, 2013, decision removing Hummingbird from the list of personal financial management instructional course providers approved by the United States Trustee Program (“USTP”) and denying its May 17, 2013, application for re-approval. Based upon the record, I affirm the USTP’s decision.

I. Course of this Proceeding

On May 17, 2013, Hummingbird, a non-profit corporation created in North Carolina and previously approved by the USTP to provide a personal financial management instructional course (“debtor education”)¹ to bankruptcy debtors, submitted Application No. 0513-DE-02305R (the “Application”) to the Credit Counseling and Debtor Education Unit of the Executive Office for United States Trustees (“EOUST”) seeking re-approval to provide debtor education via the Internet in all 88 judicial districts under the jurisdiction of the USTP.

On December 18, 2013, the EOUST removed Hummingbird from the USTP-approved list of debtor education providers and denied its Application for re-approval (“Notice of Removal” or “Notice”). By letter dated February 5, 2014, Hummingbird timely requested a review of the Notice of Removal pursuant to 28 C.F.R. § 58.36 (the “Request for Review”).² On February 27, 2014, pursuant to 28 C.F.R. § 58.36(j), the EOUST timely submitted a response (“Response”) to the Request for Review.

On various dates between April 8, 2014, and August 5, 2014, Hummingbird submitted additional unsolicited materials to the Director in connection with its Request for Review (“Supplemental Materials”). Specifically, on April 8, 2014, Hummingbird submitted copies of correspondence it had received from the Bankruptcy Administrators in the Eastern and Western Districts of North Carolina and the Middle and Northern Districts of Alabama who oversee

¹ Hummingbird was also an approved nonprofit budget and credit counseling agency, but withdrew its application for re-approval on November 13, 2013 and ceased providing credit counseling on November 15, 2013. Request for Review at 2, n.1.

² The Director granted Hummingbird an extension to submit the Request for Review until February 7, 2014.

bankruptcy matters in their respective districts, advising Hummingbird it had been placed on a six month probationary approval period. On May 28, 2014, Hummingbird submitted additional correspondence in which Hummingbird advised the Bankruptcy Administrators that it had amended certain previously provided financial figures and provided notice of changes in Hummingbird's Board of Directors ("Board") and other structural changes. Hummingbird submitted further documentation regarding certain financial records on July 27, 2014, and regarding certificate issuance on July 30, 2014. Finally, Hummingbird submitted additional materials regarding its Board structure and mailing address on August 5, 2014.

Accordingly, the administrative record in this matter consists of: (1) the EOUST's Notice of Removal and attached exhibits; (2) Hummingbird's Request for Review and attached exhibits; (3) the EOUST's Response and attached exhibit; and (3) Hummingbird's Supplemental Materials.

II. Notice of Removal

The EOUST removed Hummingbird and denied its Application for re-approval on the grounds that Hummingbird had failed to affirmatively establish to the satisfaction of the United States Trustee that it continued to meet the requirements of 28 C.F.R. § 58.32(b), due to its failure to comply with all applicable laws and regulations of the United States and each state in which the provider provides an instructional course as required by 28 C.F.R. § 58.33(a).³ Notice of Removal at 2, 9.

According to the Notice of Removal, although Hummingbird organized itself as a nonprofit corporation under the laws of North Carolina, it failed to comply with applicable North Carolina law governing nonprofit corporations, thereby violating the debtor education rule. Notice at 2, 9 and *see* 28 C.F.R. § 58.33(a) ("A provider shall comply with all applicable laws and regulations of the United States and each state in which the provider provides an instructional course. . . [.]").

Specifically, the Notice asserts that (1) Hummingbird entered into impermissible transactions for the private benefit of certain individuals and entities in violation of the terms of its Articles of Incorporation and Bylaws ("Articles") and N.C. Gen. Stat. § 55A-1-40(17); (2) Hummingbird permitted a _____, who is not a Hummingbird officer, director, or employee, but who is the principal of several companies with which Hummingbird does business, to exercise Hummingbird's corporate power and authority in violation of N.C. Gen. Stat. § 55A-8-01(b) & (c); and (3) Hummingbird impermissibly paid distributions to _____ in violation of N.C. Gen. Stat. § 55A-1-40(17), which prohibits payments to insiders. Notice of Removal at 9.

³ The legal standard applicable to a Notice of Removal and the denial of the pending Application is the same.

III. Request for Review

In its Request for Review, Hummingbird contends that, with respect to the first ground (engaging in impermissible transactions for the benefit of others), it did not incorporate the private benefit doctrine in its Articles and, therefore, could not have violated either state or federal doctrines prohibiting such transactions. Hummingbird further argues that even if it had done so, the only consequence of such a violation is revocation of federal tax-exempt status, for which Hummingbird has not applied. Request for Review at 4-6. Hummingbird also argues that, even if these doctrines did apply, it did not violate them by entering into contractual agreements with _____ companies because Hummingbird paid the companies reasonable compensation for all services rendered. *Id.* at 6-10. Additionally, Hummingbird argues that even if it did violate its Articles, such a violation is not a violation of North Carolina law. *Id.* at 21-22.

With respect to the second ground (permitting an individual who is not an officer, director, or employee to exercise corporate power and authority), Hummingbird argues that it did not violate N.C. Gen. Stat. § 55A-8-01 because _____ never exercised corporate power and is not a Hummingbird insider.

With respect to the third ground (impermissible distribution payments), Hummingbird contends it did not violate N.C. Gen. Stat. § 55A-1-40(17) because the monies paid to _____ companies were not distributions, but rather payments for the services provided to Hummingbird by contract, which are authorized under North Carolina law. *Id.* at 10-21. Hummingbird also asserts that these contracts established commercially reasonable terms for the services rendered and were approved by Hummingbird's Board. *Id.* at 13-16.

Finally, Hummingbird argues that it did not attempt to mislead the EOUST regarding _____ involvement with Hummingbird and that any obfuscation was caused by a former Hummingbird employee who has since been terminated.⁴ *Id.* at 22-28.

IV. Standard of Review

In reviewing this matter, I must consider two factors:

1. Does the record support the decision to remove?
2. Does the decision to remove constitute an appropriate exercise of discretion?⁵

⁴ Although the Notice of Removal refers to Hummingbird's alleged concealment of relationship with Hummingbird, the Notice of Removal does not specifically refer to any statute or regulation that was violated by this alleged concealment, and does not rely upon concealment or misrepresentation as a basis for removal. Thus, it is unnecessary to address Hummingbird's arguments in its Request for Review that it did not mislead the EOUST.

⁵ See 28 C.F.R. § 58.36(l) (specifying scope of the Director's review).

V. Statutory Framework

With the enactment of the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005 (“BAPCPA”), Congress required debtors to certify that they have completed a personal financial management instructional course after filing for bankruptcy relief and before they receive a discharge of their debts. Pub. L. No. 109-8, 119 Stat. 23, 36-42 (2005). At the same time, Congress charged the USTP with responsibility for ensuring that debtors receive effective instruction by establishing a list of approved service providers after the USTP’s thorough review of each applicant’s qualifications and services. 11 U.S.C. § 111(b)(1). A provider seeking approval must provide all information the USTP requests during its review. 11 U.S.C. § 111(b)(1).

In furtherance of its supervisory responsibilities, the USTP published a regulation governing the approval process and qualifications required for debtor education providers. *See* 28 C.F.R. §§ 58.25-58.36. One such requirement is that providers must “comply with all applicable laws and regulations of the United States and each state in which the provider provides an instructional course including, without limitation, all laws governing licensing and registration.” *See* 28 C.F.R. § 58.33(a).

VI. Analysis

The Notice of Removal asserts that Hummingbird failed to comply with North Carolina law on three grounds. The evidence of record fails to persuade me that Hummingbird should be removed and its application denied on the basis of the first or the third ground. Without exonerating Hummingbird as to the first or third ground, I affirm the decision to remove Hummingbird and deny its Application on the basis of the second ground. Specifically, I conclude that the record amply supports the EOUST’s decision to remove Hummingbird from the list of approved providers and to deny its pending Application based upon Hummingbird’s violation of N.C. Gen. Stat. § 55A-8-01(b) (requiring the Board of Directors of a North Carolina nonprofit company to see that its corporate powers are exercised by and under its authority, and its affairs managed under its direction, unless otherwise provided in its articles of incorporation), and that the removal was an appropriate exercise of the USTP’s discretion.

Hummingbird’s Articles establish that it was organized as a nonprofit corporation under the laws of North Carolina in April 2005. Notice of Removal, Exhibit A at 1. As a North Carolina nonprofit corporation, Hummingbird must comply with all North Carolina laws governing nonprofit corporations. 28 C.F.R. § 58.33(a). North Carolina General Statute § 55A-8-01(b) requires that all corporate powers of a North Carolina nonprofit corporation be exercised under the authority and managerial direction of the corporation’s board of directors, unless otherwise specified.⁶ Hummingbird’s Articles name _____, _____, and _____,

⁶ N.C. Gen. Stat. § 55A-8-01 provides as follows:

§ 55A-8-01. Requirement for and duties of board.

(a) Except as provided in subsection (c) of this section, each corporation shall have a board of directors.

to the Board. The Articles do not identify any other individual with corporate or managerial authority. *See* Hummingbird's April 13, 2005, Articles of Incorporation at p. 2, ¶ VI, attached to the Notice of Removal as Exhibit A (identifying three persons as Board Directors).

Notwithstanding its Articles, Hummingbird indisputably permitted the principal of several for-profit companies, including Management Service, Inc. (),⁷ with which Hummingbird conducts business, to exercise Hummingbird's corporate authority and manage its corporate affairs. By permitting to exercise such power even though he was not identified as a director or officer authorized to so act, Hummingbird violated N.C. Gen. Stat. § 55A-8-01(b) and thereby violated the USTP's regulation requiring debtor education providers to comply with applicable state law. *See* 28 C.F.R. § 58.33(a).

A. North Carolina Law Requires Corporate Power to be Exercised by the Nonprofit Corporation's Board of Directors Unless Its Articles Specifically Provide Otherwise.

Under N.C. Gen. Stat. § 55A-8-01(b), a nonprofit corporation's corporate powers "shall be exercised by or under the authority of, and the affairs of the corporation managed under the direction of, its board of directors, except as otherwise provided in the articles of incorporation." Subsection (c) further clarifies that a corporation may "dispense or limit the authority of a board of directors by describing in its articles of incorporation who will perform some or all of the duties of a board of directors." N.C. Gen. Stat. § 55A-8-01(c). Hummingbird's Articles establish , , and as the members of the Board and do not limit the Board's authority in any way. And, as previously stated, these Articles do not identify any other individual with the authority to perform the Board's duties. Notice of Removal, Exhibit A.

(b) All corporate powers shall be exercised by or under the authority of, and the affairs of the corporation managed under the direction of, its board of directors, except as otherwise provided in the articles of incorporation.

(c) A corporation may dispense with or limit the authority of a board of directors by describing in its articles of incorporation who will perform some or all of the duties of a board of directors; but no such limitation upon the authority which the board of directors would otherwise have shall be effective against other persons without actual knowledge of such limitation.

(d) To the extent the articles of incorporation vests authority of the board of directors in an individual or group other than the board of directors, the individual or group in the exercise of such authority shall be deemed to be acting as the board of directors for all purposes of this Chapter.

⁷ Management Services, Inc. is a business management company founded by and in 2005. *See* Affidavit of (" Aff.), ¶¶ 55-56. The Aff. is the fourth affidavit included in an unnumbered composite exhibit entitled "Original Affidavits," which appears immediately following Exhibit 22 to Hummingbird's Request for Review.

Although the duties of a nonprofit corporation's board of directors will vary according to the corporation's needs, some of the generally accepted duties are as follows:

1. Establishing and overseeing the organization's policies and ensuring effective organizational planning;
2. Monitoring the conduct of the staff to ensure that the business is being properly managed;
3. Reviewing the organization's finances, including approving the annual budget and monitoring financial projections throughout the year, and implementing fiscal controls to ensure that organizational resources are expended only to further organizational activities;
4. Defining, modifying, and communicating the organization's mission, and monitoring and evaluating organizational programs to determine which are most consistent with the mission on an ongoing basis;
5. Hiring and firing the chief executive(s) and establishing appropriate compensation for the executive leadership;
6. Securing the resources necessary to enable the organization to fulfill its mission;
7. Serving as an advocate for the organization in the larger community;
8. Ensuring compliance with any rules or standards prescribed by law, required by an independent accreditation agency, or assigned by the organization's bylaws and articles of incorporation;
9. Recruiting new board members and evaluating the performance of their fellow trustees on an ongoing basis; and
10. Establishing procedures to ensure that each board member understands and complies with his duties as a board member.

See Peggy Sasso, Comment, Searching for Trust in the Not-for-Profit Boardroom: Looking Beyond the Duty of Obedience to Ensure Accountability, 50 UCLA L. Rev. 1485, 1509 (2003) (citing Michael W. Peregrine & James R. Schwartz, The Business Judgment Rule and Other Protections for the Conduct of Not-for-Profit Directors, 33 J. Health L. 455, 458 (2000)); *see also* Thomas Lee Hazen and Lisa Love Hazen, Article: Duties of Nonprofit Corporate Directors – Emphasizing Oversight Responsibilities, 90 N.C.L. Rev. 1845, 1849 (2012).

B. Indisputably Exercised Hummingbird’s Corporate Powers and Managed Its Affairs without Specifically Delegated Board Authority.

While the EOUST and Hummingbird dispute whether is properly classified as a *de facto* or *de jure* director or officer under North Carolina law, the relevant inquiry is whether impermissibly exercised corporate power on behalf of Hummingbird in violation of N.C. Gen. Stat. § 55A-8-01. Although Hummingbird contends that never exercised corporate power or authority on behalf of Hummingbird, the record strongly demonstrates otherwise. own affidavit establishes the actions he took with respect to Hummingbird and details his exercise of corporate power and managerial authority despite no express authorization in Hummingbird’s Articles. Aff. ¶¶ 12, 14-20, 23, 26-27, 33-34, 38, 43, 45, 89-90, 167, 169-183, 198, 203, 205-206.

As explained in the discussion below, although he held no actual position at the company, established Hummingbird’s business organization as a credit counseling agency and debtor education provider, selected its Board of Directors, secured various leases on its behalf, supervised Hummingbird employees and provided staff for Hummingbird’s operations, advanced money to Hummingbird, introduced himself as Hummingbird’s Administrator at conferences, attended Board meetings and made recommendations regarding Hummingbird’s internal employee matters, participated in discussions to sell Hummingbird to a competitor, and ultimately presented Hummingbird’s financial figures to the Board with a recommendation that Hummingbird cease providing credit counseling services.

1. Establishing and Providing Organizational Planning

affidavit demonstrates that it was originally his idea to create Hummingbird and that he was committed to obtaining for Hummingbird “the business infrastructure, marketing, administration or operational support it required.” Aff. ¶ 12. assembled Hummingbird’s Board and outlined their duties. *Id.* ¶¶ 14-20. He rented office space for Hummingbird, advanced funds to Hummingbird, and volunteered to personally guarantee a five year lease on Hummingbird’s behalf. *Id.* ¶¶ 26, 33. Additionally, assisted in assembling Hummingbird’s “corporate materials, books, bank accounts and filed for incorporation.” *Id.* ¶ 27. purchased a telephone system for Hummingbird and personally guaranteed the contracts for telephone and Internet services. *Id.* ¶ 33. When office space became insufficient, he rented additional space “for Hummingbird’s use” along with adding additional telephone lines and increasing Internet bandwidth. *Id.* ¶ 34. formed a “new company to handle Hummingbird’s merchant billing.” *Id.* ¶ 38.

In its Request for Review, Hummingbird attempts to characterize involvement as merely administrative and argues that “ and his companies never performed services related to Hummingbird’s core functions” and that, because of this, Hummingbird did not violate N.C. Gen. Stat. § 55A-8-01(b). However, the test for determining whether an individual impermissibly exercised corporate power in violation of N.C. Gen. Stat. § 55A-8-01 is not whether the individual exercised control over “administrative” duties rather than “core functions.” Nowhere in N.C. Gen. Stat. § 55A-8-01 is a distinction made between “administrative” duties and “core functions” duties. Rather, the test is whether the individual, without Board authorization, performed duties that were reserved for a Board member, such as

those duties listed above. *See supra* ¶ VI.A. The record amply demonstrates that frequently performed such duties.

2. Securing Resources and Serving as Hummingbird’s Advocate

also performed other services for Hummingbird, including “providing the staff necessary for office management functions, marketing, bookkeeping services, human resources, payroll services, benefit administration, software development, website development, engineering support and technical services.” Aff. ¶ 45. Further, he held himself out at public events as possessing authority within Hummingbird. For example, at a conference for the National Association of Consumer Bankruptcy Attorneys (“NACBA”), introduced himself as “the Hummingbird Administrator.” *Id.* ¶ 167. also paid for Hummingbird’s display, shipping of display and materials, prizes, charity raffle, and the food and beverages. *Id.* ¶ 89.

also “used staff to man [Hummingbird’s] booth and paid for their airfare, hotel and meals.” *Id.* He has paid these expenses for Hummingbird at NACBA conferences since 2011 and has not sought reimbursement from Hummingbird. *Id.* In fact, he “would often supplement many of Hummingbird’s events from [his] own pocket.” *Id.* ¶ 90.

public posture as Hummingbird’s key representative reasonably could be construed to indicate to persons outside the corporation that he was Hummingbird’s leader.

Although Hummingbird’s President and Chair of the Board, states in her affidavit that the Board exercised independent judgment and that never exercised corporate authority, she nonetheless acknowledges special status. *See* Affidavit of (“ Aff.”).⁸ confirms that the Board considered to be more than the owner of various companies with which Hummingbird did business when she stated that performed many administrative duties for Hummingbird and “served as Hummingbird’s unpaid Administrator from the start.” Aff. ¶ 16. She further stated that although she might disagree with , she would “listen to advice” on matters regarding Hummingbird. *Id.* ¶ 18.

3. Reviewing Hummingbird’s Finances and Evaluating Its Organizational Missions

When Hummingbird contemplated selling its assets, participated in discussions with , Executive Director, , Inc. (“ ”), regarding proposed purchase of Hummingbird. Aff. ¶¶ 169-183. explained Hummingbird’s “financial situation” to , who was at that time Hummingbird’s Director of Counseling Services, and , who was not a Hummingbird director but who did own an interest in other companies, and he formulated Hummingbird’s strategy for selling its credit counseling services. *Id.* ¶ 198. At a November 2, 2013, Board meeting, , not a Hummingbird employee or Board member,

⁸ Affidavit is the sixth affidavit included in an unnumbered composite exhibit entitled “Original Affidavits,” which appears immediately following Exhibit 22 to Hummingbird’s Request for Review.

presented to the Board Hummingbird's latest financial figures. *Id.* ¶¶ 198(d), 203. At this meeting, also presented to the Board his "competition analysis" and three purchase offers from competitors, and he recommended Hummingbird withdraw from the list of the EOUST-approved credit counseling agencies. *Id.* ¶ 203.

It is hard to imagine anything more central to Hummingbird's "core functions" than the decision to terminate credit counseling services altogether. That was intimately involved in this process demonstrates the authority he possessed and the role he played with respect to Hummingbird's "core functions."

4. Monitoring Staff, Hiring and Firing Executives, and Establishing Executive Compensation

In addition to the "administrative" duties performed, testified that his company, , supervised Hummingbird's counselors regarding "office behavior, attendance, and other non-counseling related matters." Aff. ¶ 43. According to a " administrator would sit in on [Hummingbird] Counselors' performance reviews." *Id.* In order to review a counselor's performance, a discussion of how well the counselor provided credit counseling and financial management instruction services – the duties directly related to Hummingbird's core functions – logically must ensue. Hummingbird's Articles establish that credit counseling and money management skills are the specific purposes for Hummingbird's incorporation; in other words, executing these purposes constitutes Hummingbird's "core functions." Notice of Removal, Exhibit A. Thus, by own admission, employees participated in the performance reviews of Hummingbird employees – counselors who performed "core functions" for Hummingbird.

confirmed that was involved in Hummingbird's internal employee compensation decisions. For example, she indicates urged the Board to increase the salary for , who is now serving as Hummingbird's Executive Director of Financial Education and Staff Attorney. Aff. ¶ 19. also stated that recommended that the Board promote to Hummingbird's Staff Attorney, which it did. *Id.* ¶ 21.

After Hummingbird decided to sell its credit counseling business, personally informed that his employment at Hummingbird was terminated and directed to human resources manager for further information regarding his health insurance. Aff. ¶ 205. Further, Hummingbird's credit counselors were informed of the lay-offs by Hummingbird and management together, and staff also met with each of Hummingbird's counselors to discuss their separation benefits. *Id.* ¶ 206.

Moreover, in November 2013, when a decision was made that Hummingbird would cease its credit counseling operations and continue in business solely as a debtor education provider, it was not a Board member, who informed Hummingbird's Director of Counseling Services that he was terminated, and directed him to human resources manager. *Id.* ¶ 205. This activity cannot be characterized as merely consulting. Rather, his actions represent the level of involvement typically expected from a key corporate officer or board member.

The affidavits from Hummingbird’s Board members attesting that the Board approved all contracts with _____ companies do not obviate the fact that _____ performed many of the Board’s duties without authorization in Hummingbird’s Articles. In addition, the fact that _____ did not actually vote on Hummingbird’s Board does not negate his actions or diminish his significant influence over the Board’s decisions and his apparent insider status.

Aff. ¶¶ 12, 14-20, 23, 26-27, 33-34, 38, 43, 45, 89-90, 167, 169-183, 198, 203, 205-206; Aff. ¶¶ 13-16, 18, 19, 21, 22, 24; Affidavit of _____ (“ _____ Aff.”) ¶¶ 11-14, 18-20, 24; Affidavit of _____ (“ _____ Aff.”) ¶¶ 7-12, 21, 22, 25, 26.

In sum, the record establishes that _____ exercised authority and exerted managerial control over Hummingbird’s operations, without authorization in its Articles. He exerted his authority both directly and through the companies that he owned, such as _____, which were closely tied to Hummingbird. On Hummingbird’s behalf, _____ performed many of the Board’s duties (as identified above) – duties that were supposed to be reserved only for Hummingbird’s Board members or their properly delegated designees.

Taken together, the facts demonstrate that _____ exercised Hummingbird’s corporate power without authority to do so in violation of N.C. Gen. Stat. § 55A-8-01(b). Because Hummingbird allowed _____ to exercise its corporate power in violation of this statute, Hummingbird is also in violation of 28 C.F.R. § 58.33(a), which requires Hummingbird to comply with all state laws.

On the basis of the record, I find that removal on this ground is appropriate.

C. Other Arguments

As previously mentioned, the EOUST removed Hummingbird on the basis of two additional grounds. However, I am not fully persuaded that a violation relating to the federal private benefit/inurement doctrines would have constituted a violation of North Carolina law and, thereby, a violation of 28 C.F.R. § 58.33(a). Absent a sufficient showing that this doctrine is applicable and relevant, I can neither exonerate Hummingbird of this alleged violation, nor find that the record supports this ground for removal.

As to the USTP’s more troubling contention that Hummingbird violated North Carolina nonprofit law by permitting insider distributions via payments to _____ companies, there appears to be an irreconcilable conflict. N.C. Gen. Stat. § 55A-1-40(17) defines a nonprofit corporation as having no income that is distributable to its members, directors, or officers, and

⁹ _____ Affidavit is the eleventh affidavit included in the unnumbered composite exhibit entitled “Original Affidavits,” which appears immediately following Exhibit 22 to Hummingbird’s Request for Review.

¹⁰ _____ Affidavit is the nineteenth affidavit included in the unnumbered composite exhibit entitled “Original Affidavits,” which appears immediately following Exhibit 22 to Hummingbird’s Request for Review.

N.C. Gen. Stat. § 55A-13-01 prohibits “distributions,” which is the transfer of money, directly or indirectly, to the benefit of an insider.^{11 12} Yet, N.C. Gen. Stat. § 55A-8-31, which governs conflict of interest transactions, specifically authorizes a nonprofit corporation’s board of directors to approve transactions between the corporation and companies in which its insiders have a financial interest, so long as a majority of disinterested board members authorize the transactions.¹³

¹¹ N.C. Gen. Stat. § 55A-1-40(17) provides as follows:

§ 55A-1-40. Chapter definitions

In this Chapter unless otherwise specifically provided:

(17) “Nonprofit corporation” means a corporation intended to have no income or intended to have income none of which is distributable to its members, directors, or officers, except as permitted by Article 13 of this Chapter, and includes all associations without capital stock formed under Subchapter V of Chapter 54 of the General Statutes or under any act or acts replaced thereby.

¹² N.C. Gen. Stat. § 55A-13-01 provides as follows:

§ 55A-13-01. Prohibited distributions

Except as authorized by G.S. 55A-13-02 or Article 14 of this Chapter, a corporation shall not make any distributions.

¹³ N.C. Gen. Stat. § 55A-8-31 provides as follows:

§ 55A-8-31. Director conflict of interest

(a) A conflict of interest transaction is a transaction with the corporation in which a director of the corporation has a direct or indirect interest. A conflict of interest transaction is not voidable by the corporation solely because of the director's interest in the transaction if any one of the following is true:

(1) The material facts of the transaction and the director's interest were disclosed or known to the board of directors or a committee of the board and the board or committee authorized, approved, or ratified the transaction;

(2) The material facts of the transaction and the director's interest were disclosed or known to the members entitled to vote and they authorized, approved, or ratified the transaction; or

(3) The transaction was fair to the corporation.

(b) For purposes of this section, a director of the corporation has an indirect interest in a transaction if:

(1) Another entity in which he has a material financial interest or in which he is a general partner is a party to the transaction; or

(2) Another entity of which he is a director, officer, or trustee is a party to the transaction and the transaction is or should be considered by the board of directors of the corporation.

(c) For purposes of subdivision (a)(1) of this section, a conflict of interest transaction is authorized, approved, or ratified if it receives the affirmative vote of a majority of the directors on the board of

Hummingbird’s Board members, who appear from their own statements in the record to be disinterested, all have averred that they approved the transactions between Hummingbird and companies. Aff. ¶ 13; Aff. ¶ 14; Aff. ¶ 25. Further, I note that N.C. Gen. Stat. § 55A-13-01 allows for “authorized distributions” as specified in N.C. Gen. Stat. § 55A-13-02, which authorizes nonprofit corporations to “pay reasonable amounts to its members, directors, or officers for *services rendered* or other value received . . .” (emphasis added).¹⁴ There is some ambiguity as to whether “services rendered” could refer to the payment

directors (or on the committee) who have no direct or indirect interest in the transaction, but a transaction shall not be authorized, approved, or ratified under this section by a single director. If a majority of the directors who have no direct or indirect interest in the transaction vote to authorize, approve, or ratify the transaction, a quorum is present for the purpose of taking action under this section. The presence of, or a vote cast by, a director with a direct or indirect interest in the transaction does not affect the validity of any action taken under subdivision (a)(1) of this section if the transaction is otherwise authorized, approved, or ratified as provided in that subdivision.

(d) For purposes of subdivision (a)(2) of this section, a conflict of interest transaction is authorized, approved, or ratified by the members if it receives a majority of the votes entitled to be counted under this subsection. Votes cast by or voted under the control of a director who has a direct or indirect interest in the transaction, and votes cast by or voted under the control of an entity described in subdivision (b)(1) of this section, shall not be counted in a vote of members to determine whether to authorize, approve, or ratify a conflict of interest transaction under subdivision (a)(2) of this section. The vote of these members, however, is counted in determining whether the transaction is approved under other sections of this Chapter. A majority of the votes, whether or not present, that are entitled to be cast in a vote on the transaction under this subsection constitutes a quorum for the purpose of taking action under this section.

(e) The articles of incorporation, bylaws, or a resolution of the board may impose additional requirements on conflict of interest transactions.

¹⁴ N.C. Gen. Stat. § 55A-13-02 provides as follows:

§ 55A-13-02. Authorized distributions

(a) A corporation may pay reasonable amounts to its members, directors, or officers for services rendered or other value received and may confer benefits upon its members in conformity with its purposes.

(b) Subject to the provisions of subsection (d) of this section:

(1) A corporation may make distributions to any entity that is exempt under section 501(c)(3) of the Internal Revenue Code of 1986 or any successor section, or that is organized exclusively for one or more of the purposes specified in section 501(c)(3) of the Internal Revenue Code of 1986 or any successor section and that upon dissolution shall distribute its assets to a charitable or religious corporation, the United States, a state or an entity that is exempt under section 501(c)(3) of the Internal Revenue Code of 1986 or any successor section.

(2) Any corporation other than a charitable or religious corporation may make distributions to any domestic or foreign corporation.

(3) Except as otherwise prohibited by statute, a corporation not operated for profit, the membership of which is limited to the owners or occupants of real property in a condominium, cooperative housing corporation, or other real property development, having as its primary purposes the

of money to _____ companies for the specific services they rendered to Hummingbird. A review of North Carolina case law yields no enlightenment. Under the circumstances, I find that the record does not alleviate my concerns regarding alleged insider distributions, and yet is not sufficient to demonstrate that that removal is warranted on this ground.

VII. CONCLUSION

Based upon my review of the record, and for all of the foregoing reasons, I affirm the USTP's decision to remove Hummingbird from the list of approved debtor education providers and to deny its Application for re-approval on the ground that Hummingbird allowed an individual who is not an officer, director, or employee to exercise its corporate power and authority.

This decision constitutes final agency action in this matter.

Dated: 4.3.15



Clifford J. White III
Director
Executive Office for United States Trustees

management, operation, preservation, maintenance, and repair of common areas and improvements upon the real property owned by the members and the corporation or organization, may make distribution to its members of excess or surplus membership dues, fees, or assessments remaining after the payment of or provisions for common expenses and any prepayment of reserves; provided that these distributions are in proportion to the dues, fees, or assessments collected from the members.

(c) Subject to the provisions of subsection (d) of this section, a corporation other than a charitable or religious corporation may make distributions to purchase its memberships.

(d) A corporation shall not make any distribution under subsection (b) or (c) of this section if at the time of or as a result of such distribution:

(1) The corporation would not be able to pay its debts as they become due in the usual course of business; or

(2) The corporation's total assets would be less than the sum of its total liabilities.