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MEMORANDUM FOR MICHAEL J. HOROWITZ
Counsel to the Director for Policy Analysis and Law
Office of Management and Budget

Re: Presidential Power Concerning Directors
of the National Consumer Cooperative Bank

I am responding to your four inquiries concerning the Board of Directors of the National Consumer Cooperative Bank, 12 U.S.C. 3001 et seq.

1. You first question whether members of the Board of Directors serve at the pleasure of the President. This question is answered squarely by § 103(a) of the National Consumer Cooperative Bank Act, 12 U.S.C. 3013, which provides, in relevant part: "Any member appointed by the President may be removed at any time with or without cause by the President." Under this provision, which is not qualified elsewhere in the Act, the President is empowered to remove any presidentially appointed director 1/ at any time and without the requirement of any prior formal procedure. In short, he may dismiss presidentially appointed directors immediately. 2/

2. You next question whether, if vacancies exist on the Board, the President may fill such vacancies immediately on an interim basis. This question is likewise answered on the face of § 103(a), which also provides:

1/ Section 103(b) of the Act provides for resignations of presidentially appointed directors at particular stages in the capitalization of the Bank. They are to be replaced by directors chosen by holders of Class B or Class C bank stock. Because we understand that all of the Bank's current directors are presidentially appointed, we do not here consider the President's authority with respect to the removal of any shareholder-chosen director.

2/ The President is not required to effect a dismissal with any particular degree of formality. It should be noted, however, that, under the terms of the Act, the President's power to appoint an interim replacement depends on the existence of a "vacancy," 12 U.S.C. § 3013(a). It would thus be prudent to record any dismissal in writing as evidence of the date and time of the ensuing vacancy.

- (a) If a vacancy occurs on the Board for any reason other than a resignation pursuant to subsection (b) of this section [pertaining to resignations triggered by various stages in the capitalization of the Bank], a new member shall be appointed by the President to serve until the next annual meeting of the Bank (5) 40/1 (5)
- (N)

As in the case of the provision of the Act discussed above, the presidential authority conferred by this provision is not qualified by any other provision of the Act or by the Act's legislative history. Consequently, we read this provision on its face to permit the President to appoint interim Directors, whether government officers or members of the public as prescribed in § 103(a), except to fill vacancies created by the resignations of those directors required to resign because of the capitalization of the Bank. The President thus is empowered, for example, to fill immediately any vacancies created by the removal from Government office of any director appointed from among the officers of the Government, or by the presidential dismissal of a director with or without cause. 3/2 (E)

3. (E) ^{next} Your third question is whether directors appointed by the President to fill vacancies on an interim basis can take action that is legally binding on the Bank and, if so, how quickly. The Act does not deal with this subject expressly, but simply empowers the Bank to "operate under the direction of its Board of Directors," without making any distinctions between the powers of Directors appointed by the President with advice and consent, by the President on an interim basis, or by stockholders. The Bank's bylaws likewise make no such distinction.

In the absence of any such distinction, we read the Act as intending that interim directors be empowered to exercise the full power of directors immediately upon appointment. Although the legislative history of the Act does not elaborate on the President's authority to appoint interim directors, the obvious purpose of empowering the President to appoint interim Directors is to permit the Bank to continue to function notwithstanding the creation of vacancies on the Board. This purpose would be defeated if interim Directors could not exercise all the authority of directors. It is thus readily inferable that they may exercise such authority. (P)

4. Your final question is how many directors constitute a legal quorum for exercising the powers of the Board of Directors.

3/ As with dismissals under the Act, the Act does not require the President to appoint interim directors with any degree of formality. Lest there be any subsequent question, however, of an appointee's status as director at a particular time, we recommend that the President record his appointments in writing as a matter of prudence.

This Office has previously concluded in a memorandum dated August 7, 1979 to then White House Counsel Robert J. Lipshutz (attached) that the Corporation can act through a majority of all its statutorily authorized directors, even if not all the directors have been appointed. That is, the Bank can operate through the action of any eight legally appointed directors, even if some or all of the remaining seven positions are vacant. This accords with Section 8 of the Board's current bylaws.

Theodore B. Olson
Assistant Attorney General
Office of Legal Counsel

Attachment

31 JUL 1979

MEMORANDUM FOR HONORABLE ROBERT J. LIASHUTZ
Counsel to the President

Re: National Consumer Cooperative Bank

I am responding to your memorandum of July 14, 1979, concerning the National Consumer Cooperative Bank. The Bank has been "created and chartered [as] a body corporate ... as an instrumentality of the United States and until otherwise provided, shall be a mixed ownership, Government corporation." Act of August 20, 1978, Sec. 101, 92 Stat. 499. I have been advised that it is important for budgetary reasons that the Bank be operational by early August. This would involve the convening of the Board of Directors by that time.

According to § 103(a) of the Act, 92 Stat. 502, the Board shall consist of thirteen members who for the time being are to be appointed by the President by and with the advice and consent of the Senate. Seven members of the Board shall be appointed from among the officers of agencies and departments of the Government of the United States, and six from the general public. The President has nominated eleven directors, five of whom are Government officials and six who represent the general public. It is likely that those directors will be confirmed prior to the August recess of the Senate. It is, however, possible that two government officials will not be nominated until the end of July, too late to be confirmed prior to the recess.

1. The question has been raised whether the initial meeting of the Board of Directors may be convened before all the members of the Board have been appointed. In my view the Board can be so convened. The statutory language (§ 101) provides: "[t]here is hereby created and chartered a body corporate * * *." Congress thus intended the corporation to come into existence immediately. Under the common law rule that a quorum consisting of a single majority may act for a collective body in the absence of a statutory provision to the contrary. 1/, the Federal

1/ Federal Trade Commission v. Flotill Products, 389 U.S. 179 (1967); Fletcher, Cyclopedia of Private Corporations, Vol. 2, §§ 419, 421; McQuillan, The Law of Municipal Corporations, Vol. 4, § 13.30.

agencies are constantly operating with vacancies in their membership as long as a quorum is observed. Congress is fully aware of that practice approved by the Supreme Court ^{2/}, and did not indicate that a different rule should apply to the first meeting of the Bank's Board of Directors. We therefore are of the opinion that a Board meeting can be held if a quorum of at least seven directors is present, even before all of the statutory number of directors have been appointed.

We are aware of the memorandum of the Deputy General Counsel of the Community Services Administration which concludes that the Board can not act before all the thirteen statutory Board members have been appointed. In our view, however, the authorities cited for that proposition are not applicable to the situation at hand.

These authorities are fairly old State cases relating to boards and commissions of a governmental nature. The Bank, however, although an instrumentality of the United States, would operate mainly like a private corporation. Two of the cases, Williamsburg v. Lord, 51 Me. 599 (1863) and Colman v. Shattuck, 62 N.Y. 348 (1875), as well as Schenck v. Peay, Fed. Cas. No. 12450 (C.C.E.D. Ark, 1869), the only pertinent Federal case of which we are aware, deal with tax sales of real property where the courts traditionally are hypercritical. As Miller, J. stated in Schenck:

Nothing is better settled in the law of the country than that proceedings in pais for the purpose of divesting one person of title to real estate, and conferring it on another, must be shown to have been in exact pursuance of the statute authorizing them, and that no presumption will be indulged in favor of their correctness. This principle has been more frequently applied to tax titles than to any other class of cases.

In our view these cases are not precedents in the situation at hand.

The other two cases cited in the memorandum, People ex rel Hoffman v. Hecht, 105 Cal. 621 (1891) and First National Bank v. Mt. Tabor, 52 Vt. 87 (1879) actually repudiate the ancient and technical common law rules on which the memorandum relies.

^{2/} See Federal Trade Commission v. Flotill Products, *supra*.

We have not been able to discover any recent directly applicable cases. In a closely related situation, viz., the increase in the number of the members of a board of directors of a corporation, it has been held that the quorum of the board is to be determined on the basis of the old board until the new members are actually elected, thus implying that a board is capable to transact business before it has been brought up to its new membership. Robertson v. Hartman, 6 Cal. 2d 408, 57 P.2d 1310 (1936); Rocket Mining Co. v. Gill, 25 Utah 2d 434, 483 P.2d 897 (1971).

The final argument of the Deputy General Counsel's memorandum is that the Presidential or Federal control envisaged by Congress would be lacking, if the Board were composed only of five Government and six private members. Federal control, however, is assured by the provision in § 103(a), pursuant to which any member of the Board appointed by the President serves at the pleasure of the President. This argument also overlooks the factor that, even if all federal members were appointed, the Board could still transact business with a quorum consisting of one government member and six private ones.

2. You have asked whether recess appointments would be appropriate for the two government officer members who are not likely to be confirmed prior to the recess of the Senate. The Attorneys General have ruled that the President can make recess appointments during a month long summer recess of the Senate. 33 Op. A.G. 20 (1921); 41 Op. A.G. 463 (1960). There have been numerous instances of recess appointments before and after that opinion during intra-session recesses of the Senate of a month's or similar duration. However, since Kennedy v. Sampson, 511 F.2d 430 (C.A. DC, 1974), which held that the Pocket Veto clause of Article I, § 7, cl. 2 of the Constitution does not apply to intra-session adjournments, Presidents have been reluctant to make recess appointments during an intra-session adjournment of the Senate 3/, although the Kennedy case does not directly apply to recess appointments under Article II, § 2, cl. 3 of the Constitution. Nevertheless, it is our opinion that the President is constitutionally authorized to make recess appointments during the August recess. The question whether the two government members of the Board should be given recess appointments therefore constitutes a policy decision. While the President may be reluctant to raise this issue in connection with these two relatively unimportant positions, it may become necessary to cross

3/ This problem will be discussed in more detail in a separate memorandum dealing with the vacancies in the Cabinet.

this bridge in connection with the vacancies and impending vacancies in the cabinet, if the Senate should fail to confirm the President's nominations prior to its August recess. In the event that it should be decided to give recess appointments to the directors it would be necessary, in view of 5 U.S.C. § 5503, to submit nominations to the Senate before it goes into recess. Otherwise the recess appointmentees could not be paid unless subsequently confirmed.

We recommend strongly against designations under the Vacancy Act (5 U.S.C. §§ 3345-3349) in view of the uncertainties of the application of those provisions to agencies and instrumentalities other than the departments listed in 5 U.S.C. §§ 101, 102, and of the 30 day clause of 5 U.S.C. § 3348.

3. As to the calling of the first meeting of the Board of Directors it appears sufficient if it is signed by two or more of the directors. Some lawyers take the position the agenda attached to the notice may be brief, others suggest a more comprehensive form. 4/ There appears to be no reason why Mr. Altman should not prepare the agenda. We suggest, however, that the agenda be signed by the directors calling the meeting. In preparing the agenda Mr. Altman may want to be guided by Fletcher, Corporate Forms, Vol. 2, §§ 1429-1430; 1444-1460 which contains suggestions as to forms of notices and of items that should be included in the agenda of this first meeting of the Board of Directors, such as the election of officers, the adoption of bylaws, the establishment of an office of the Bank, and the scheduling of meetings of the Board of Directors.

Under the Sunshine Act it would be necessary to make a public notice announcement of the meeting, including a notice in the Federal Register. 5 U.S.C. § 552 b.

John M. Harmon
Assistant Attorney General
Office of Legal Counsel

4/ We attach a copy of Fletcher, op .cit. supra., Vol. 19, § 8946 which elaborates on these points.

business in a more logical order, giving each item a number and leaving space for additional items of business as they come to mind. As the meeting is held and the different items of business are transacted they are crossed off, one by one, from the agenda until, when all have been crossed off, the attorney will know that all necessary business has been transacted and that a motion for adjournment is in order.

§ 8946. Calling of directors' meeting.

The statutes may provide a method of calling the first meeting of the board of directors. If not and the bylaws have already been adopted by the incorporators' meeting, which is usually the case, the meeting will be called in accordance with the bylaws. If bylaws have not yet been adopted and there is no statutory provision for the calling of the meeting it would seem that it would be proper to have it called on notice signed by any two or more directors a reasonable time, say three or four days, if all the directors are in the immediate vicinity, in advance of the meeting. As this is a special meeting the place of the meeting should be fixed by the call.¹ In most cases, however, instead of going through the formalities of a call, the meeting will be convened on written waiver signed by all of the directors. As to the particularity with which the notice of the first directors' meeting or the waiver thereof should refer to the business to be transacted at the meeting attorneys are not in agreement. One group take the position, which seems logical, that as it is to be an organization meeting, all directors are on notice that there will be a large and varied program of business to be considered and the notice or waiver will be sufficient if it state in general terms "for the transaction of any and all business that may come before said meeting." Other attorneys consider it safer to refer specifically to such items of business as the election of officers, issuance of stock, and purchase of property.²

¹ For general discussion of directors' meetings and how called, see §§ 591-433. For form of notice of first meeting of directors, see Fletcher Corp Forms (3rd Ed) § 1444.

² For form of waiver of notice of first meeting of board of directors, see Fletcher Corp Forms (3rd Ed) § 1445.

§ 8947. Corporation minutes.

Before discussing the form of minutes for this important meeting, it might be well to discuss briefly the subject of corporation minutes, their nature, purpose, and function.