

2 2 MAY 1981

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

Re: Interim Directors of the National
Consumer Cooperative Bank

This memorandum responds to your May 15, 1981 telephone inquiries concerning interim directors that the President is authorized to appoint to fill vacancies on the Board of Directors ("the Board") of the National Consumer Cooperative Bank ("the Bank"), 12 U.S.C. § 3013(a).

I. Terms of Office

Your first question concerns the status of seven interim directors that the President recently appointed to fill vacancies created by the departure from government service of seven of the eight directors originally appointed to Board positions reserved by statute for officers of Federal departments and agencies. Under 12 U.S.C. § 3013(a), the President was authorized to appoint such directors "until the next annual meeting of the Bank, at which time the vacanc[ies] shall be filled for the remainder of the unexpired term[s] by the President." The issue presented is whether the authority of the interim directors terminates at the next annual meeting or whether, like regular directors, the interim directors serve "until their successors have been appointed and qualified." Id. 1/

The legislative history of the National Consumer Cooperative Bank Act, 12 U.S.C. § 3001 et seq., is entirely silent on this point. Consequently, in interpreting the Act, we are constrained to take its language at face value, giving effect to Congress' intent as implied in the statute itself. On this basis, we believe the better reading of the Act is that interim directors, like regular directors, serve until their successors have been appointed and qualified.

This reading serves two congressional purposes manifestly implied in the Act: first, that the Bank be operational on a

1/ The Bank's bylaws do not distinguish in this respect between regular and interim directors.

continuing basis once established; 2/ and, second, that the Government have effective control of the Board of Directors until "the amount of paid-in capital attributable to the class B and class C stock equals or exceeds eight-fifteenths of the total amount of paid-in capital of the Bank." 12 U.S.C. § 3013(b).

If the authority of interim directors were to terminate at the next annual meeting following their appointment, whether or not their successors had been appointed, situations are foreseeable in which private stockholders, although holding a minority interest in the Bank, could take control of the Board. For example, once private stockholders provide \$10 million in paid-in capital to the Bank, they will be entitled to elect six directors. If, prior to an annual meeting, the Board were to consist of six such directors and nine presidentially appointed directors, up to four of whom were interim appointees, the Board would effectively slip into private control at the annual meeting if the terms of the interim appointees were to expire without any presidential appointees immediately succeeding them.

The President, in theory, could avoid this result by immediately appointing "new" interim directors to replace the "former" interim directors, but the statute expresses no such requirement and to infer such a procedure would be senseless. It would not, in any way, enhance the prerogatives of the Senate or the President with respect to appointments or serve any other identifiable statutory purpose. It would further create a potentially important source of legal confusion. The statutory provision that interim directors shall serve "until the next annual meeting" itself could be interpreted as meaning "until the meeting is convened" or "until the meeting is adjourned"; unless the President were, on the basis of legal advice, to anticipate correctly the legally correct time for appointing new interim directors, the prospect would exist for technical legal challenges to the actions of the "old" interim appointees that likewise would not serve any statutory purpose.

2/ Congress created the Bank for the express purpose of "mak[ing] available necessary financial and technical assistance to cooperative self-help endeavors as a means of strengthening the Nation's economy," 30 U.S.C. § 3001, which can reasonably be viewed as a continuing goal.

In contrast to these reasons for treating interim and regular directors alike, no legal or policy reason appears for applying a contrary rule. It might be suggested that the President could abuse his interim appointment power under our suggested reading of the Act by making interim appointments and not nominating successors. As noted above, however, this possibility would exist under any reading of the statute. Even if the terms of the interim directors were to expire prior to the appointments of their successors, the President could fill the resulting vacancies with other interim appointees. Indeed, this theoretical potential for "abuse" exists with respect to regular directors who could, under the express language of the Act, serve indefinitely should the President never name their successors.

Consequently, we conclude that under 12 U.S.C. § 3013(a), the current interim directors shall serve until the next annual meeting, 3/ or until their successors have been appointed and qualified.

II. Qualifications

Your second question is whether, under 30 U.S.C. § 3013(a), interim directors appointed to fill vacancies reserved for members of the general public must be qualified under the same provisions that apply to regular directors appointed from the general public, namely, that they be experienced in specified fields of cooperative enterprise and that, in connection with such appointments, the President consider nominees submitted

3/ We understand from the Office of the General Counsel of the Department of the Treasury that the next annual meeting is currently set by a resolution of the Directors for June 24, 1981. The Bank's bylaws would not prevent the current Directors from rescinding this resolution, so long as the Chairman could still comply with the Chairman's obligation, under the bylaws, to set a meeting date in June if no resolution is in effect, and to afford stockholders 15 days' notice of the meeting. (Art. VI, §§ 1-3.)

The bylaws, of course, are subject to amendment in this or any other respect consistent with the National Consumer Cooperative Bank Act. The procedures for amending the bylaws are set forth in Article X of the bylaws.

by national associations of cooperatives. 4/ Once again, the statutory language does not plainly answer your question and the legislative history is silent on the point.

We believe, however, inferring Congress' intent from the Act itself, that interim appointees from the general public are to be qualified in the same manner as such regular appointees. Congress expressly provided that, in the ordinary case, such interim directors would be so qualified. Further, any delay in filling vacancies in these positions need never undermine Government control of the majority of the Board or the preservation of a working quorum. Finally, it could be argued that respect for the statutory criteria is especially prudent with respect to interim directors, whose appointments are not subject to the advice and consent of the Senate.

For these reasons, and because we are aware of no legal or policy reason for applying a contrary rule, we interpret the Act as requiring regular and interim directors appointed from the general public to have like qualifications.

Larry L. Simms
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Office of Legal Counsel

4/ With respect to Board members to be appointed from the general public, 12 U.S.C. § 3013(a) provides: "(T)he President shall consider nominees submitted by national associations of cooperatives." The statute, however, does not specify any requirement that the President solicit nominations or a procedure for considering such nominations as he may receive. Because the legislative history does not interpret this provision and we are unable to locate any instructive judicial authority, we construe § 3013(a) according to the plain meaning of its words, that is, to require the President only to take into account such nominations as he may receive from national associations of cooperatives, and not to require any formal procedure for soliciting nominations or deciding upon a nominee.