

INTERPRETIVE LETTER 90-1 (JANUARY 3, 1990)

State bank must amend its charter in order to eliminate cumulative voting rights.

This is in reply to the two issues you have raised regarding the elimination of cumulative voting rights by shareholders of a state bank in Illinois.

The first issue concerns the manner in which the shareholders can eliminate cumulative voting; specifically, whether the shareholders can eliminate cumulative voting through an amendment to the bank's by-laws or whether an amendment to the bank charter is necessary. Please be advised that it is the position of the Agency that the repeal of cumulative voting rights can only be accomplished by an amendment to the bank charter. This conclusion is reached after a review of Sections 15 and 17 of the Illinois Banking Act. Section 15(3) states, in relevant part:

[A] bank organized prior to January 1, 1984 may amend its charter to eliminate cumulative voting rights under all or specified circumstances, or to eliminate voting rights entirely, as to any class or classes or series of stock of such bank...provided...that the proposal to eliminate such voting rights receives the approval of the holders of 70% of the outstanding shares of stock entitled to vote as provided in paragraph (b)(7) of Section 17 (emphasis added).

This language in Section 15(3) clearly indicates that the elimination of cumulative voting rights is to be accomplished by an amendment to the bank charter. The right to use cumulative voting is a statutory right provided to each shareholder of a state-chartered bank by Section 15(3). Section 15(3) states:

Except as provided below in this paragraph (3), in all elections for directors every stockholder ...shall have the right to vote, in person or by proxy, for the number of the shares of stock owned by him, for as many persons as there are directors to be elected, or to cumulate the shares and give one candidate as many votes as the number of directors multiplied by the number of his or her shares of stock shall equal, or to distribute them on the same principle among as many candidates as he or she shall think fit (emphasis added).

The two above-quoted excerpts from Section 15(3) demonstrate that cumulative voting by a shareholder is a statutory right which can only be repealed in the manner specified by the statute (i.e., by a charter amendment). Further support for the conclusion that the repeal of cumulative voting rights is to be accomplished by a charter amendment is found in Section 17 of the Illinois Banking Act. Section 17 describes certain areas of bank structure and governance which may be altered by amending the bank's charter and it also sets forth the procedures for accomplishing such a charter amendment. Among the topics of bank structure and governance specifically listed in Section 17(a) is the elimination of cumulative voting rights.

The second issue concerns the timing of when a charter amendment becomes effective; specifically, whether a stockholder vote to amend the bank's charter to eliminate cumulative voting rights pursuant to Section 15(3) is sufficient to accomplish the charter amendment so that the stockholders may continue at the same meeting to conduct an election of directors where voting is limited to non-cumulative voting. Please be advised that it is the position of the Commissioner that the charter amendment to eliminate cumulative voting which would be initiated by the vote of the holders of 70% of the outstanding shares of stock entitled to vote would not become effective upon such vote. Rather, such charter amendment would become effective only when the requirements of Section 17(b) have been fully complied with. Because the requirements in Section 17(b)(5) involve the proposed charter amendment receiving the written approval of the Commissioner, the recording of a certificate of amendment and the delivery of a file-marked copy of the certificate of amendment back to the Commissioner's office, it is obvious that a proposed amendment to a bank charter which seeks to eliminate cumulative voting rights would not yet be effective merely by vote of the stockholders and would not effectively eliminate cumulative voting rights until the charter amendment had been duly approved in writing by the Commissioner and all the other requirements of Section 17(b)(5) had been met. Clearly, the shareholders of a bank could not vote to amend the bank's charter at the beginning of one shareholders' meeting and then validly conduct business at the same meeting with the understanding that the charter amendment voted upon was immediately effective.