

**INTERPRETIVE LETTER 90-9 (MAY 30, 1990)**

**Shareholders of state bank may fix number of directors by two-thirds affirmative vote at any meeting called for that purpose.**

This is in response to your letter dated \* in which you asked for confirmation concerning the conclusions you reached about the ability of the stockholders to change the number of directors at a special meeting, regardless of the number of directors provided for in the charter or in the by-laws.

The bank's charter provides for an eleven-member board of directors, and the bank's by-laws provide for a twelve-member board of directors. The bank's by-laws also provide that only the board of directors may amend the by-laws. You have asked whether Section 16(2)(a) of the the Illinois Banking Act (Ill. Rev. Stat. 1989, ch. 17, par. 323(2)(a)) (the "Act") would authorize a stockholder, who controlled more than two-thirds of the stock of the bank, to change the number of directors from twelve (or eleven) to seven, without amending the bank's charter and without the board of directors amending the bank's by-laws.

Section 16(2)(a) provides that:

[n]otwithstanding the provisions of any charter heretofore or hereafter issued, the number of directors, not less than five nor more than twenty-five, may be fixed from time to time by the stockholders at any meeting of the stockholders called for the purpose of electing directors, or changing the number thereof by the affirmative vote of at least two-thirds of the outstanding stock entitled to vote at such meeting and the number so fixed shall be the board regardless of vacancies until the number of directors is thereafter changed by similar action....

This provision sets forth the specific procedure by which the number of directors will be fixed. Furthermore, this provision expressly provides that the number of directors fixed by the stockholders shall be the board regardless of vacancies until the number of directors is changed by similar action of the stockholders. Therefore, only a two-thirds vote by the stockholders at a meeting called for that purpose can fix or change the number of directors on a bank's board. Any contrary provision in a bank's charter or by-laws would be meaningless.

The introductory language in Section 16(2)(a) refers to "the provisions of any charter heretofore or hereafter issued." Originally, state bank charters had to provide for the number of directors a bank would have on its board. A charter amendment was then necessary when a bank sought to change the number of directors on its board. The practice of providing for the number of directors on a bank's board in its by-laws seems to be quite commonplace. These by-law provisions, however, are not controlling if they are inconsistent with the number of directors fixed by the stockholders in the manner prescribed in Section 16(2)(a) of the Act.

Thus, if a special meeting were called for the purpose of changing the number of directors and electing new directors, two-thirds of the stockholders could fix a different number of directors, between five and twenty-five, and elect a new board of directors. It would then be the responsibility of the new board to amend the by-laws to conform them to the action taken by the stockholders.