COMMONWEALTH OF MASSACHUSETTS

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June 5, 2019

Jon K. Skarin
Executive Vice President, Legislative & Regulatory Policy
Massachusetts Bankers Association
One Washington Mall, 8th Floor
Boston, MA 02108

Dear Mr. Skarin:

This letter is in response to your correspondence on behalf of the Massachusetts Bankers Association ("Association") dated March 22, 2019 to the Division of Banks ("Division") in which you request an opinion relative to Massachusetts General Laws chapter 167I, section 14, governing changes in control of Massachusetts stock banks. In particular, the statute sets forth the requirement that changes in control of a stock bank, as defined by the statute, are subject to review and potential disapproval by the Commissioner of Banks.

On behalf of the Association, you have asked that the Division provide clarification of relevant undefined terms in the statute. As noted in your correspondence, the Division has not previously had occasion to provide an interpretation of the statute's requirements. Notably, however, upon enacting the Massachusetts statute, the Legislature adopted language largely mirroring that of the federal Change in Bank Control Act (CBCA) found at 12 U.S.C. § 1817(j). This fact informs the Division's review and interpretation of the Massachusetts statute.

Massachusetts General Laws, chapter 167I, section 14 provides, in pertinent part:

> No person, acting directly or indirectly or through or in concert with 1 or more other persons, shall acquire control of any stock bank, through a purchase, assignment, transfer, pledge or other disposition of voting stock of such bank unless the commissioner has been given 60 days prior written notice of such proposed acquisition and within said 60 days the commissioner has not issued a notice disapproving the proposed acquisition or extending for up to another 30 days the period during which such a disapproval may issue.
> . . .
>
> For the purposes of this section, "person" shall mean an individual or a corporation, partnership, trust, association, joint venture, pool, syndicate, sole proprietorship, unincorporated organization or any other form of entity not specifically listed herein and "control" shall mean the power, directly or indirectly, to direct the

> management or policies of any such corporation or to vote 25 per cent or more of any class of voting securities of any such corporation.

Your correspondence seeks interpretations with regard to three aspects of the statute. With regard to the first aspect of your inquiry, your letter requests explanation of what it means to possess the power to "to direct the management or policies" of a bank. In particular, your letter requests that the Division opine that a presumption of such power exists where there is an acquisition of voting securities through which any person proposes to acquire ownership of, or the power to vote, 10% or more of a class of voting securities of any stock bank. This presumption of control is consistent with the presumption that exists under the regulations promulgated pursuant to the cognate federal statute. *See* 12 CFR 5.50(f)(2)(iii). In light of this, the Division agrees that under G. L. c. 167I, § 14, it is appropriate to find that a presumption of the power to direct the management or policies of a bank exists under such circumstances. The existence of this presumption is also consistent with the corporate governance reporting requirements set forth in G. L. c. 167J, § 15, requiring stock banks to notify the Commissioner within 10 days of any transfer of stock of the bank which makes the transferee the owner of record of 10 per cent or more of the outstanding stock with voting power.[1] The presumption clarified by this opinion would not apply if another person or persons acting in concert possess ownership of or power to vote a higher percentage of such voting securities. *See* 12 CFR 5.50(f)(2)(iii)(B).

The second aspect of your inquiry involves the statute's use of the phrase "acting in concert" and requests that the Division provide interpretive guidance as to the meaning of such language. In this instance, the federal Change in Bank Control Act regulations define "acting in concert" as follows:

> (2) Acting in concert means:
>
> (i) Knowing participation in a joint activity or parallel action towards a common goal of acquiring control whether or not pursuant to an express agreement; or
> (ii) A combination or pooling of voting or other interests in the securities of an issuer for a common purpose pursuant to any contract, understanding, relationship, agreement, or other arrangement, whether written or otherwise.

This language from the federal regulations has been in place for some time, and other states also provide an analogous interpretation of "acting in concert" under their respective state laws. *See e.g.* N.Y. Banking Law, §§143-B and 141(2). As also noted in your correspondence, the Division's regulation governing the conversion of a mutual bank to a stock form bank also provides a definition of the phrase "Group Acting in Concert." This language tracks the language of the second prong in the definition set forth in the federal CBCA regulation. *See* 209 CMR 33.02; 12 CFR 5.50(d)(2)(ii).

After review of the pertinent federal authorities and in light of the language of the Massachusetts statute, as well as various other authorities, it is the position of the Division that the above-referenced interpretation of "acting in concert", as set forth in the federal CBCA regulation, appropriately encompasses the range of conduct intended to be covered by G. L. c. 167I, § 14. This is especially true in light of the evolving activity in the investment market.

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[1] The Division notes that such a presumption also arises under the change in control provisions governing Massachusetts insurance companies. *See* G. L. c. 175, §206 *et seq.*

Integral to the determination of "control" under G. L. c. 167I, § 14 and both of the foregoing issues is the interpretation of what constitutes the "power to vote", as used in the definition of "control." As a final matter, your correspondence requests a determination that the power to vote includes the holding of proxies to vote shares of a stock bank. The pertinent statutes governing voting by shareholders of stock form savings banks, stock form cooperative banks, and trust companies all provide that "[s]tockholders entitled to vote may vote in person or by proxy." *See* G.L. c. 168, § 23; G. L. c. 170, § 17; G. L. c. 172, § 11. Both as contemplated by the banking statutes as well as other corporate statutes of the Commonwealth, the very nature of a proxy is the power to vote. The Division can discern no reason why a proxy would be treated differently for purposes of G. L. c. 167I, § 14. Accordingly, it is the position of the Division that for purposes of G. L. c. 167I, §14 and its definition of "control," the power to vote includes the holding of proxies to vote shares of a stock bank.

The conclusions reached in this letter are based solely on the facts presented. Fact patterns which vary from that presented may result in a different position statement by the Division.

Sincerely,

Merrily S. Gerrish

Merrily S. Gerrish
Deputy Commissioner of Banks
and General Counsel

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