

COMMONWEALTH OF MASSACHUSETTS

Office of Consumer Affairs and Business Regulation

DIVISION OF BANKS

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September 10, 2019

Mr. Robert M. Cashman
President and CEO
Metro Credit Union
200 Revere Beach Parkway
P.O. Box 9100
Chelsea, MA 02150-9100

Dear Mr. Cashman:

This letter is in response to your correspondence dated April 10, 2019 and supplemental information submitted via electronic mail on June 11, 2019 on behalf of Metro Credit Union (Credit Union) to the Division of Banks (Division) requesting an opinion with regard to the purchase and subsequent sale or assignment of commercial or residential real estate mortgage loans as set forth below pursuant to G.L. c. 171, § 65E. This matter was also discussed with your counsel and Division staff most recently on September 5, 2019.

Question Presented:

Your letter asks the following question:

May a state-chartered credit union (credit union) purchase for investment commercial or residential real estate mortgage loans (real estate mortgage loans) originated by a state- or federally chartered bank or state- or federally chartered credit union or credit union service organization (CUSO), whose main office is located within or without the Commonwealth, to borrowers who may or may not be eligible for credit union membership on real property located within or without the credit union's geographical area (within Massachusetts or a 100-mile radius from its main office) and, if so, may it sell or assign interests in such loans to the originating financial institutions?

Statutory Authority:

Section 65E of G.L. c. 171 states the following:

“Every credit union, subject to limitations imposed by section 65 to section 65E, inclusive, or other general law, shall have the following powers and whatever further incidental or complementary powers that may fairly be implied from those expressly conferred and such as are reasonably necessary to enable it to exercise fully those powers according to common customs and usages:

(1) to discount, buy, invest in, hold, assign, transfer, sell and negotiate promissory notes, drafts, bills of exchange, mortgages, bonds, debentures, bonds or notes secured by mortgages, installment obligations and other evidences of debt;

(2) to advance money or credits on real estate, on improvements thereto or on personal security, on terms to be agreed upon; and

(3) to buy, sell or make loans as participation loans with any other federally-insured credit union, bank or insurance company and to service any loans sold by it.” (Emphasis supplied.)

In addition, G.L. c. 171, § 65 provides definitions for Sections 65 through 65E, inclusive, including the definition of “mortgage loan”, which is defined in relevant part as “a loan, line of credit, or borrowing secured primarily by an interest in real estate...” There are other references to the acquisition of loans in G.L. c. 171, § 65A, § 65C, and § 65D as well.

G.L. c. 171, § 66 further governs the making of real estate mortgage loans, in relevant part, as follows:

“In *making* mortgage loans on real estate pursuant to sections 65 to 65E, inclusive, a credit union shall be subject to the following conditions:

- (1) A person obligated from time to time to make payments under a mortgage, whether as the original borrower or as a subsequent owner of the mortgaged property, shall be or shall become a member of the credit union.
- (2) Each loan shall be on real estate situated within the commonwealth or within a radius of 100 miles of the main office of the credit union without regard to geographical location...” (Emphasis supplied.)

With regard to federal law, the NCUA’s regulation at 12 CFR § 741.8(a) provides in relevant part that a state-chartered credit union insured by the National Credit Union Share Insurance Fund (NCUSIF) must receive approval from the NCUA before purchasing loans from:

- “(1) Any credit union that is not insured by the NCUSIF; (and)
- (2) Any other financial-type institution (including depository institutions, mortgage banks, consumer finance companies, insurance companies, loan brokers, and other loan sellers or liability traders)...”

The Division notes that there are several types of transactions that do not require approval from the NCUA at 12 CFR 741.8(b).

Analysis

Your request poses two questions, which will be addressed in order:

- (1) Whether a credit union can purchase real estate mortgage loans from a bank, credit union, or CUSO, and what limitations, if any, would there be; and
- (2) If so, could there be a partial sale or assignment of interest in such loans to the originating financial institution.

- ***Question #1: Authority Governing the Acquisition of Real Estate Mortgage Loans***

With regard to the first question, one of the key clauses in the Introductory Paragraph of Section 65E (Introductory Paragraph) is “subject to limitations imposed by section 65 to section 65E, inclusive, or other general law.” At issue is the significance of this text, specifically, whether the limitations on the real estate mortgage loans that a credit union could make to its members would also set forth restrictions on the real estate loans it could purchase under clause (1) of Section 65E (Section 65E(1)). Potential limitations include whether the loan of a non-member could be purchased; whether there was any geographic limitation; and whether there are any limitations with regard to the financial institutions from which a loan could be purchased.

There is no provision set forth in Section 65 to Section 65E, inclusive, setting any express limitation with regard to the acquisition of mortgage loans. The provisions of these sections generally reference lending authorities and related matters.

The Division notes that there is no express limitation on the types of financial institutions from which the purchases of loans authorized in Section 65E(1) can be obtained. With regard to the types of institutions, this is in contrast with clause (3) of Section 65E, regarding participation loan authorities for consumer loans, for which a credit union may only “buy, sell or make loan as participations loans with any other federally-insured credit union, bank or insurance company...” In addition, there is no express requirement in Section 65E(1) or elsewhere that the purchase of loans be limited to loans of credit union members. The Division notes, however, that safety and soundness considerations are an inherent potential limitation in all activities under these provisions.

As noted above, also at issue is whether any limitations on acquisitions could be implied from other provisions in these sections, or any provision set forth in G.L. c. 171, § 66 or other provision of the General Laws. The introductory language in said section 66 references the “making” of mortgage loans, even though clause (3) of section 66 uses the word “invest”. There is no reference in this section to the acquisition of mortgage loans.

Viewing the express authorities contained in the Introductory Paragraph together with Section 65E(1), and the lack of any other express provision that would limit these authorities solely for acquisitions, it is the position of the Division, based on the authority in the Introductory Paragraph and Section 65E(1), that a credit union may purchase a real estate mortgage loan from a state- or federally chartered credit union, a state- or federally chartered bank, or a CUSO whose main office is located within or without the Commonwealth, to borrowers who may or may not be eligible for credit union membership. In addition, there is no restriction on the location of the real property, which is therefore not limited to being within the borders of Massachusetts or within a 100-mile radius of the Credit Union’s main office, as further set forth in the conditions below.

The Credit Union would be required, however, to receive any required approvals from the NCUA pursuant to 12 CFR 741.8, as applicable, prior to proceeding with the types of transactions authorized herein. The Credit Union should copy the Division of Banks on any correspondence in connection with its request to the NCUA.

- ***Question #2: Sale or Assignment of Interests to the Originating Financial Institution***

The second question raised in your letter is whether in acquiring the mortgage loan immediately after origination there could be a partial sale or assignment of interests in such loans by the Credit Union to the originating financial institution pursuant to G.L. c. 171, § 65E. Your letter states that the Division should

not treat the partial sale or re-assignment of an interest in the mortgage loan to the originating financial institution as a loan participation.

Your question presents various potential scenarios in which the originating financial institution is either a state or federally-chartered bank or state or federally-chartered credit union or CUSO. For illustrative purposes, the Division will address your question under the scenario in which the originating financial institution is a Massachusetts-chartered credit union.

The Division's 2014 *Industry Letter on Participation Authority for Credit Unions* referenced in your correspondence established that the authority for mortgage loan participations is set forth in the provision of the Division's *Parity with Federal Credit Unions* regulation (Parity Regulation) currently included in 209 CMR 50.07(2)(b). As described in the Industry Letter, although granting authority for Massachusetts-chartered credit unions to originate residential and commercial mortgage loans as participations, the Parity Regulation would require Massachusetts-chartered credit unions to observe several significant requirements in originating such loan participations, including but not limited to credit union membership requirements.

In urging the Division to not treat the subsequent partial assignment or transfer of a purchased mortgage loan as a participation, you refer to the separate statutory provisions authorizing loan purchases and participations as well as agency guidance published by the federal banking regulators recognizing the distinction between loan purchases and participations. On this general distinction, the Division does not disagree. However, from this general distinction you further contend that in the proposed scenario in which a partial assignment would be granted by the purchasing Credit Union to the Massachusetts-chartered credit union that originated the mortgage loan, "The purchase of a mortgage loan immediately after origination or shortly thereafter or the subsequent parceling out of interests in the mortgage loan to the originator... does not turn a loan assignment or transfer into a loan participation."

While there is no definition of "participation" in G.L. c. 171, the Division will look to "common customs and usages," as referenced in the Introductory Paragraph. The Division notes that the NCUA defines a loan participation at 12 CFR § 701.22(a) as "a loan where one or more eligible organizations participate pursuant to a written agreement with the originating lender, and the written agreement requires the originating lender's continuing participation throughout the life of the loan."

As previously established, the Credit Union would rely upon the authority in G.L. c. 171, § 65E(1) to *buy* the mortgage loan and as clarified by the Credit Union in discussions with the Division would rely upon the incidental authority of § 65E or the express authority in § 65E(1) to *sell or assign* an interest in the mortgage loan to the Massachusetts-chartered credit union that originated the mortgage loan. Relying upon separate authority under Massachusetts law to originate the mortgage loan, the Division understands your proposed scenario to invoke the inverse sequence of these § 65E authorities by the originating credit union for the remaining steps in the transaction whereby the originating credit union would rely upon § 65E incidental or express authority to *sell* the mortgage loan and § 65E(1) authority to immediately thereafter *acquire* an assignment or transferred interest in such mortgage loan. Under these circumstances in which the assignment is back to the originating credit union, the Division perceives a significant substantive correlation between the outcome of this origination, sale, and buyback scenario with the outcome of a mortgage loan participation contemplated by the Division's *Industry Letter on Participation Authority for Credit Unions*.

The Division does not believe that § 65E(1) presents this alternate authority to achieve, in substantial part, that which more commonly has been contemplated and designed as a mortgage loan participation where the originating credit union intends to retain an interest in the mortgage loan. The Division notes that in addition to presenting a different structure to the transaction, proceeding in the manner you describe in selling the mortgage loan and immediately reacquiring an interest in such loan, the originating Massachusetts-chartered credit union would also seemingly remove this transaction in whole or in part from

the significant requirements referenced in the Division's *Industry Letter on Participation Authority for Credit Unions* that would otherwise apply under the parity scenario of a mortgage loan participation.

Conclusion

The Division is aware of the lengthy statutory and regulatory history underscoring the issues raised in your letter, and does not arrive lightly at the conclusions set forth herein. There is ample room to debate the issues raised in your letter, however, in the end the Division has based its position on the statutory provisions and the substance of the transactions, as described above.

Accordingly, with regard to your first question, it is the position of the Division that a state-chartered credit union may purchase for investment commercial or residential real estate mortgage loans originated by a state- or federally chartered bank or state- or federally chartered credit union or CUSO, whose main office is located within or beyond the Commonwealth, to borrowers who may or may not be eligible for credit union membership. In addition, there is no restriction on the location of the real property, which is therefore not limited to being within the borders of Massachusetts or within a 100-mile radius of the Credit Union's main office, provided that the following three conditions are met:

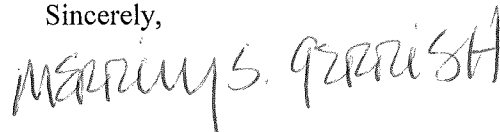
1. The Credit Union has a comprehensive written policy governing such activities;
2. The Credit Union has received the requisite approval from the NCUA, if applicable, pursuant to 12 CFR 741.8(a)(2); and
3. The loan is secured by collateral anywhere in the United States.

With regard to your second question, it is the position of the Division that the partial sale or assignment of the mortgage loan to the originating lender, as described above, would not be permitted. If the desired result is for the originating lender to retain a portion of a mortgage loan, then the transaction should be structured as a participation with the original lender. As a participation, such a transaction would be based, for Massachusetts-chartered credit unions, on the authority in the Parity Regulation, at 209 CMR 50.07(2)(b). The Division would recommend a comparable analysis be undertaken for the originating lenders in the other financial institutions set forth in your question, other state-chartered credit unions, federally chartered credit unions, state- and federally chartered banks, and CUSOs, to determine the legal authority, as described above.

Please be advised that the Credit Union should contact the NCUA for further guidance prior to proceeding in accordance with the conclusions stated herein.

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

Sincerely,



Merrily S. Gerrish
Deputy Commissioner of Banks
and General Counsel