

The Commonwealth of Massachusetts

Office of Consumer Affairs and Business Regulation

Division of Banks and Division of Insurance

ARGEO PAUL CELLUCCI
Governor
DANIEL A. GRABAUSKAS
Director
THOMAS J. CURRY
Commissioner of Banks
LINDA L. RUTHARDT
Commissioner of Insurance

March 24, 1999

Mr. Kevin F. Kiley
Executive Vice President and COO
Massachusetts Bankers Association, Inc.
73 Tremont Street, Ste. 306
Boston, MA 02108-3906

Dear Mr. Kiley:

This letter is in response to your correspondence of November 24, 1998 to the Division of Banks ("DOB") and the Division of Insurance ("DOI") requesting comment on the issues raised in several questions relative to the operation of the bank insurance sales statute, Chapter 129 of the Acts of 1998 (the "Act") and regulations promulgated by the DOB and DOI, 209 CMR 49.00 *et seq* and 211 CMR 142.00 *et seq*, respectively.¹

As you are aware, the Division of Insurance and the Division of Banks consistently approach regulatory matters within the context of a particular factual scenario and, thus, ongoing banking/insurance issues, including those relative to solicitation, licensure and marketing, should logically be expected to continue to develop over time. Notwithstanding this temporal and fact-specific caution, the Divisions make the following general and informal comments, following the format of your own letter for the purposes of clarity only. You are also cautioned to refer to DOI Bulletin 99-01 and DOB opinion letters² for further information.

The questions presented in your letter are repeated and addressed in the same order.

1. What activities constitute solicitation of insurance that would require licensure? Is the term "marketing" in the definition of "insurance sales activities" intended to encompass a broader or narrower range of activities than "solicitation"? We assume, for example, that a bank that makes marketing materials from an insurance company or licensed insurance agent available to its customers would not be required to be licensed under the bank insurance law. For example, can we assume that a bank statement

¹ Please note that the discussion which follows is merely informational and is not intended to present an Advisory Opinion pursuant to M.G.L. c. 30A, section 8 and Division of Insurance Bulletin 96-22. Additionally, the information may change should the operative facts and/or law and regulations change.

² See, e.g., Opinion 98-247 issued January 28, 1999.

stuffer introducing customers to the new insurance agency is part of a bank family? Can that statement stuffer bear the bank's name even though the affiliate or subsidiary is the licensee. Please assume that all literature would make clear that the licensed affiliate or subsidiary would be the entity making the sales and not the bank.

Comments Relative to "Solicitation" and "Marketing":

Please note this response also addresses matters raised in Question #8.

It is acknowledged by the Divisions that banks customarily use advertising and promotional materials as fundamental marketing tools. Banks often disseminate information, written or otherwise, to bank customers and the general public describing products that are available from the bank, its subsidiaries, affiliates, or unaffiliated third parties. With respect to the sale of insurance products and annuities, the Office of the Comptroller of the Currency included comment on this subject matter in its Advisory Letter providing guidance to national banks on insurance and annuity sales activities.³ Pursuant to the provisions of Chapter 129, the DOB's regulations, 209 CMR 49.00 et seq, reflect the substance of conditions established by the Comptroller of the Currency and set forth in said Advisory Letter.⁴ The Advisory Letter included the caveat that "These communications[advertisements] must not suggest or convey any inaccurate information, and should be designed with care to avoid misunderstanding, confusion, or misrepresentation to the bank's customers." Chapter 129 similarly provides in the context of bank premises sales activity, "It shall be the responsibility of a bank to institute procedures to eliminate customer misunderstanding or confusion as to the distinction between such insurance products and other bank functions, and to prevent any misrepresentation thereof."⁵

Chapter 129 sets forth "solicitation or sale" restrictions independent of a reference to marketing matters. The law notes that consumer disclosure requirements attendant to anti-tying provisions do not apply "in situations where a bank contacts a customer in the course of direct or mass marketing of insurance products to a group of persons in a manner that bears no relation to any such person's loan application or credit decision."⁶ A bank's use of general informational marketing materials, distributed or made available to groups of persons in a manner which bears no relation to a credit application or decision, would be permissible and within the "direct or mass marketing" provision of the statute. This would include such materials as an informational brochure available on bank premises or statement stuffer describing insurance products available through the bank's properly licensed subsidiary, affiliate or third party. The content of any such marketing materials should be designed and drafted in such a manner, including appropriate consumer disclosures, so as to minimize the risk of customer confusion. The marketing materials should include the name of the entity licensed to sell insurance products and should, at a minimum, include consumer disclosures making clear that the products are not deposits of the bank, are not protected by deposit insurance, are not obligations of or guaranteed by the bank and may be subject to risk. The use of the bank's name in such materials may increase the risk of customer confusion. The content of all marketing materials is subject to review through established procedures of both Divisions.

³ See OCC Advisory Letter, AL96-8, Guidance to national banks on insurance and annuity sales activities, October 8, 1996.

⁴ See Mass. Gen. L. ch. 167F, §2A(b)

⁵ See Mass. Gen. L. ch. 167F, §2A(b)(3)

⁶ See Mass. Gen. L. ch. 167F, §2A(b)(4)(ii)

2. What activities by a bank or its subsidiary require submission of an application and plan of operation to the Commissioner of Banks or the Commissioner of Insurance, and which entity would need to submit the application? The following are examples of some of the arrangements being contemplated by banks. It would be helpful to know in what circumstances a bank insurance license must be obtained, if any.

- A bank or its subsidiary continues to engage in the sale of annuities in which it engaged prior to enactment of the bank insurance statute through a third party marketing arrangement and subject to the restrictions contained in the regulations that were, prior to their repeal, applicable to such arrangements.

The DOI's regulation at 211 CMR 142.04(1) provides that prior to entering into a third party agreement relative to the sale of insurance that includes the sharing of commissions with an insurance agent or broker, the bank must obtain a license from DOI pursuant to G.L. c. 175, §209. Certain types of annuities may be considered insurance products for insurance licensing purposes and require a bank or bank subsidiary to obtain a license from the DOI to enter into a third party agreement which includes the sharing of commissions. A state-chartered bank in the Commonwealth may engage in the sale of annuities and other nondeposit investment products.⁷ Section 10 of the Act provides that "[N]othing in this act shall be construed so as to prohibit a bank from selling annuity products pursuant to state or federal law." A plan of operation pursuant to Chapter 129 to engage in the sale of annuities would not be required to be filed with the DOB, however, the sale of annuities by a bank or bank subsidiary would be subject to compliance with applicable federal guidelines governing retail sales of non-deposit investment products.⁸ These guidelines, similar to Chapter 129, require specific consumer disclosures concerning the nature of the investment products; require separate physical locations for on-premises sales and require that sales are made by specifically designated and trained personnel.⁹

- A bank or its subsidiary enters into a third party marketing arrangement in which they engage a licensed agency to conduct insurance sales activities. The third party marketing arrangement does not involve the splitting of commissions or other activities that constitute agency activities. What if the arrangement does involve the splitting of commissions?

The Act provides the authority for a bank to sell insurance products through a third party agreement. The DOI's regulation at 211 CMR 142.04(1) provides that prior to entering into a third party agreement relative to the sale of insurance that includes the sharing of commissions with an insurance agent or broker, the bank must obtain a license from DOI pursuant to G.L. c. 175, §209. If the bank intends for a subsidiary to enter into a third party agreement that includes the sharing of commissions, the subsidiary would require a license from the DOI. In these circumstances, a state-chartered bank or licensed lender would be required to obtain

⁷ See, e.g., Mass. Gen. L. ch. 167F, §2, para. 25 and *Nationsbank v. Valic*, 115 S. Ct. 810 (1995).

⁸ The Interagency Statement on Retail Sales of Nondeposit Investment Products (Fed. Banking L. Rep. (CCH) Pars. 70-001-70-119, February 15, 1994) contains guidelines for the sale of nondeposit investment products, which include annuities.

⁹ See *id.*

approval of a plan of operation from the DOB pursuant to the Act and regulations. If the arrangement does not include the sharing of commissions, a license would not be required from the DOI. In such a case, the DOB would not require the submission of a formal plan of operation but would require the bank to provide information that any such arrangement sufficiently incorporates the substantive consumer protection provisions of the Act and regulations.

- Many banks operate as subsidiaries of a bank holding company (BHCs). The BHC may also control other banks. One of the banks in the BHC may also control an insurance agency as a wholly-owned subsidiary. The bank that does not own the agency has a third party marketing arrangement with its affiliate bank's insurance agency (which is appropriately licensed under Massachusetts or other applicable law). The marketing arrangement does not involve commission splitting or other agency activities.

The Act provides the authority for a bank to sell insurance products through a third party agreement. The DOI's regulation at 211 CMR 142.04(1) provides that prior to entering into a third party agreement relative to the sale of insurance that includes the sharing of commissions with an insurance agent or broker, the bank must obtain a license from DOI pursuant to G.L. c. 175, §209. In addition, in these circumstances, the bank would be required to submit a plan of operation to the DOB. A third party arrangement which does not include the sharing of commissions would not require a license from the DOI. In such a case, the DOB would not require the submission of a formal plan of operation but would require the bank to provide information that any such arrangement sufficiently demonstrates compliance with the substantive consumer protection provisions of the Act and regulations.

3. Most banks intend to sell insurance through subsidiaries, and the new Division of Insurance application appears to contemplate that the bank itself will be selling insurance. We assume that the bank will not have to obtain a separate license if the subsidiary is licensed.

Yes, that's correct. If the bank intends to conduct insurance sales activities through a subsidiary and the subsidiary is properly licensed, the bank is not required to obtain a separate license. The payment or "upstreaming" of dividends by a licensed subsidiary to a parent bank would not trigger a separate license requirement for the bank.

4. The insurance statute requires that at least the majority of licensed officers and directors of an insurance agency have three years experience as a licensed agent. We understand that the Division of Insurance interprets this provision as requiring that one licensed officer have the requisite experience if there is only one licensed officer in the agency. Please confirm that interpretation. In addition, would experience as a Savings Bank Life Insurance agent count for purposes of the relevant experience requirements for active officer qualifications? We have been informed that the requirement is not interpreted to mean that each of the groups of officers on the one hand and directors on the other has to meet the experience requirement. Please confirm this interpretation. If this is not so, it poses a problem for a bank acquiring or starting an agency that wants to put a majority of its bank directors on the board of the newly acquired or newly formed agency.

The DOI interpretation of Section 174 is that one licensed officer must comply with the provisions of Section 174 if there is only one licensed officer. Relevant experience with SBLI would be considered in determining experience. The requirement is not interpreted to mean that each of the groups of the officers on the one hand and directors on the other has to meet the experience requirement.

5. Will bank-owned insurance agencies have to get approval from sponsoring insurance companies? We would like you to confirm whether you will require banks to inform you of the insurance companies for which they intend to act directly as agents (other than third party marketing arrangements), and whether banks should update these disclosures on a periodic basis.

Consistent with the law, regulations, and the Interagency Agreement, the Division of Insurance will share requested and relevant licensing and appointment information with the Division of Banks on an "as needed" basis. Brokers and agents are licensed to do business through the Division of Insurance. Brokers need not be "appointed" to a specific insurance company since they are licensed through the Division of Insurance after the successful completion of an application; such brokers then sign separate contracts with insurance companies. Agents must complete the Division of Insurance's "appointment application" form and then have it endorsed by the "sponsoring" insurance company. These processes have not been changed by Chapter 129.

6. If an out-of-state bank that is not conducting a banking business in Massachusetts has an insurance agency subsidiary that is appropriately licensed under Massachusetts law, we have assumed that the out-of-state bank does not need to obtain a license from either Commissioner assuming the bank is not itself also conducting insurance sales activities directly.

Under these circumstances, the out-of-state bank would not be required to obtain a separate license from the DOI and would not be required to submit a plan of operation to the DOB.

7. We believe that banks and their affiliates have the ability to offer insurance products, pursuant to third party marketing arrangements or otherwise, through subsidiaries that engage in other permissible activities. Banks, bank holding companies and their subsidiaries are subject to a high degree of supervision and regulation, including limitations on their ability to engage in nonbanking activities. Given this level of oversight in bank subsidiaries, we do not think that it will serve any legitimate purpose to limit the activities of such subsidiaries to insurance.

While noting that specific factual scenarios will be addressed on their own merits, please note that section 174 of chapter 175 of the Massachusetts General Laws and 211 CMR 142.04(1) provide some helpful guidance on these points.

8. We would like your offices to confirm that the mass-marketing exception to the restrictions regarding solicitation permits both national and state-chartered bank to solicit sales of insurance, directly or through third party marketing arrangements, to bank customers (including preselected segments of the bank's customer base) or the general public without limitation.

SEE RESPONSE TO QUESTION #1

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9. Why are license renewals for corporate licensees required by the Division of Insurance every year where Chapter 175, Section 174 specifically references the provisions of Sections 163 and 166, and those sections require license renewals only every three years?

The Division of Insurance will treat license renewals for individuals operating within the context of Chapter 129 consistently as other general license renewals; this approach supports the Division of Insurance's interest in ascertaining whether individuals meet the standards of satisfactory performance detailed within the Massachusetts General Laws, including but not limited to appointment and continuing education requirements.

Please note that a party applying for proper licensure under Chapter 129 must submit all materials as set forth in Chapter 129 and 211 CMR 142.00 et seq., including a general plan of operation with a detailed description of complaint resolution procedures, including personnel designated for enforcement. See generally Chapter 129; 211 CMR 142.04. Entities seeking to file a plan of operation are urged to review and address in their filing all consumer protection provisions contained in Chapter 129 and implementing regulations of both Divisions.

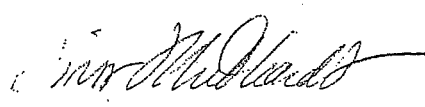
The Division of Insurance and Division of Banks trust that the foregoing proves helpful. As additional issues arise, the Divisions would be pleased to provide further guidance in the context of a particular factual circumstance. Entities may file specific requests for review with the DOI's Office of the General Counsel and/or the DOB under general procedures established for requesting an opinion or approval set forth in DOB Regulatory Bulletin 1.1-103 and DOI Bulletin 96-22. Any such requests should concisely present all known issues, facts, and citations to applicable statutes, regulations, regulatory bulletins or other issued opinions within each Division's respective jurisdiction. Whenever practicable, writers should include a complete analysis of the facts and law in support of their position. The DOI's Office of the General Counsel may be reached at (617) 521-7309 with a current address at 470 Atlantic Ave., Boston, MA 02210-2223 and the DOB's Legal Unit at (617) 727-3145 Ext. 320 or 321 with a current address at 100 Cambridge Street, Rm. 2004, Boston, MA 02202. For insurance licensing inquiries, one may contact Robert Krumscheid of the DOI's Licensing Unit at (617) 521-7447.

Sincerely,

Sincerely,



Thomas J. Curry
Commissioner of Banks



Linda Ruthardt
Commissioner of Insurance