

## K&amp;L GATES

MASSACHUSETTS BANKERS ASSOCIATION  
ANNUAL CONVENTION - BERMUDA 2015  
THE STATUTORY RECODIFICATION OF MASSACHUSETTS  
BANKING LAW FOR DIRECTORS

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## Overview

- Chapter 482 of Massachusetts Acts of 2014
- 100 plus pages of text
  - Charter Statutes simplified – Chapters 168, 170 and 172
  - Streamlined merger and acquisition statute - Chapter 167I
  - New consolidated corporate governance statute - Chapter 167J
- Last major rewrite in 1982
- Effective April 7, 2015

## The Ten Things Directors Need to Know

1. Tiered regulation
2. Enhanced legal powers
3. Elimination of consumer protection laws that do not provide consumers with any additional protection
4. Mutual holding company simplification
5. Streamlined mergers and acquisitions

## The Ten Things Directors Need to Know

6. Elimination of redundant insider lending provisions
7. Uniform operational governance provisions
8. Corporate governance flexibility
9. Elimination of unnecessary reports / statutory requirements
- 10. What you need to do**

## Tiered Regulation

- The Recodification Act authorizes the Commissioner to “establish a tiered regulatory structure for the supervision and examination” of state chartered banks
  - Commissioner authorized to promulgate rules and regulations implementing tiered examination structure
  - Tiering can be based upon asset size, capital levels, balance sheet composition, CAMELS rating, CRA rating and “such other factors as the commissioner may determine”
  - Any tiering should “seek to effect cost reductions and reduce the regulatory burden” for state chartered banks

## New or Enhanced Legal Powers

- Operating Subsidiaries
  - A bank can establish a wholly owned operating subsidiary upon 10 days advance notice to the Commissioner
  - Approval of the Commissioner required only if the amount of the bank’s investment in a subsidiary exceeds 50% of tier 1 capital
  - A bank can own less than a 100% interest in an operating subsidiary with 30 days advance notice under the “parity” power
- OREO Subsidiaries
  - The Commissioner’s approval is still required if the purpose to the subsidiary is to hold or invest in OREO



## New or Enhanced Legal Powers

- Parity or Wild Card Powers
  - A bank can exercise any power or engage in any activity authorized for a federally chartered or out of state bank by providing 30 days advance notice to the Commissioner if
    - The power or activity is not otherwise prohibited under Massachusetts law
    - The power or activity is subject to the same limits applicable to federal or out of state banks
    - Any power or activity authorized for an out of state bank has been permitted by FDIC under Part 362 of the FDIC regulations
  - Prior authorization by regulation is no longer required

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## New or Enhanced Legal Powers

- Financial activities
  - A bank can engage in any activity, or invest in the shares of a company engaged in any activity, that is “financial in nature” or “incidental to a financial activity” or “complementary to a financial activity” if
    - The activity is not prohibited by law
    - The activity does not pose a substantial risk to the safety and soundness of the bank
    - 30 day advance notice is provided to the Commissioner
    - The activity does not include the sale of title insurance
  - In general, these activities are likely permissible only through the use of “financial subsidiaries” under Section 46 of the FDI Act

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## New or Enhanced Legal Powers

- Shared Services
  - A bank may collaborate with other banks to share the costs of providing technology, trust, financial planning, compliance, internal audit, human resources or other operational functions
  - Provision removes legal impediments to collaboration among community banks
  - Collaboration will be key to maintaining vitality of smaller community banks

## Consumer Protection

- The Recodification Act eliminates or reduces inconsistencies between
  - The state Truth in Lending Law and the federal Truth in Lending Act
  - State and federal Electronic Funds Transfer laws
  - Federal and state statutes dealing with Fair Credit Billing and Expedited Funds Availability
- The Recodification Act repeals the state Truth in Savings Act

## Consumer Protection

- The Recodification Act rewrites Chapter 167D, the state law governing bank deposits and accounts
  - Consolidated and streamlined
- The Recodification Act modifies Chapter 167E, the state law governing mortgage loans by banks
  - Removes requirement for mandatory inspection of real estate collateral within 91 days of default and replaces it with a required inspection as per the bank's loan policy

## Mutual Holding Company Simplification

- A Massachusetts mutual holding company can now
  - Merge with or acquire a federally chartered MHC or can be chartered by another state
  - Have its subsidiary stock bank merge with or acquire a federally chartered bank or a federal or Massachusetts chartered credit union
  - Merge with a stock holding company as long as the MHC charter is the survivor
  - Invest in a limited purpose trust company

## Mutual Holding Company Simplification

- A Massachusetts mutual holding company can now
  - Unwind its previous reorganization as a MHC
    - Approval of Commissioner required
    - 2/3 thirds vote of corporators needed
  - Form an interim bank to create a second MHC to acquire an existing mutual bank without an MHC and allow that acquired mutual bank to operate as a stand-alone sister bank subsidiary to the existing MHC stock bank subsidiary
    - MHC now able to charter interim banks
    - No BBI involvement

## Mutual Holding Company Simplification

- MHC reorganizations less complicated
  - BBI approval not required for non-operating interim banks formed to facilitate reorganizations that exist only for “moment in time”
  - Commissioner can approve “interim bank” if it is used purely to facilitate a reorganization
- Existing Mass Housing Partnership Fund commitment provisions survive



## Streamlined Mergers and Acquisitions

- Merger and acquisition provisions are now consolidated into a single chapter, providing a single, consistent set of merger provisions
- Mutual holding company merger and acquisition authority clarified
- Mutual to stock conversion statutory rules simplified
- Merger of a non-bank subsidiary or affiliate into its parent bank allowed
  - No need for liquidation of subsidiary/affiliate
  - FDIC approval necessary; no Commissioner approval

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## Streamlined Mergers and Acquisitions

- Massachusetts mutual banks can merge with
  - Other Massachusetts mutual banks
  - Mutual banks chartered in another state
  - Federally chartered mutual banks
  - Credit unions with Federal, Massachusetts, or other state charters
- Massachusetts stock banks can merge with
  - Other Massachusetts stock banks
  - Stock banks from other states
  - Federally chartered stock banks

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## Streamlined Mergers and Acquisitions

- Massachusetts stock or mutual banks can acquire the assets or stock of:
  - Stock banks with federal, Massachusetts or other state charters
  - Limited purpose trust companies

## Elimination of Redundant Insider Lending Law

- Statutory limits on loans to officers have been eliminated and replaced with a simple obligation to comply with Federal Reserve Regulation O
- The existing state law “buckets” on loans to executive officers repealed
  - \$100,000            personal loan
  - \$200,000           educational loan
  - \$750,000           owner-occupied single family mortgage
- Regulatory Bulletin 2.1-102 will need to be revised to reflect that there are no longer Massachusetts-specific limits

## Uniform Governance Provisions

- The Recodification Act consolidates the substantially identical operational governance provisions in Chapter 168, 170 and 172 and transfers them to new Chapter 167J
  - New Chapter 167J covers a range of operational subjects including bonding, statements of condition, treasurer duties, willful violations of banking laws by insiders, payment of interest, capital, service on other bank boards, board reports, audits and capital stock classification

## Corporate Governance Flexibility

- A Massachusetts bank now has the ability to specify in its bylaws the “corporate governance procedures” of Chapter 156D provided they are not inconsistent with and otherwise “comply with banking laws and regulations and safe and sound banking practices”
- If a bank is subject to a specific requirement in a banking statute, which is inconsistent with a governance provision in Chapter 156D, the former takes precedence



## Corporate Governance Flexibility

- Corporators
  - The requirement that 75% of a mutual savings bank's corporators be citizens and residents of Massachusetts has been reduced to 50%
- Trustees/Directors
  - Mutual savings banks must still have a minimum of 11 trustees
  - Stock savings banks only need 7 directors
  - Mutual co-operative banks have a required minimum of 5
  - Stock co-operative banks must have a minimum of 7
  - Mutual banks can now allow the board to add two members as trustees/directors

## Corporate Governance Flexibility

- Directors' shares
  - Stock co-operative bank and savings bank directors are expressly required to own \$1000 in directors' shares of stock of the bank
  - Unclear whether this provision will be applied to directors of stock bank subsidiaries of mutual holding companies
  - Stock ownership can be controlled through the use of stock restriction agreements

## Corporate Governance Flexibility

- Statutory committee requirements
  - Mutual savings banks must still have a five member board of investment and a three member audit committee
  - Mutual co-operative banks must still have security and audit committees with at least three members each and non-overlapping membership
  - Stock banks must have a three member executive committee

## Corporate Governance Flexibility

- The president
  - The president and vice presidents of a mutual savings bank are now elected by the trustees, not the corporators
  - The president of a stock bank must be a director and is also by default the chairman of the board if another director is not selected
- The treasurer
  - Treasurer is responsible for all duties that are not assigned to other officers

## Corporate Governance Flexibility

- Board action by written consent
  - Unless the bylaws provide otherwise, the board or a committee of a Massachusetts bank or can vote by an action by consent executed by all of its members
- Participation by conference call or videoconference
  - A bank board or committee can determine whether telephone participation by members will be allowed by simple resolution (in addition to a provision in the bylaws or charter)

## Corporate Governance Flexibility

- A mutual holding company may now
  - “Elect to follow the corporate governance procedures of the General Laws” by designating “in its bylaws the body of law selected for its corporate governance procedures”
- Technical amendment expected to clarify that this provision is intended to allow a mutual holding company to follow Mass. Gen. Laws ch. 156D or other relevant banking law provisions
- Some questions may remain as to the powers and duties of MHC corporators given that Mass. Gen. Laws ch. 156D does not address this issue



## Corporate Governance Flexibility

- If a mutual holding company elects to apply Mass. Gen. L. c. 156D in its bylaws
  - Must have a minimum of three (3) directors, meaning that the mutual holding company board could function like an executive committee
  - MHC board (and possibly corporator) votes could be taken by written consent
    - Note that even though statutes may allow written consent, examiners will still want to see minutes showing deliberation
  - An MHC that elects to follow the governance provisions in Mass. Gen. Law ch. 156D in its bylaws will remove much of the guesswork in ensuring valid corporate action

## Elimination of Savings Bank Reports

- Trustee statutory reports simplified/eliminated
- Board of investment reports simplified/eliminated
- Annual insider loan report to Commissioner eliminated
- General penalties for improper payment of interest eliminated
- Mandated statutory requirements governing Federal Reserve balance requirements repealed
- Mandated semi-annual audit committee reporting to the Trustees eliminated
- Need to file bylaws with the Commissioner eliminated

### **Elimination of Co-operative Bank Reports**

- Statutory list of required bylaw provisions eliminated
- Annual insider loan report to Commissioner repealed
- Statutory distribution of net profits provisions repealed
- Required statutory restriction on interest computation repealed
- Outmoded statutory liquidity formula repealed
- Mandated statutory requirements governing Federal Reserve balance requirements repealed
- Need to file bylaws/amendments with the Commissioner eliminated

### **Elimination of Trust Company Reports**

- Mandated statutory minimum standards for capital structure repealed
- Periodic filing of trial balances with Commissioner repealed
- Statutory reserve requirements repealed
- Mandated statutory restrictions governing Federal Reserve balances repealed
- Statutory sanctions for insufficient reserves repealed

## What You Need to Do

- Review your bylaws and consider addressing the following:
  - Allowing the board to elect two directors
  - Adopting corporate governance provisions of Mass. Gen. Laws ch. 156D
  - Allowing actions by written consent
- Update list of potential merger partners
- Reevaluate strategic plan in light of enhanced powers
- Look for opportunities to collaborate with other banks
- Update insider transactions policy

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