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Updated Annual Meeting Guidance for Mutual Banks and Mutual Holding Company Subsidiary Banks

On March 10, 2020, the Governor declared a state of emergency due to the outbreak of a novel coronavirus (COVID-19). The Governor subsequently issued a series of orders in response to the pandemic, several of which limited the size of public and private gatherings. On June 12, 2020, the Massachusetts Division of Banks (Division) issued industry guidance (June 2020 Guidance) regarding the requirement to hold an annual meeting for depositors of mutual co-operative banks, incorporators of mutual savings banks (collectively, mutual banks), and incorporators of mutual holding companies and their Massachusetts state-chartered subsidiary banks (collectively, including all mutual banks, referred to as mutual institutions). In light of the ongoing nature of the COVID-19 pandemic and applicable in-person gathering limitations, the Division is now providing further guidance regarding the annual meeting requirement for 2021.

The June 2020 Guidance established that any mutual institution that opted to postpone holding an in-person annual meeting until after the COVID-19 state of emergency was terminated would not be subject to any adverse regulatory finding by the Division as a result of such postponement. The June 2020 Guidance also set forth certain considerations for mutual institutions that would conduct the annual meeting through remote or hybrid participation in lieu of an in-person meeting. The June 2020 Guidance only addressed annual meetings that were scheduled to be held in 2020. The Division is issuing this updated guidance to help institutions plan for 2021 annual meetings.

As referenced in the June 2020 Guidance, certain provisions of the Massachusetts banking laws refer to the “place of the meeting,”¹ but do not expressly address whether or not a mutual institution is permitted to conduct the annual meeting either solely by remote communication (a fully virtual meeting) or through a combination of remote communication in conjunction with limited in-person attendance of depositors or incorporators (a hybrid meeting). In consideration of the gathering restrictions imposed due to the COVID-19 pandemic, mutual institutions inquired whether the Division interpreted the “place of the meeting” to require an annual meeting to be held in person at a single physical location, or whether the annual meeting could be conducted in a virtual format through remote communication. The June 2020 Guidance established that the Division would take no adverse regulatory actions if a mutual institution opted to conduct its 2020 annual meeting through remote communication, regardless of whether the mutual institution had adopted the corporate governance provisions of Massachusetts General Laws chapter 156D.

¹ Massachusetts General Laws chapter 168, section 11 and Massachusetts General Laws chapter 170, section 11.

The June 2020 Guidance noted that the annual meeting would have to be conducted in accordance with the mutual institution's organizing documents. The Division further stated that a mutual institution would not be subject to any adverse regulatory findings for postponing its annual meeting in accordance with the June 2020 Guidance.

The Division is providing the following further guidance both to supplement the June 2020 Guidance for any mutual institutions that have not yet held their 2020 annual meeting and to clarify the Division's expectations for 2021 annual meetings.

2021 Annual Meeting

The Division's June 2020 Guidance provided scheduling flexibility for mutual institutions in light of the COVID-19 pandemic and permitted mutual institutions to postpone their 2020 annual meetings during the duration of the state of emergency. While the Division recognizes the ongoing nature of the pandemic, it is the Division's position that annual meetings should not be postponed indefinitely. As such, all mutual institutions should plan to hold their 2021 annual meetings either as an in-person meeting held in accordance with the then-applicable public health guidance on in-person gatherings, or as virtual or hybrid meetings in accordance with the Division's June 2020 Guidance. Consistent with the June 2020 Guidance, the Division will take no adverse regulatory actions if a mutual institution opts to conduct its 2021 annual meeting through remote communication, regardless of whether the mutual institution has adopted the corporate governance provisions of Massachusetts General Laws chapter 156D. To the extent possible, the 2021 annual meeting should be scheduled in a manner consistent with the timing provisions for holding the annual meeting established by the mutual institution's organizational documents, as applicable.

Waiver of Separate 2020 Annual Meeting

Any mutual institution that has not yet held its 2020 annual meeting will not be expected to hold separate 2020 and 2021 annual meetings. Rather, at its 2021 annual meeting the mutual institution should consider and vote upon any matters that would have been considered at the 2020 annual meeting. The annual meeting minutes should reflect such considerations. Further, the Division anticipates that there may be questions regarding trustee, director, or corporator elections and terms expiring in 2020. For mutual institutions that did not hold a 2020 annual meeting and have trustees, directors, or corporators whose terms were set to expire in 2020, the mutual institution should treat such term as extending until elections are held and their successors are chosen in 2021.

If you have any questions on this updated guidance or the June 2020 Guidance, please contact Gregory Short, Deputy General Counsel, at (617) 956-1547 or gregory.short@mass.gov.

Sincerely,



Mary L. Gallagher
Commissioner of Banks

PRIOR INDUSTRY GUIDANCE ISSUED ON JUNE 12, 2020:

Industry Guidance Regarding Annual Meetings for Massachusetts State-Chartered Mutual Banks and Subsidiary Banks of a Massachusetts Mutual Holding Company

The Massachusetts Division of Banks (Division) is issuing this industry guidance in response to requests for clarification of supervisory expectations during the 2019 novel Coronavirus (COVID-19) emergency relative to holding an annual meeting of depositors of mutual co-operative banks and incorporators of mutual savings banks (collectively, mutual banks). Guidance is also provided for mutual holding companies and their Massachusetts state-chartered subsidiary banks (collectively, including all mutual banks, referred to as mutual institutions) that may follow similar governance provisions as the mutual banks pursuant to their charter, articles of organization, or bylaws (organizational documents). The Division recognizes the ongoing challenges and concerns that the COVID-19 emergency presents to mutual institutions that may have conducted all previous annual meetings on an in-person basis in accordance with organizational documents that do not authorize or incorporate the use of remote communication to conduct the annual meeting either in whole or in part on a remote or virtual basis.

Background

The requirements for conducting meetings of depositors or incorporators of a mutual bank, including the annual meeting, are governed by both Massachusetts statutes and the mutual institution's bylaws. In the time since Governor Baker issued Executive Order No. 591² declaring a state of emergency in the Commonwealth and the release of subsequent social distancing guidelines to confront the COVID-19 pandemic, the Division has received inquiries from many mutual institutions about whether the Division could provide additional clarification regarding the annual meeting requirement during this declared emergency. The Division believes that although Governor Baker's COVID-19 Order No. 19 (Order No. 19)³ suspending the Massachusetts prohibition on public corporations from holding annual meetings of shareholders exclusively on a virtual basis was not directly applicable to all mutual institutions, consideration of Order No. 19 is informative in developing this guidance.

For mutual banks, Massachusetts General Laws chapter 167J, section 21 establishes that, "A bank's corporate governance procedures shall comply with banking laws and regulations and safe and sound banking practices. To the extent not inconsistent with the above, a bank may elect to follow the corporate governance procedures of chapter 156D or the law of the state in which its holding company is organized. A bank shall designate in its by-laws the body of law selected for its corporate governance procedures." Similarly, for mutual holding companies Massachusetts General Laws chapter 167H, section 6 states that, "the mutual holding company shall (i) continue to possess and exercise all the rights, powers, and privileges, except deposit-taking powers, of a mutual banking institution and (ii) shall be subject to the limitations and restrictions imposed on bank holding companies by chapter 167A and by applicable federal law and regulations. To the extent not inconsistent with the above, a mutual holding company may elect to follow

¹ Executive Order No. 591, *Declaration of a State of Emergency to Respond to COVID-19* (March 10, 2020).

³ COVID-19 Order No. 19, *Order Regarding the Conduct of Shareholder Meetings by Public Companies* (March 30, 2020). See also SECTION 15 of Chapter 53 of the Acts of 2020 (April 3, 2020).

the corporate governance procedures of the General Laws and shall designate in its by-laws the body of law selected for its corporate governance procedures.”

For both mutual banks and mutual holding companies, the mutual institution must have affirmatively elected to follow the corporate governance procedures of chapter 156D by reflecting such designation in its bylaws and must follow such governance procedures in a manner that is consistent with the banking laws and regulations. Questions have arisen about whether a mutual institution that has not previously elected to follow the corporate governance procedures of chapter 156D and were therefore not directly subject to the remote communication temporary exception granted under Order No. 19 will be permitted to conduct the annual meeting through a virtual format.

In several discussions with the Division among those seeking clarification on the annual meeting requirements, it has been mentioned that certain provisions of the Massachusetts banking laws also refer to the “place of the meeting”⁴ without further specifying whether this language would permit the institution to conduct the annual meeting either solely by remote communication (virtual meeting) or through a combination of remote communication in conjunction with limited in-person attendance of depositors or corporators (hybrid meeting). In the absence of such clarification, institutions have questioned whether the “place of the meeting” under the Massachusetts banking laws is limited to a physical, geographic location.

For the mutual institutions that have not yet held their annual meeting this year, the Division is issuing this industry guidance to provide further scheduling flexibility and to express the Division’s non-objection to the use of remote communications to conduct the annual meeting either as a virtual meeting or as a hybrid meeting that includes the limited in-person attendance of depositors or corporators in which social distancing and related guidelines on larger gatherings would be followed to protect the health and safety of depositors, corporators, and bank personnel.

Postponement of the In-Person Annual Meeting

The decision to transition from an in-person annual meeting to a virtual or hybrid annual meeting this year will be left to the individual institution to determine what option is best for its set of facts and circumstances. The Division recognizes that mutual institutions opting for an in-person annual meeting may wish to postpone the meeting until a date following the end of the state of emergency. It is the Division’s position that any mutual institution that has not yet held its 2020 annual meeting and wishes to further postpone an in-person annual meeting to occur only after the state of emergency has ended may do so. The institution would not be subject to any adverse regulatory finding by the Division for such delay if the timing of the postponed meeting were to be held on a date beyond the period for conducting the annual meeting as established by the institution’s organizational documents. Recognizing that the authorization for a virtual meeting for public corporations under Order No. 19 was granted on the condition that such temporary authority will expire sixty (60) days after the declared emergency is terminated, the Division believes that the postponement of the in-person annual meeting should follow a similar timing guideline.

⁴ Massachusetts General Laws chapter 168, section 11 and Massachusetts General Laws chapter 170, section 11.

Within sixty (60) days of the end of the state of emergency, the Division would encourage any mutual institution that has elected to postpone the in-person annual meeting to either conduct the in-person annual meeting or, at a minimum, to issue the notice of the annual meeting identifying the date on which the annual meeting will be held which may be a date that occurs after the expiration of such sixty (60) day period. The additional time following the end of the state of emergency would provide mutual institutions with the opportunity to ensure that the location selected for the annual meeting would allow the meeting to be conducted in accordance with any social distancing or public health guidelines for larger in-person gatherings that may be recommended at that time. Notice of the annual meeting postponement should be communicated to depositors or corporators, as applicable, with an explanation of the decision to postpone the meeting.

Remote Annual Meeting Options

For mutual institutions that do not wish to postpone their annual meeting for an indefinite or extended period of time, but do not want to proceed with an in-person meeting due to concerns associated with the COVID-19 pandemic, the Division has determined that such mutual institutions may conduct their annual meetings by remote communication this year, but should incorporate the following considerations in planning for the meeting:

- *Meetings by Remote Communication:* The annual meeting may be conducted as a virtual or hybrid meeting, but must allow depositors or corporators, as applicable, to participate in the meeting telephonically. Mutual institutions that wish to offer the additional option of accessing the meeting via a substantially concurrent videoconference may do so as long as participation by telephone is also available. The notice of the annual meeting must include clear instructions describing how to access the meeting by remote communication and procedures for how depositors or corporators will be able to participate in the meeting, including how they will be able to present questions either prior to or during the annual meeting.

Any mutual institution electing to conduct the annual meeting by remote communication this year must review the provisions of Massachusetts General Laws chapter 156D, section 7.08 as compliance with these provisions is incorporated as a condition of the Division's non-objection to the remote communication format for the annual meeting.

- *Verifying Attendees:* The procedures governing the virtual or hybrid meeting must include reasonable provisions that will allow the mutual institution to verify the identity of the depositors or corporators that join through a remote communication method.
- *Technical Support:* Technical support should be available during the annual meeting to assist any depositors or corporators that experience difficulties accessing the meeting or participating through remote communications to ensure individuals do not miss the opportunity to ask questions or engage in discussions.
- *Extended Meeting Duration and Voting by Mail:* Mutual institutions may wish to hold their meetings open for an extended period of time in order to facilitate and increase opportunities

to submit a completed ballot on any matters that may be presented for a vote at the annual meeting. For the limited purpose of conducting the annual meeting this year, the Division would not object to the mutual institution accepting completed ballots by mail where the institution's prior practice may not have allowed for voting by mail. Extended hours for the annual meeting would permit the institution to receive completed ballots by mail or allow an individual to deliver their completed ballot in-person at one of the institution's office locations.

- *Board Minutes*: If the mutual institution's board of trustees or directors, as applicable, elects to postpone the 2020 annual meeting due to COVID-19 considerations, the board meeting minutes should record this decision. Likewise, if the board decides to conduct the 2020 annual meeting by remote communication through a virtual or hybrid meeting, the board meeting minutes should also record this board decision.
- *Bylaws*: The decision to transition from an in-person to virtual or hybrid annual meeting this year must also include a consideration of the provisions contained in the mutual institution's charter, articles of organization, and bylaws to determine whether the institution's organizing documents specifically require that the annual meeting be conducted in-person. If so, this guidance should not be construed to permit the mutual institution to violate a provision of such organizational documents. Where any organizational document specifically requires an in-person annual meeting, the organizational document should be amended to authorize the annual meeting by remote communication for this year in response to the COVID-19 emergency.

A mutual institution should provide notice of the annual meeting to its depositors or corporators, as applicable, in accordance with the notice requirements set forth in Massachusetts law and the institution's bylaws and adopt such other additional procedures governing remote communication and participation in the remote annual meeting as the institution determines to be reasonable. Mutual institutions may also wish to review and ratify all actions taken during the 2020 annual meeting conducted by remote communication at its next annual or special meeting.

Recognizing the significant governance considerations and challenges that have been presented by the COVID-19 pandemic, mutual institutions may also wish to review their bylaws in the weeks and months ahead to identify opportunities for possible amendments that would provide additional discretion and flexibility, where permissible, to respond to any similar emergency circumstances in the future.

The guidance provided above on postponing the annual meeting and conducting the annual meeting by remote communication applies solely to the 2020 annual meeting.

If you have any questions, please contact Merrily Gerrish, General Counsel, at (617) 956-1514 or merrily.gerrish@mass.gov.

Sincerely,

Mary L. Gallagher
Commissioner of Banks