

To the Chief Executive Officers of the Institutions Listed:

The New York State Department of Financial Services (the “Department”) is issuing this interpretative guidance in response to a request by the New York Bankers Association for an interpretation with respect to Sections 143-b and 141(2) of the New York Banking Law (the “Banking Law”). These sections relate to the requirement that the Superintendent grant prior approval of an acquisition of control of a banking institution. There is concern that some investors have been developing novel but not always transparent methods of acquiring and controlling banking institutions without obtaining prior regulatory review and approval from the Department.

The purpose of this guidance is to ensure that the Department reviews and, if found to be appropriate, approves any exercise or acquisition of control of a banking institution, as required under Section 143-b of the Banking Law irrespective of the method or technique used to acquire control.

Section 143-b of the Banking Law provides in relevant part that:

“It shall be unlawful except with the prior approval of the Superintendent for any company to acquire control of any banking institution, directly or indirectly . . . .  
As used in this section, the term “control” means the possession, directly or indirectly, of the power to direct or cause the direction of the management and policies of a banking institution, whether through the ownership of voting stock of such banking institution, the ownership of voting stock of any company which possesses such power or otherwise. Control shall be presumed to exist if any company, directly or indirectly, owns, controls or holds with the power to vote ten per centum or more of the voting stock of any banking institution...”

Section 141(2) of the Banking Law defines the term “Company” as follows:

“Company”, when used in this article, means any corporation, partnership, trust, unincorporated association, joint stock association or similar organization organized under the laws of the state of New York, or if not so organized, doing business in the state of New York, or any individual residing or doing business in the state of New York, or any combination of individuals which combination is residing or is doing business in the state of New York, any combination of the foregoing which combination is residing or is doing business in the state of New York, or any such individual and any of the foregoing acting in concert . . . .”

Acting in Concert:

The Department interprets the term “acting in concert” as used in Section 141(2) to include either:

- (i) Knowing participation in a joint activity or in 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 oral.

This interpretation is consistent with the interpretation of the term under the federal Change in Bank Control Act.<sup>1</sup> Indeed, Section 143-b was enacted to ensure that the Department has the opportunity to review any acquisition or exercise of control of a banking institution before it occurs. A banking institution is different from other companies because of its purpose and regulated nature. Therefore, the Governor's Approval Memorandum in support of the enactment in 1969 noted:

"Commercial banks, although privately owned, are quasi-public institutions. They derive their lendable funds primarily from deposits and fiduciary accounts and not from the capital supplied by stockholders. They are chartered to provide banking and trust services to the general public, and have come to play a primary role in the allocation of credit within our economy . . . .

[U]nregulated changes of control can lead to significant changes in a bank's lending and investment policies which may be detrimental to the general public and the bank's depositors."

Accordingly, the Department expects that all proposed changes of control, including those that meet the above standard, must be submitted to the Department for its prior approval.

Power to Vote:

Unless the specific facts dictate otherwise, the phrase "owns, controls or holds with the power to vote" as used in Section 143-b includes holding of proxies to vote shares for the election of directors of a banking institution.

The power to vote is the essence of a proxy. The holder of a proxy is authorized by the principal to vote the voting stock of the principal that is subject to the proxy.<sup>2</sup> This is consistent with prior interpretations of the Department with respect to proxies under Section 143-b.<sup>3</sup>

It should be noted that neither the purpose of Sections 143-b and 141(2) nor that of the foregoing interpretations is to prevent all changes of control of banking institutions. Rather, the objective is to assure that the Department has an opportunity to thoroughly review and make a decision with respect

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<sup>1</sup> 12 C.F.R. § 225.41; 12 C.F.R. § 5.50(d)(2).

<sup>2</sup> Section 609 (a) of the New York Business Corporation Law on "Proxies" provides that: "Every shareholder entitled to vote at a meeting of shareholders to express consent or dissent without a meeting may authorize a person or persons to act for him by proxy."

<sup>3</sup> Memorandum dated December 17, 1980 from Associate Attorney Gelman to Examiner Lulek - C/B Division, *available at*: <http://www.dfs.ny.gov/legal/interpret/lo801217.htm> ; memorandum dated March 12, 1998 from Kathleen A. Scott, Legal Division, to Deputy Kursky, *available at*: <http://www.dfs.ny.gov/legal/interpret/lo980312.htm>

to a change of control before it occurs, in order to protect the institutions the Department supervises and the public that the Department is charged to protect. As noted in the Governor's Approval Memorandum, "New York is the leading financial state in the Nation, and its commercial banks play a vital role in that leadership." The goal of the legislation is to avoid those "changes of control that could lead such institutions away from their fiduciary relationships to the public" in order to maintain "safety for depositors and full public confidence in the . . . banks of the state." The Department will fully protect the public as contemplated by law.

The above interpretations are without prejudice to the Department's position on any particular application for the acquisition of control of a banking institution.

A handwritten signature in black ink, appearing to read "Maria T. Vullo". The signature is fluid and cursive, with a large initial "M" and "V".

Maria T. Vullo

Superintendent of Financial Services