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DEPARTMENT OF FINANCIAL INSTITUTIONS
DIVISION OF BANKS
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ISDRL – 2018 – 001 – DOB

March 15, 2018

[redacted]

RE: Interpretation of RCW 30A.04.400 through RCW 30A.04.410 of the Washington Commercial Bank Act

Dear Mr. Cohen:

This Interpretive Statement is in reply to [redacted], addressed to Roberta Hollinshead, who is the Director of the Division of Banks ("Division Director"), Washington State Department of Financial Institutions ("Department"). The [redacted] asks for this Department's interpretation of two key phrases contained in the Washington Commercial Bank Act ("the Act").[1]

This interpretation is made by the Director of Regulatory and Legal Affairs acting under authority and with the express approval of the Division Director.

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1.0 Introductory Background

Certain "change of control" provisions of the Act (collectively, "Change of Control Provisions"),[2] represent the Washington Legislature's recognition that state-chartered banks exercise such an important role in the financial well-being of the State of Washington that "control" of such banks should not change without prior review and approval by the Division Director, acting by way of delegated authority from the Department's Director.[3]

This approval requirement is not designed to prevent changes of control. Rather, it is to assure the "protection of bank depositors, borrowers or shareholders, and the public interest."[4] To accomplish this objective, the Washington Legislature broadly defined the concept of "control" to mean "directly or indirectly alone or in concert with others to own, control, or hold the power to vote twenty-five percent or more of the outstanding stock or voting power of the controlled

[1] Title 30A RCW.
[2] RCW 30A.04.400 through RCW 30A.04.410, inclusive.
[3] RCW 43.320.050.
[4] RCW 30A.04.405(1).

entity."[5] The Department's Director, and by way of delegation, the Division Director, may disapprove a "change of control" for any number of reasons,[6] including the "public interest."[7]

The Division is mindful that since the enactment of the Change of Control Provisions in 1977,[8] hedge fund activists have from time-to-time developed new and sometimes less-than-transparent methods of acquiring and exercising control over banking and other organizations.[9] During the period between 1977 and the present, the Division has been called upon infrequently to invoke or otherwise rely upon these Change of Control Provisions. It would appear that this has always been in a context other than as expressed by the present Request for Interpretation, unless the interpretation was given (if at all) in an informal manner of which there is no record.

Therefore, the Division now makes the following formal interpretation of the Change of Control Provisions as set forth in this letter. This interpretation is without prejudice to and in no way a prejudgment as to what the Department's position would be relative to any future application for a "change in control" of a state-chartered bank regulated by the Department. Rather, the objective of this Interpretive Statement is to (1) assure that the Department will in fact have an opportunity to approve a "change in control" before it occurs and (2) provide a clear understanding to all affected persons should an application for "change of control" be made to the Department.

2.0 Issues and Summary Interpretation

2.1 Acting in Concert.

Question: How shall the phrase "acting in concert with others," as used in the definition of "control" in RCW 30A.04.400, to be interpreted by the Department?
Answer: The Department interprets the phrase "acting in concert with," as used in the definition of "control" under RCW 30A.04.400, to mean either:

1. Knowing participation in a joint activity or parallel action towards a common goal of acquiring control, whether *or not* pursuant to an express agreement; *or*
2. 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 otherwise.

2.2 Proxies.

Question: How shall the Department interpret the phrase "own, control or hold the power to vote" in RCW 30A.04.400?

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[5] RCW 30A.04.400(1).

[6] RCW 30A.04.410(1)(a)-(e).

[7] *Id*. at subsection (1)(e).

[8] 1977 ex.s. c 246 §§ 1-3.

[9] Without prejudice to the merits of any future application for "change of control," the Department is aware that on a national basis, some hedge fund activists have worked together to acquire control of an organization, but with each hedge fund staying below (or slightly below) the relevant jurisdiction's threshold amount that would require an application or other regulatory filing. The Department is also aware that certain hedge funds have worked together in so-called "conscious parallelism," without a binding agreement.

Answer: The phrase "own, control or hold the power to vote," as used in RCW 30A.04.400, includes the *holding of proxies to vote shares* of a bank subject to the provisions of RCW 30A.04.400 through RCW 30A.04.410, inclusive.

3.0 Detailed Analysis

3.1 Interpretation of "in concert with others".

In interpreting a statute, a court's fundamental objective is to ascertain and carry out the legislature's intent;[10] and in like manner, this is also the proper objective of the Department. Statutory interpretation begins with a statute's plain meaning.[11] If the meaning of the statute "is plain on its face, then the court must give effect to that plain meaning as an expression of legislative intent."[12]

In this regard, the Director and the persons acting by way of delegation under her authority, have broad administrative discretion to interpret the provisions of the Act, including the Act's Change of Control Provisions.[13] In addition to the Department's *explicit* statutory authority to interpret the banking statutes that it administers, the Department also has *implied* authority to do so.[14] If, in the exercise of this express discretion and implied authority, the Division cannot be certain of the meaning of "control" in the Act's Change of Control Provisions by a plain reading of it, the Division may employ additional measures in arriving at a proper interpretation within its broad discretionary authority.

The Act's Change of Control Provisions expressly defines "control" as—

> ". . . directly or indirectly alone or in concert with others to own, control, or hold the power to vote twenty-five percent or more of the outstanding stock or voting power of the "controlled" entity . . . ."[15]

The Division may consider application of the following principles of statutory construction to interpret what "in concert with" means in the context of the above-cited definition of "control":

The "Whole Act" Rule. If in looking to the language of the entire Act the Division, as here, can find no language in the express language of the entire Act which would suggest an interpretation of the words "in

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[10] *Dep't of Ecology v. Campbell & Gwinn, LLC*, 146 Wn.2d 1, 9, 43 P.3d 4 (2002).

[11] *Lake v. Woodcreek Homeowners Ass'n*, 169 Wn.2d 516, 526, 243 P.3d 1283 (2010).

[12] *Campbell & Gwinn, supra*, 146 Wn.2d at 9; *State ex rel. Citizens Against Tolls (CAT) v. Murphy*, 151 Wash.2d 226, 242, 88 P.3d 375 (2004).

[13] RCW 30A.04.030(2) declares: "The director shall have the power, and broad administrative discretion, to administer and interpret the provisions of [the Act] to facilitate the delivery of financial services to the citizens of the state of Washington by the banks, trust companies, and holding companies subject to [the Act]." Identical statutory authority contained in the Washington Consumer Loan Act ("WCLA"), at RCW 31.04.165(1), has been affirmed by the Washington Court of Appeals to confer upon the Department the "power to interpret" the WCLA. *Bell v. Muller*, 129 Wash.App. 177, 187, 118 P.3d 405, 410 (Div. 3 – 2005).

[14] See, for example, *Ass'n of Wash. Bus. V. Dep't of Revenue*, 155 Wash.2d 430, 439, 120 P.3d 46, 50 (*En Banc* 2005); see also *Rosemere Neighborhood Ass'n v. Clark County*, 170 Wash.App. 859, 873, 290 P.3d 142, 151 (Div. 2 – 2012).

[15] RCW 30A.04.400(1).

concert with" in the Act's Change of Control Provisions, then the Director may look first to the "plain meaning" of the words in question.[16]

The "Plain Meaning" Rule. The Department should "construe and apply words according to the meaning that they are ordinarily given, taking into account the statutory context, basic rules of grammar, and any special usages stated by the legislature on the face of the statute as part of the statute's context."[17] In this manner, the plain meaning is "derived from what the Legislature said in its enactments," but "discerned from all that the Legislature has said in the statute."[18] If after this inquiry, "the statute remains susceptible to more than one reasonable meaning, the statute is ambiguous and it is appropriate to resort to aids to construction, including legislative history."[19]

The "Ordinary Usage" Rule; "Dictionary Definition" Rule. It is also permissible, if necessary, for the Director to apply *extrinsic* source canons of statutory construction when interpreting a statute to be enforced by the Department. The Director may apply (as may the courts) the "ordinary usage" rule that indicates that "an undefined term should be given its plain and ordinary meaning unless a contrary legislative intent is indicated."[20] In addition, if necessary, the Director may apply (as may the courts) the "dictionary definition" rule, which says that a court should follow a recognized dictionary definition of a relevant term unless the Legislature has provided a specific definition.[21]

The "Agency Deference" Doctrine. It is a commonly held principle that a court shall (and the Director may) give deference to the Department's interpretation of a statute where the Department's expertise is clearly in play.[22] Indeed, courts will give considerable weight to an interpretation of the Act by the Department, which sponsored the legislation in the first place and is charged with the statute's enforcement.[23] The courts are required to uphold the Department's interpretation of the Act if such interpretation reflects a plausible construction of the statute's language, not contrary to legislative intent.[24]

The "Borrowed Statute" Rule and "In Pari Materia" Doctrine. Sometimes a statute may also be said to be "borrowed" from another, in which case one could look to the interpretations and case

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[16] *Washington State Republican Party v. Washington State Pub. Disclosure Comm'n*, 141 Wash. 2d 245, 280-281, 4 P. 3d 808, 827-828(2000); *Davis v. Dep't of Licensing*, 137 Wash.2d 957, 970-971, 977 P.2d 554, 559-560 (1999); *City of Seattle v. State*, 136 Wash.2d 693, 698, 965 P.2d 619, 621 (1998); *State v. Talley*, 122 Wash.2d 192 213, 858 P.2d 217, 228-229 (1993).

[17] *Campbell & Gwinn, supra*, 146 Wn.2d at 11.

[18] *Id.*

[19] *Id.* at 12.

[20] *Ravenscroft v. Washington Water Power Co.*, 136 Wash.2d 911, 920, 969 P.2d 75, 80 (1998); citing *Cowishe Canyon Conservancy v. Bosley*, 118 Wash.2d 801, 813, 828 P.2d 549, 556 (1992).

[21] *Western Telepage, Inc. v. City of Tacoma*, 140 Wash.2d 599, 609-610, 998 P.2d 884, 890 (2000); citing *C.J.C. v. Corp. of Catholic Bishops*, 138 Wash.2d 699, 709, 985 P.2d 262, 267 (1999).

[22] *See, e.g., Port of Seattle v. Pollution Control Hearings Bd.*, 151 Wn.2d 568, 587, 90 P.3d 659 (2004).

[23] *Blueshield v. State Office of Ins. Com'r*, 131 Wn. App. 639, 646, 128 P.3d 640, 644 (2006).

[24] *Nationscapital Mortg. Corp. v. State Dept. of Financial Institutions*, 133 Wash.App. 723, 737, 137 P.3d 78, 86 (2006); citing *Seatoma Convalescent Ctr. v. Dep't of Soc. & Health Servs.*, 82 Wash.App. 495, 518, 919 P.2d 602 (1996), *review denied*, 130 Wash.2d 1023, 930 P.2d 1230 (1997).

precedent given effect to the statute being "borrowed."[25] In addition, there is the "*in pari materia*" doctrine, which holds that similar statutes must be interpreted similarly.[26]

Analogous Federal and State Statutes. Finally, it is also permissible for the Division, applying the "*in pari materia*" doctrine on a cross-jurisdiction basis, to look to similar federal statutes and the legislation of other states, which were enacted for a similar regulatory purpose and are part of an overall statutory scheme within the nation dual-charter system, in order to fairly interpret the meaning of the Act's Change of Control Provisions.

Looking to the entire Act, the Division can find no other usage of the words "in concert with" that would aid in an interpretation of the Act's Change of Control Provisions.

Applying the "ordinary usage" and "dictionary definition" rules is of some help, though incomplete. According to *Merriam-Webster's Online Dictionary*, "concert" (a noun) means an "agreement in design or plan" or a "union formed by mutual communication of opinion and views."[27] In turn, the same dictionary defines "concerted" (an adjective) as "mutually contrived or agreed on."[28] *Black's Law Dictionary*[29] defines "concerted action" as "an action that has been planned, arranged, and agreed on by parties acting together to further some scheme or cause, so that all involved are liable for the actions of one another."

The Washington Supreme Court has never interpreted the Act's Change of Control Provisions,[30] but it has employed the words "in concert with" in various contexts, with reference to cases involving joint tortfeasors,[31] common law agency,[32] aiding and abetting,[33] and breach of duty,[34] none of which involved facts similar to the situation described in the Request for Interpretation. Indeed, only one case, which involved the interpretation of a director's and officer's liability insurance policy, used the words "in concert with," while concluding that for purposes of interpreting an insurance policy coverage exclusion clause, "ownership" and "control" did not mean the same thing.[35] So, we must look elsewhere to provide guidance as to the meaning of "in concert with" in the context of how it is employed in the Act's Change of Control Provisions.

While it is true that the Washington Business Corporation Act ("WBCA")[36] has a definition of "control" it is inapplicable in the context of this interpretation. A *bank* is a species of corporation

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[25] *Town of Republic v. Brown*, 97 Wash. 2d 915, 917-18, 652 P.2d 955, 957 (1982); *Jenkins v. Bellingham Mun. Court*, 95 Wash. 2d 574, 627 P.2d 1316 (1981); *Pac. First Fed. Sav. & Loan Ass'n v. Pierce County*, 27 Wash. 2d 347, 355, 178 P.2d 351, 355 (1967). Compare, however, *In re Taylor*, 105 Wash. 2d 67, 69-70, 711 P.2d 345, 347 (1985) ("Absent a clearer indication of legislative intent, we cannot accept petitioner's theory of incorporation.").

[26] *State v. Tili, 139 Wash. 2d 107, 985 P.2d 365 (1999).* See also *Enter. Leasing v. City of Tacoma, 139 Wash. 2d 546, 554-6, 988 P.2d 961, 966 (1999); Harmon v. DSHS, 134 Wash. 2d 523, 542, 951 P.2d 770, 779 (1998).*

[27] https://www.merriam-webster.com/dictionary/concert.

[28] https://www.merriam-webster.com/dictionary/concerted.

[29] 10th ed. 2014.

[30] Neither has the Washington Court of Appeals Divisions.

[31] *White Pass Co. v. St. John*, 71 Wash.2d 156, 158, 427 P.2d 398 (1967).

[32] *State v. Austin*, 65 Wash.2d 916, 922, 400 P.3d 603 (1965).

[33] *Lyle v. Haskins*, 24 Wash.2d 883, 904, 168 P.3d 797 (1946).

[34] *Bancroft v. Olympia Coal & Mining Co.*, 117 Wash. 211, 212, 200 P. 1081 (1921).

[35] *Lynott v. National Union Fire Insurance Co.*, 123 Wash.2d 678, 871 P.2d 146 (1994).

[36] Title 23B RCW.

distinct from a *general business corporation* under the WBCA. In the case of a Washington State-chartered commercial bank or savings bank, the certificate of authority of the bank or savings bank — i.e., its *charter* — is issued by the Department,[37] not the Secretary of State as in the case of a general business corporation.[38] Not only did the Washington Legislature contemplate that state banking laws would govern the affairs of distinct species of organizations known as "banking corporations," the Department also notes that the WBCA's definition of "control" specifically lacks the words "in concert with."[39]

Since a court would give *deference* to the agency's interpretation of the Act that it administers, the Division is of the view that it is a fair and most sound interpretation of "in concert with" to apply a *similar* federal statute and regulatory guidance of state banking regulators, which are the Department's regulatory counterparts. Such an application is consistent with general principles of statutory construction applied specifically in the banking regulatory context. Both the federal Change in Bank Control Act[40] and recent guidance issued by the New York Department of Financial Institutions ("NYDFS")[41] support the Division's summary interpretation above that "in concert with," in the context of the Act's Change of Control Provisions, means (1) knowingly participating in a joint activity or parallel action towards a common goal of acquiring control, whether *or not* pursuant to an express agreement, or (2) 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 otherwise.

3.2 Interpretation of "Proxy".

The same principles of statutory construction applicable in *Subsection 3.1* above apply equally in the context of interpreting whether the words "power to vote," as contained in the definition of "control" in the Act's Change of Control Provisions, should include a "proxy" or "proxies."

The key statutory phrase — "power to vote" — is the very essence of a "proxy." Upon receipt of the proxy, a person will then "control" and "hold" the "power to vote . . . the voting stock" of a company. A proxy is a contract by which a stockholder authorizes a designated person to vote his or her shares at the discretion of that person.[42] This interpretation is supported by guidance issued by the Department's counterparts, the banking authorities in New York and Pennsylvania. As noted in *Subsection 3.1* above, NYDFS recently issued an interpretation of New York's bank "change in control" statute. In addition to providing a definition of "acting in concert," the interpretation found that proxies to vote shares of a company constitute holding the "power to vote voting stock" and therefore required prior approval from the New York state banking

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[37] See RCW 30A.08.060; RCW 32.08.010 and .040. See also WBCA, at RCW 23B.01.204, which underscores the distinction between the charter by the Department under the Act versus the one conferred by the Secretary of State under the WBCA.

[38] RCW 23B.02.030.

[39] RCW 23B.19.020.

[40] See 12 U.S.C. § 1817(j)(1); 12 C.F.R. § 5.50(d)(2).

[41] New York Department of Financial Services, "Guidance on Acquisition of Control of Banking Institutions" (May 22, 2017) (the "NYDFS Guidance").

[42] Black's Law Dictionary 1346 (10th ed. 2014); see also Proxy Definition, Oxford University Press (Dec. 2016), http://www.oed.com/view/Entry/153573?rskey=ap4sbR&result=1&isAdvanced=false (last visited Feb. 22, 2017) (defining "proxy" as "[a] document authorizing a person to vote on behalf of another at an election, meeting of shareholders, etc. . . . (hence) a vote so cast").

regulator.[43] Likewise, in a 2007 interpretation, the Pennsylvania Department of Banking and Securities ("Pennsylvania DoB") determined that the acquisition of proxies for purposes of withholding votes at an election of directors constituted voting rights and therefore required prior regulatory approval.[44] As one factor, the Pennsylvania DoB noted that the "plain language of the revocable proxy form" demonstrated that the proxy would constitute voting rights.[45] The Pennsylvania DoB also noted that the Pennsylvania General Assembly (that state's legislature) intended to give banks "a greater level of protection from shareholder activity than [other] corporations . . . ."[46]

The Division, therefore, has determined that for purposes of the definition of "control" as contained in the Act's Change of Control Provisions, the words "power to vote" includes a "proxy" or "proxies" to vote "voting shares."

4.0 Conclusion

This interpretation of the Act's Change of Control Provisions conforms to the intended public policy of the Washington State Legislature. The importance the Washington State Legislature has given to the state-chartered banking industry and its impact on the public is clear from a complete reading of the Act's Change of Control Provisions. The Change of Control Provisions contain a special statutory scheme designed to assure that the Department has the opportunity to review and approve all situations in which a bank's purpose and risk profile could be altered if control of the bank were to change. As echoed in NYDFS Guidance, the interpretations we make here are designed to protect the banks that the Division supervises and the public that the Department as a whole is charged to protect.

This letter is limited to an interpretation of the Act's Change of Control Provisions only but is applicable to all entities regulated by the Department that are similarly situated. This interpretation may be later modified or withdrawn upon advance notice and in the event of a material change in circumstances, including an amendment or repeal of applicable statutes.

Yours very truly,

WASHINGTON DEPARTMENT OF
FINANCIAL INSTITUTIONS
DIVISION OF BANKS

By:

Joseph M. Vincent
Director of Regulatory & Legal Affairs

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[43] NYDFS Guidance (May 22, 2017), http://www.dfs.ny.gov/legal/industry/il170522.pdf.

[44] Pennsylvania DoB Interpretive Letter, Re: Applicability of Section 112 of the Banking Code of 1965 (2007), http://www.dobs.pa.gov/Documents/Interpretive%20Letters/Banking%20Code%20of%201965/030207Section%20112%20B%20Code%20of%201965.pdf.

[45] *Id*. at 3.

[46] *Id*. at 4.