Commonwealth of Massachusetts
STATE ETHICS COMMISSION
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David E. Sullivan
General Counsel
Executive Office for Administration and Finance
State House, Room 373
Boston, MA 02133

Dear David,

This is in response to your inquiry about how the conflict of interest law, G.L. c. 268A, applies to the acceptance by municipalities of Chapter 69 of the Acts of 2011. Chapter 69 allows municipalities and other political subdivisions of the Commonwealth to change the health insurance coverage that they offer to their subscribers if certain requirements are met. Cities must make such changes by majority vote of the city council and approval by the manager or mayor; towns must make such changes by vote of the board of selectman. You ask how this process should proceed if the city councilors or selectmen are eligible to receive health insurance from their municipalities, potentially giving them a financial interest in the matter; and you also ask whether the exemption in § 19(b)(3) of c. 268A, or alternatively the rule of necessity, would allow them to participate. Your Executive Office is charged with implementing parts of Chapter 69, so I view your request for advice as consistent with G.L. c. 268B § 3(g), authorizing us to give advisory opinions to persons subject to the conflict law.

Section 19 of c. 268A prohibits municipal employees, including city councilors and selectmen, from participating in particular matters in which they have a direct and immediate, or a reasonably foreseeable, financial interest. Chapter 69 gives municipalities the power to change their subscribers' health insurance benefits in ways that will affect, among other things, the amount of copayments, deductibles, and other cost-sharing plan elements. Clearly, any current subscriber of a municipal health insurance plan has a reasonably foreseeable financial interest in the acceptance or not of Chapter 69, and is therefore subject to the restrictions of Section 19.

Your August 29th email to me states that a town received an informal opinion from an attorney in this office that selectmen in towns that provide health insurance coverage to selectmen may not vote on the acceptance of Chapter 69, presumably on the ground that they have a reasonably foreseeable financial interest in the matter, and are therefore precluded from participating by Section 19. In my opinion, that statement is too

broad. A city councilor or selectman who has health insurance coverage from her city or town clearly has a foreseeable financial interest in the acceptance of Chapter 69, as does a councilor or selectman who intends to obtain such coverage. However, a city councilor or selectman who does not have municipal health insurance coverage and has no intention of obtaining it – for instance, because he or she is covered under a spouse's private health insurance coverage – would not have a foreseeable financial interest in the acceptance of Chapter 69, and would therefore be able to participate in deciding and voting on such acceptance.

Section 19 only presents a potential issue for cities and towns that lack a quorum of councilors or selectmen who may vote on acceptance of Chapter 69 because some councilors or selectmen cannot participate due to conflicts of interest. Any city or town that has a quorum of councilors or selectmen who do not have municipal health insurance coverage, and do not intend to obtain such coverage, has no issue under Section 19 with respect to acceptance of Chapter 69.

Turning to those cities and towns that lack a quorum to vote on acceptance because their councilors and selectmen have municipal health insurance coverage, you ask whether the general policy exception set forth in Section 19(b)(3) applies here. That exception allows municipal employees to participate in particular matters in which they have a financial interest "if the particular matter involves a determination of general policy and the interest of the municipal employee or members of his immediate family is shared with a substantial segment of the population of the municipality." The Commission interprets the phrase "substantial segment" to mean at least 10% of a town's population, *EC-COI-93-20 n. 8.* The 19(b)(3) exemption will therefore only be available in municipalities in which more than 10% of the population has municipal health insurance coverage.

In municipalities that lack a quorum of councilors or selectmen due to Section 19 conflicts, and which do not cover 10% of their population with municipal health insurance coverage, the rule of necessity gives a way to proceed. As explained in Commission Advisory 05-05, *The Rule of Necessity*, the rule of necessity may be used to allow public employees who would otherwise be disqualified by conflicts of interest to act when five requirements are met:

1. An elected board must be legally required to act on a matter, and lack a quorum solely due to members being disqualified by conflicts of interest.
2. Before invoking the rule of necessity, every effort must be made to find another board or legal authority with the power to act in place of the board that lacks a quorum.
3. The board must be legally required to act by a certain time, and be unable to do so because of the lack of a quorum.
4. The rule must be invoked by one or more of the disqualified board members, upon advice of town counsel or the Commission.

5. The minutes must reflect that the board lacks a quorum because of conflicts of interest of members and specifically state the facts that give rise to those conflicts, and that the rule of necessity is being used to allow the board to take a valid vote.

Here, Chapter 69 and its preamble establish that city councils and boards of selectmen are legally required to act to accept the law; specifically, Section 3 of Chapter 69 adopts new G.L. c. 32B, Section 21(a), providing that changes to health insurance benefits pursuant to Chapter 69 must be approved by majority vote of a city council or board of selectmen. The law does not give any other board or authority the legal authority to approve acceptance of Chapter 69. The preamble to Chapter 69 states that its purpose is "immediately to authorize" municipalities to implement health law changes. I interpret this as a requirement that city councils and boards of selectmen are required to act as soon as possible, satisfying the third requirement listed above for invoking the rule of necessity.

Accordingly, in municipalities which lack a quorum of councilors or selectmen to approve acceptance of Chapter 69 because of conflicts of interest, it is my opinion that the rule of necessity may be invoked by one or more of the disqualified members to allow them to participate in deciding whether to accept that Chapter. When this is done, the minutes must reflect that the board lacks a quorum because of conflicts of interest of members and specifically state the facts that give rise to those conflicts, and that the rule of necessity is being used to allow the board to take a valid vote.

I hope that this advice is helpful. You are free to disclose this letter to anyone you want. The Ethics Commission is required by law to keep your request and this letter confidential; under our regulations, the only circumstances in which we would not keep an advice letter confidential would be if a requestor materially misrepresents the contents of a letter, or if court orders us to produce it. Don't hesitate to contact me if you have further questions.

Very truly yours,

Deirdre Roney
General Counsel