

November 6, 2003

Dear _____ :

This letter responds to your cover letter to Chief Counsel Carl Anderson of the Pennsylvania Department of Banking (“Department”) with which you transmit for review a letter sent by your client, [redacted] (“Client”), to James Keiser of the Department’s Compliance Division.

Background

Your Client’s letter to Mr. Keiser explains that your Client seeks to sell its portfolio of first mortgage loans to an unlicensed entity and that, although it is licensed as a consumer discount company, the loans were made pursuant to the Mortgage Bankers and Brokers Act.¹ Your Client further explains that it believes that licensees under the Consumer Discount Company Act qualify for an exemption to the Mortgage Bankers and Brokers Act. Your Client argues that it qualifies for this exemption because its net worth exceeded \$250,000, its line of credit exceeded \$1,000,000 and it held over \$1,000,000 worth of first mortgage loans. Your Client also argues that it qualifies for a federal exemption to rates and/or fees charged on the aforementioned first mortgage loans.

Analysis

Licensees under the Consumer Discount Company Act, 7 P.S. § 6201 *et seq.* (“CDCA”), are authorized by the CDCA to make mortgage loans secured by a first lien on real property up to \$25,000. 7 P.S. § 6213.B. Loans made by CDCA licensees in excess of \$25,000 are governed by what is known informally as the “melded rate” found at 10 Pa. Code § 41.3(p). *See also Beneficial Consumer Discount Co. v. Whitesell*, 404 A.2d 794 (Pa. Cmwlth. Ct. 1979).

¹ The Department notes that it is unaware of the date any of the loans referenced in your Client’s letter were made. However, the Mortgage Bankers and Brokers Act was amended and re-named by Act Number 55 of 2001 as Chapter 3 of the Mortgage Bankers and Brokers and Consumer Equity Protection Act which is currently found at 63 P.S. § 456.301 *et seq.*

Notwithstanding the foregoing, CDCA licensees may elect, at their option, to use an exemption found in Chapter 3 of the Mortgage Bankers and Brokers and Consumer Equity Protection Act (“Chapter 3”), 63 P.S. § 456.301 *et seq.*, that authorizes CDCA licensees to make first mortgage loans pursuant to Chapter 3 without a license. The exemption states:

(b) Exceptions.--The following persons shall not be required to be licensed under this chapter in order to conduct the first mortgage loan business but shall be subject to those provisions of this chapter as specifically provided in this section:

* * * * *

(9) A licensee under the act of April 8, 1937 (P.L. 262, No. 66), known as the Consumer Discount Company Act, except that any such licensee who makes a mortgage loan other than under the provisions of that act shall be subject to the provisions of sections 304(b)(2) and (3), 308, 310 and 314(b), excluding section 308(a)(1).

63 P.S. § 456.303(b)(9). Thus, a CDCA licensee may use the foregoing exception to make first mortgage loans pursuant to Chapter 3 provided it complies with the particular sections of Chapter 3 listed in the exception. Section 304(b)(2) of Chapter 3 requires a line of credit or equivalent mortgage-funding capability of not less than \$1,000,000, section 304(b)(3) of Chapter 3 requires a tangible net worth of \$250,000, and sections 308, 310 and 314(b) all relate to certain examination requirements and enforcement issues.

In addition, the Department has long recognized that section 501 of the Depository Institutions Deregulation and Monetary Control Act of 1980 (“DIDMCA”), 12 U.S.C. § 1735f-7a, preempts Pennsylvania state usury limits. It is the Department’s understanding that Pennsylvania did not “opt out” of the preemption imposed by section 501 of DIDMCA as permitted by section 501(b) of DIDMCA, 12 U.S.C. § 1735f-7a(b). *See, e.g.*, 63 P.S. 456.308(a)(5).² As long as your Client met the requirements for invoking section 501 of DIDMCA at the time it made the loans in question, it would be authorized to preempt Pennsylvania state usury limits pursuant to section 501 of DIDMCA.

Your client has specifically asked the Department about its ability to sell first mortgage loans to an unlicensed entity. The Department is aware that your Client intends to sell first lien mortgage loans to an entity in Colorado that is neither licensed, nor exempt from licensing, under Chapter 3. Please be advised that the Department takes the position that Chapter 3 does not govern whether, and the extent to which, first mortgage loans subject

² Licensees must comply with Pennsylvania’s general usury statute, “provided, however, that this shall not be deemed an override of section 501 of the Depository Institutions Deregulation and Monetary Control Act of 1980 (94 State. 161, 12 U.S.C. § 1735f-7a).” 63 P.S. § 456.308(a)(5).

to Chapter 3 may be sold in the secondary market, although servicing first mortgage loans is limited by section 309(a)(4) and (5). For instance, the definitions of mortgage banker, mortgage broker, and limited mortgage broker all specifically limit their scope to activity in the “primary market.” *See* 63 P.S. § 456.302. Similarly, the definition of a “loan correspondent” is limited by its own terms to activity in the primary market since it refers only to originating and closing loans. *Id.*

In addition, the Department takes the position that Pennsylvania’s general usury statute, the Loan Interest and Protection Law (“LIPL”), 41 P.S. § 101 *et seq.*, would not apply to the unlicensed entity in Colorado to which your Client seeks to sell the first mortgage loans in question since the preemption imposed by section 501 of DIDMCA applies to, “any loan, mortgage, credit sale, or advance . . .” 12 U.S.C. § 1735f-7a. Thus, the preemption of state usury law attaches to the loan itself, rather than just to a particular lender. This is important because a consumer aggrieved by usury may collect damages from, “the person who has **collected** such excess interest or charges . . .,” 41 P.S. § 502 (emphasis added), provided that the LIPL would apply to such loans. *See* 41 P.S. §301(f) (exceptions to LIPL).

Conclusion

Given the foregoing, a CDCA licensee that makes first mortgage loans pursuant to section 303(b)(9) of Chapter 3 and the preemption of Pennsylvania usury law provided by Section 501 of DIDMCA may sell such loans to an unlicensed entity since Chapter 3 does not govern the sale of first mortgage loans into the secondary market.

Advisory

Pursuant to the Commonwealth Attorneys Act, 71 P.S. § 732-101 *et seq.*, the undersigned may only give legal advice to the Department and may not divulge that legal advice or other confidential matters, such as attorney-client communications, to anyone without permission from the Department. No such permission has been given in this case. Therefore, this letter represents the policy positions of the Department and is not intended to disclose privileged and confidential advice provided by the Office of Chief Counsel. Accordingly, this letter may not be relied upon or construed as constituting legal advice. This letter constitutes a duly authorized statement of the Department’s official position regarding the issues discussed herein and has been authorized by the appropriate Department personnel. The Department’s analysis is based upon the facts as stated in this letter. Any change in the facts could result in an amendment or reversal of the Department’s position.

Sincerely,

David H. Bleicken
Deputy Chief Counsel