

August 1, 2001

Re: Licensing Requirements for Independent Contractor Insurance Agents

Dear

This is in response to your letter to the Department of Banking (the "Department") in which you request a determination of whether independent contractor insurance agents (the "Insurance Agents") employed by [redacted] (the "Company") are required to be licensed pursuant to the Mortgage Bankers and Brokers Act ("MBBA"), 63 P.S. § 456.01 *et seq.*, and the Secondary Mortgage Loan Act ("SMLA"), 7 P.S. § 6601 *et seq.*, in order to originate and broker residential first and second mortgage loans in Pennsylvania on behalf of [redacted] (the "Bank"), a federally-chartered savings bank.

Factual Background

You have indicated the following factual scenario in your letter to the Department. The Company has approximately five hundred exclusive Insurance Agents licensed as insurance agents under Pennsylvania law working with Pennsylvania consumers. The Insurance Agents are not compensated as W-2 employees of the Company, but are compensated as 1099 independent contractors.

The Bank, which is an affiliate of the Company, has proposed an arrangement whereby the Insurance Agents would originate residential mortgage loans and perform mortgage brokerage services on behalf of the Bank. The proposed arrangement is unique among traditional mortgage origination arrangements with independent contractors in that the Bank would require each Insurance Agent to enter into a written agreement whereby, like a typical employee, 1) the Insurance Agent must broker mortgage loans exclusively for the Bank, 2) liability for the Insurance Agent actions related to originating mortgage loans would be assumed by the Bank, and 3) the Insurance Agent would not accept any fees for its services or those of any third party (e.g. appraiser) from a consumer but would be paid directly by the Bank. Any fees related to the origination or brokering of a mortgage loan would be paid directly to the Bank after the consumer is put in touch with a Bank employee sales consultant. Also, all mortgage loans would close in the Bank's name.

Legal Analysis

The MBBA governs the origination and brokering of first mortgage loans in Pennsylvania. Section 3(b)(1) of the MBBA provides that federally-chartered savings banks are not required to be licensed under the MBBA in order to originate or broker first mortgage loans in Pennsylvania. *See* 63 P.S. § 456.03(b)(1). Similarly, Section 3(b)(12) of the MBBA provides that insurance companies and their affiliates and subsidiaries authorized to transact business in Pennsylvania are not required to be licensed under the MBBA in order to

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originate or broker first mortgage loans in Pennsylvania. *See* 63 P.S. § 456.03(b)(12). The Department has consistently taken the position that only W-2 employees of excepted entities are exempt from licensure pursuant to Section 3(b)(11) of the MBBA, 63 P.S. § 456.03(b)(11). *See, e.g.*, Letter of Secretary of Banking Hargrove, 24 Pa. Bull. 3374 (July 9, 1994) (enclosed). Based upon the foregoing, the Insurance Agents, as 1099 independent contractors, will each be required to obtain a license pursuant to the MBBA in order to broker or originate more than two mortgage loans in a calendar year secured by residential real property in Pennsylvania. *See* 63 P.S. § 456.03(b)(5).

The SMLA governs the origination and brokering of secondary mortgage loans in Pennsylvania. Section 3(a)(3) of the SMLA provides an exception from licensure for federally-chartered savings banks. *See* 7 P.S. § 6603(a)(3). The SMLA does not provide an exception from licensure for insurance companies or their affiliates and subsidiaries. The Department has consistently taken the position that only W-2 employees of excepted entities are exempt from licensure pursuant to the SMLA. Based upon the foregoing, the Insurance Agents, as 1099 independent contractors, will each be required to obtain a license pursuant to the SMLA in order to broker or originate more than two secondary mortgage loans in a calendar year in Pennsylvania. *See* 7 P.S. § 6603(a)(5)(i).

This letter does not address whether the Insurance Agents may accept mortgage broker fees directly and/or as referral fees from the Bank under federal law, including the Real Estate Settlement Procedures Act ("RESPA"), 12 U.S.C. § 2601 *et seq.*

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. This letter has been authorized by the appropriate Department personnel and constitutes a duly authorized statement of the Department's position regarding the issues discussed herein. This letter may not be relied upon or construed as constituting legal advice.

Please do not hesitate to contact me if you have any further questions regarding this matter.

Sincerely,

Carter D. Frantz
Staff Counsel