

November 5, 2002

[redacted]

Re: Internet Service Provider- "Private Label" Service

Dear [redacted]

This is in response to your letters to the Pennsylvania Department of Banking (the "Department") in which you request that the Department indicate its position regarding whether the proposed "private label" service activities of your client, an internet service provider (the "Company"), would require licensure under the Mortgage Bankers and Brokers and Consumer Equity Protection Act ("MBBCEPA"), 63 P.S. § 456.101 *et seq.*, and/or the Secondary Mortgage Loan Act ("SMLA"), 7 P.S. § 6601 *et seq.*

You have submitted two letters, dated June 18, 2002, and October 14, 2002, respectively, describing the activities of the Company. In addition, on September 19, 2002, you submitted a draft service provider agreement (the "Agreement") that the Company is using in other states, which agreement would generally conform to the specific agreement used for the Company's business in Pennsylvania.

#### Factual Background

You have indicated the following factual scenario, which is essentially quoted directly from your June 18, 2002, letter.

A depository or non-depository lender (the "Lender") that seeks to offer mortgage services to the public via the internet will contract with the Company. It is the Department's understanding that the Company is not a depository institution. The Company will either establish a new internet website for the Lender in the Lender's own name, or utilize an existing website that the Lender may have had in place previously. In either case, a prospective consumer will click onto an internet link on the Lender's website which will transport the consumer to a second website, administered in the Lender's name by the Company, at which the consumer may apply online for a mortgage loan.

The Company will then use the information provided by the consumer directly to the Company through the Lender's website in order to perform loan application processing functions and apply the Lender's established underwriting criteria. In the event that the consumer needs to be contacted by the Company, that contact will be in the name of the Lender, not the Company, even though Company personnel will be the ones who contact the consumer.

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After closing, depending upon the particular Lender's preference, the loan will either be held in the Lender's portfolio or sold directly from the Lender to a third-party wholesale Lender or investor in the secondary market. The Company also wishes to offer smaller Lenders, who do not have direct access to the secondary market, the option of selling the resulting loans to the Company, who then will have the capability to immediately resell to third-party investors in the secondary market.

You further indicate that no loan will be closed in the name of the Company, or funded with the Company's funds. All loans will be closed in the name of the Lender, and with funding from the Lender who is the Company's customer. The Company will not engage in any servicing activities. While the Company may become the holder of some loans which are purchased by the Company for resale from smaller Lenders, those loans will be immediately transferred to licensed entities or entities who are exempt from licensure under the MBBCEPA and /or the SMLA. The Company under its normal course of business will, at the time it initially acquires those loans from the originating Lender, have in place commitments from the subsequent purchasers, allowing for immediate transfer to the ultimate investor/holder.

You assert that all activities which the Company undertakes in connection with the consumer are done on behalf of and in the name of the Lender that is the Company's direct customer. This is what is known in the mortgage industry as a "private label" service. Accordingly, a consumer will be dealing with the Company as an authorized agent of the Lender, and will not be made aware that the Company is a separate entity. A Lender who utilizes the services of the Company will be directly responsible to the consumer for all of the activities which it authorizes the Company to undertake.

You finally state that all of the Company's compensation will be derived from payments by the Lender who is the Company's direct customer; and, in the event that the Company purchases a loan for resale, profit on that resale of the loan to a third-party investor. The Company will not charge consumers any fees whatsoever payable to the Company in connection with the entire loan application and closing process.

The Agreement provides that the Company will be compensated with a flat "maintenance fee" in addition to a fee for each loan that is closed. *See* Agreement at "Service Acceptance Form." This fee structure is confirmed in your October 14, 2002, letter. The Agreement also indicates that the Company is an independent contractor of the Lender and that there is not an agency relationship between the Company and the Lender. *See* Agreement at ¶ 9.2. The Agreement further indicates that the Company will perform various "loan fulfillment" functions on behalf of the Lender, including, but not limited to, engaging in "telephone, e-mail and on-line chat consultation with all prospects and applicants;" "regularly scheduled follow-up contacts with prospects to help insure that [Lender] originates as many applications as possible;" "preparing closing documents;" "[closing] all Mortgage Loans in the name of [Lender] which loans will be funded by [Lender];" and "[supervising] third party agents used in connection with the closing of loans." *See* Agreement at Appendix A, ¶ 6. Finally, the Agreement states that the Lender "will

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sell, transfer and assign to [the Company] all of [the Lender's] ownership right, title, and interest of any type or kind in each Mortgage Loan that [the Lender] elects to sell [to the Company] . . . ." See Agreement at Appendix B, ¶ 2.1. It is specifically contemplated that the Lender will sell loans and the corresponding servicing rights to the Company. See Agreement at Appendix A, ¶ 7.a.

### Legal Analysis

The MBBCEPA provides that a person is deemed to be engaged in the "first mortgage loan business" in Pennsylvania if:

. . . that person advertises, causes to be advertised, solicits, negotiates or arranges in the ordinary course of business, offers to make or makes more than two first mortgage loans in a calendar year in this Commonwealth, whether directly or by any person acting for his benefit.

63 P.S. § 456.302. A "mortgage broker" is defined in the MBBCEPA as "[a] person who directly or indirectly negotiates or places mortgage loans for others in the primary market for consideration." 63 P.S. § 456.302.

The SMLA provides that a person is deemed to be engaged in the "secondary mortgage loan business" in Pennsylvania if:

(i) such person advertises, causes to be advertised, solicits, negotiates or arranges in the ordinary course of business, offers to make or makes more than two secondary mortgage loans in a calendar year in this Commonwealth, whether directly or by any person acting for his benefit, but this provision shall not prohibit advertising or solicitation by a licensee under a general corporate name, logo or trade mark; or

(ii) such person in the ordinary course of business becomes the subsequent holder of more than two promissory notes or mortgages, indentures or any other similar instruments or documents received in a calendar year in connection with a secondary mortgage loan; provided, however, that a person will not be deemed to be engaged in the secondary mortgage loan business if such person becomes the subsequent holder of two or more promissory notes or mortgages, indentures or any other similar instruments or documents received in a calendar year in connection with a secondary mortgage loan solely as an investment and such person is not otherwise in the business of making or servicing such loans.

7 P.S. § 6603(a)(5). In addition the SMLA provides that:

[a] secondary mortgage loan licensee and a secondary mortgage loan broker licensee shall not:

\* \* \*

[u]nless the licensee shall retain responsibility for servicing the loan assign, sell or transfer a secondary mortgage loan to any person except a licensee or a person excepted from the licensing provisions of this act in accordance with section 3 hereof without written permission of the secretary.

7 P.S. § 6611(3). A “secondary mortgage loan broker” is defined in the SMLA as “[a] person who in the ordinary course of business, for a fee, directly or indirectly negotiates or arranges for others a secondary mortgage loan.” 7 P.S. § 6602.

#### *Brokering of Loans*

It is the position of the Department that the Company is engaged in the first mortgage loan business based upon the activities that the Company will be conducting on behalf of the Lender, as described above. Specifically, the Company is advertising, soliciting, negotiating, and arranging mortgage loans for consideration on behalf of the Lender via a website established and operated by the Company. The “consideration” that the Company will receive for such services is based significantly upon the number of loans that are closed through the website which is operated by the Company on behalf of the Lender. Based upon the foregoing, the Company is required to obtain a license as a mortgage broker pursuant to the MBBCEPA in order to engage in this aspect of the Company’s business. The MBBCEPA does not restrict its applicability based on whether the consumer (first mortgage loan applicant) or some other individual or entity paid “consideration” to a mortgage broker in exchange for the brokering of a first mortgage loan.

Similarly, it is the position of the Department that the Company is engaged in the secondary mortgage loan business based upon the activities that the Company will be conducting on behalf of the Lender, as described above. Specifically, the Company will be advertising, soliciting, negotiating, and arranging secondary mortgage loans for a fee on behalf of the Lender via a website established and operated by the Company. The “fees” that the Company will receive for such services are based significantly upon the number of loans that are closed through the website which is operated by the Company on behalf of the Lender. Based upon the foregoing, the Company is required to obtain a license as a secondary mortgage loan broker pursuant to the SMLA in order to engage in this aspect of the Company’s business. The SMLA does not restrict its applicability based on whether the consumer (secondary mortgage loan applicant) or some other individual or entity paid “fees” to a secondary mortgage loan broker in exchange for the brokering of a secondary mortgage loan.

#### *Purchase and Resale of Loans*

Based upon the factual scenario described above, it is the position of the Department that the Company is not required to obtain a license under the MBBCEPA in order to purchase and then re-sell first mortgage loans originated by the Lender, because the Company would not be

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engaged in the "first mortgage loan business" regarding the secondary market purchase of first mortgage loans as that term is defined in Section 302 of the MBBCEPA, 63 P.S. § 456.302.

However, based upon the factual scenario described above, it is the position of the Department that the Company is required to obtain a license under the SMLA in order to purchase and then re-sell secondary mortgage loans originated by the Lender. Specifically, since the Lender will not be responsible for servicing the secondary mortgage loans sold to the Company, the Company will be required to become licensed as a secondary mortgage lender pursuant to Sections 3(a)(5) and 11(3) of the SMLA, 7 P.S. §§ 6603(a)(5), 6611(3), in order to purchase and then re-sell secondary mortgage loans originated by the Lender.

### Conclusion

It is the position of the Department that the Company is required to obtain a license as a mortgage broker under the MBBCEPA, and a secondary mortgage lender under the SMLA, if the Company wishes to conduct the activities described in this letter in Pennsylvania. As a matter of clarification, it is the Department's position that the MBBCEPA does not require the Company to obtain a lender license in order to purchase first mortgage loans on the secondary market. However, the Company is required to obtain a secondary mortgage lender license in order to purchase secondary mortgage loans on the secondary market, pursuant to Section 11(3) of the SMLA, 7 P.S. § 6611(3).

In addition, if the Company becomes licensed in order to engage in the activities described in this letter in Pennsylvania, the Company will be required to establish a full-time office in Pennsylvania, in accordance with, but not limited to, Sections 304(d), 306(c)(1), 308(a)(2), and 308(a)(4) of the MBBCEPA, 63 P.S. §§ 456.304(d), 456.306(c)(1), 456.308(a)(2), 456.308(a)(4); and Sections 4(c), 10(a)(2), 10(a)(4), and 20(b) of the SMLA, 7 P.S. §§ 6604(c), 6610(a)(2), 6610(a)(4), 6620(b).

It is noted that this letter does not authorize Lenders, such as Pennsylvania state-chartered depository institutions or federally-chartered depository institutions, to originate loans in this manner. It is further noted that federal and state banking regulators may have safety and soundness concerns regarding the activities described in this letter. Accordingly, the Department reserves the right to determine whether to object or prohibit a Lender from engaging in the mortgage lending procedures and activities as described in this letter.

The Department reserves the right to approve or deny any license application that may be filed by the Company under the MBBCEPA or SMLA.

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.

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

Sincerely,

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Deputy Secretary of Banking

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