

October 20, 1999

Re: **Refusing to Fund Closed Mortgage Loans After Loan Documents Have Been Signed by Loan Customer Is Not Permissible Under the Mortgage Bankers and Brokers Act and Secondary Mortgage Loan Act**

Dear Licensee:

The Department of Banking (“Department”) has received consumer complaints alleging that some first and secondary mortgage lenders licensed under the Mortgage Bankers and Brokers Act (“MBBA”) and the Secondary Mortgage Loan Act (“SMLA”) are refusing to fund closed mortgage loans. More specifically, the consumer complaints indicate that after the consumer signs a promissory note and mortgage to receive (i) nonpurchase money residential first mortgage loans and/or (ii) secondary mortgage loans, some lenders have refused to fund the closed loans. **While only a few lenders have been reported as refusing to fund closed mortgage loans, this letter is intended to clearly set forth the Department’s position on this issue.**

The refusal of a licensed lender to fund a closed mortgage loan, other than when the borrower legally rescinds the loan (“borrower rescission”) in accordance with the Federal Truth in Lending Act’s Regulation Z (together, this activity is described herein as “nonfunding”), is viewed by the Department as unfair, unethical, and not a reasonable incident to or aspect of the first or secondary mortgage lender business. Therefore, “nonfunding” is not legally authorized under the MBBA or the SMLA.

When the closing has occurred in which the loan customer signs the promissory note and mortgage presented directly or indirectly by the lender to the loan customer, then it is not appropriate or legally permissible under the MBBA or SMLA for the lender to refuse to fund such mortgage loan except in cases of borrower rescission under Regulation Z. Consistent with the MBBA and SMLA, a licensee should not agree to schedule and hold a loan closing until all underwriting has been completed and final approval has been granted by the lender.

Nonfunding of closed mortgage loans under the MBBA and SMLA is not authorized for the reasons stated below.

The Department views nonfunding as unduly burdensome on a loan customer because of the monetary detriment to the loan customer who has substantial reason to rely on the lender to disburse money for a closed loan. In addition, the Department views contract provisions that would allow nonfunding as not legally authorized by the MBBA or SMLA because such contract provisions would be unfair, unethical, not a reasonable incident to or aspect of the first or second mortgage lender business, and as such illegal under the MBBA and SMLA respectively.

Consistent with the MBBA and SMLA respectively, it is not the ordinary course of business and is not fair, ethical, legitimate or legal for nonfunding to become or to be viewed as part of (i) the “first mortgage loan business” as that latter term is defined in section 2 of the MBBA or (ii) the “business of making secondary mortgage loans” as that term is stated in section 3(a)(1) of the SMLA. It follows that the Department’s issuance of a first mortgage lender license under sections 3, 4, and 6 of the MBBA or a secondary mortgage lender license under sections 3, 4, and 6 of the SMLA does not authorize the recipient of a license under either of those statutes to engage in unfair or unethical activities such as nonfunding that clearly is neither expressly nor impliedly authorized by the MBBA or SMLA.

It is the Department’s understanding that only the prospective borrower has a right to rescind a mortgage loan within the three day rescission period pursuant to Regulation Z, and that Regulation Z does not contain a right for the lender to engage in the nonfunding of a closed mortgage loan except when the borrower rescinds. The Department is not aware of any other law that may permit MBBA or SMLA lender licensees to engage in nonfunding. In fact, nonfunding may violate Regulation Z for failure of the lender to fully disclose the terms of the legal obligation between the parties.

Thus, for reasons including but not necessarily limited to those stated above, the Department’s position is that “nonfunding” as described in this letter is not legally authorized and therefore is impermissible under both the MBBA and SMLA. Accordingly, lenders licensed under the MBBA and SMLA should cease any nonfunding of closed mortgage loans immediately.

To the extent that the Department may do so under the MBBA and SMLA respectively, the Department reserves the right to suspend, revoke, refuse to renew, or otherwise not issue licenses to lenders that engage in nonfunding. In addition, the Department reserves the right to assess fines, issue orders, and take any other enforcement action against licensed lenders that engage in nonfunding.

If you have any questions regarding this matter, please contact Victor Seesholtz, Manager, Compliance Division, at (717) 772-3889, or Reginald Evans, Chief Counsel, at (717) 787-1471.

Sincerely,

A handwritten signature in black ink that reads "Kathleen A. Wolfe". The signature is written in a cursive, flowing style.

Kathleen A. Wolfe
Deputy Secretary of Banking