



COMMONWEALTH OF MASSACHUSETTS

DIVISION OF BANKS

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July 20, 2023

John Kromer, Esq.
Orrick, Herrington & Sutcliffe LLP
2001 M Street, N.W.
Suite 500
Washington, DC 20036

Dear Mr. Kromer:

This letter is in response to your April 7, 2023 correspondence to the Division of Banks (Division) on behalf of Lendizen Mortgage LLC (Lendizen) seeking a legal opinion as to whether an individual who holds an ownership interest in a mortgage broker may also hold an ownership interest in a real estate brokerage, under the facts and circumstances described in your letter.¹

Lendizen is a Massachusetts limited liability company in which one individual (Individual A) holds an 80% ownership interest. Lendizen has applied for a mortgage broker license with the Division. Individual A is not licensed as a mortgage loan originator in Massachusetts and will not conduct any business as a mortgage loan originator for Lendizen.

Individual A also holds a 100% ownership interest in a real estate brokerage company (Real Estate Brokerage) licensed with the Commonwealth of Massachusetts. Individual A is a licensed real estate broker and is the broker of record for the Real Estate Brokerage. While your correspondence states that Individual A does not act as a listing or selling agent directly in connection with any real estate transactions in Massachusetts, it also states that Individual A reserves the right to do so in the future.

Your request contemplates that there may be transactions where a borrower, through a referral by one of the entities to the other, would be utilizing both the mortgage broker services of Lendizen and the realtor services of the Real Estate Brokerage. Your request confirms that no compensation or gain will be received by Lendizen or the Real Estate Brokerage from the other entity save for the return on the ownership interest held by Individual A in both entities, and your request seeks the Division's opinion regarding the permissibility of the described ownership structure of Lendizen involving Individual A.

The Division has reviewed the pertinent statute and regulation governing mortgage lenders and brokers. Neither the pertinent statute, M.G.L. c. 255E, nor the Division's regulation, 209 CMR 42.00 *et seq.*, includes any provision addressing the specific question posed by Lendizen regarding the permissibility of

¹ Your April 7, 2023 opinion request indicates it is on behalf of "IntroLend LLC, Evolution." As confirmed in correspondence dated May 16, 2023 to the Division, your client recently changed its name from "IntroLend LLC, Evolution" to "Lendizen Mortgage LLC." You provided supplemental correspondence confirming the facts and changes set forth in the May 16, 2023 correspondence. Accordingly, the Division will refer to your client as "Lendizen" in this opinion.

one individual holding an ownership interest in both a licensed mortgage broker and a real estate broker.² In analyzing the permissibility of Lendizen's ownership structure, the Division also reviewed pertinent prior legal opinions, as well as guidance and information from other sources addressing this topic.³ In reviewing the question presented, it appears that the Division has not had occasion to opine on the permissibility of the ownership structure proposed by Lendizen.

Nevertheless, prior opinions of the Division have addressed business arrangements where one individual had multiple direct or indirect interests in a mortgage loan transaction. In Opinion 99-046, which addressed a separate fact pattern, the Division noted that it would "likely" issue a negative decision for an arrangement where a real estate broker business "shared in any compensation or gain from the mortgage broker business" with respect to the same transaction. In Opinion 01-163, the Division opined on the applicable disclosure requirements, if any, for a business arrangement where an individual was a part owner of a title insurance company and also acted as a mortgage broker and would refer clients to the title insurance abstract company in connection with the same transaction for which the consumer was utilizing the individual's mortgage broker services. In issuing its opinion, the Division noted that the owners of the title insurance company – including the individual at issue – received compensation only in the form of profits based upon their respective ownership interest in the title insurance company and not based upon referrals made to the title insurance company; the Division did not provide any further comment on the proposed business relationship or indicate that it would be prohibited under Massachusetts law.

In Opinion 05-043, the Division also considered an inquiry involving a licensed real estate broker who sought to be compensated for work as a real estate broker and a licensed mortgage broker by the same consumer in the same transaction. The arrangement described in Opinion 05-043 involved an individual acting as a mortgage broker and real estate broker for the same client on the same transaction with compensation to be paid based upon the individual's work in each capacity. In that opinion, the Division recognized both the inherent conflict of interest, as well as the absence of any express statutory prohibition on this type of dual representation, and concluded that it would not endorse such a business arrangement. The arrangement described in Opinion 05-043, where an individual would receive commissions for the individual's work on the same transaction in two different capacities is fundamentally different from the arrangement described in your request where the compensation earned in the second capacity derives solely from the individual's ownership interest in the business.

Based upon a consideration of the available authorities, including the pertinent statutes, regulations, Division opinions, and other related guidance, the Division concludes that the ownership structure proposed by Lendizen does not violate M.G.L. c. 255E and would not prohibit its licensure as a mortgage broker.

Your correspondence also provides a detailed discussion of the requirements of section 8 of the Real Estate Settlement Procedures Act, 12 U.S.C. § 2601 *et seq.* ("RESPA"). As part of that analysis and discussion, your correspondence concludes that the ownership structure of Lendizen and the Real Estate Brokerage, as described, constitute a permissible affiliated business arrangement under RESPA. Your letter confirms several material facts with respect to the ownership structure and affiliated business arrangement between Lendizen and the Real Estate Brokerage, including that the following criteria will be met: (1) the relationship between the entities is disclosed to the consumer, (2) the consumer is not required to use any

² While 209 CMR 42.12A(14) prohibits a mortgage broker or lender from requiring that a consumer use the real estate brokerages services of a particular entity, agent, or broker, Lendizen has confirmed that, consistent with the Real Estate Settlement Procedures Act's affiliated business arrangement exemption, consumers will not be required to use any particular settlement services provider.

³ Among other resources, the Division reviewed prior Opinions 99-046, 01-163, and 05-043, as well as HUD Mortgagee Letter 2022-22, and guidance from other states addressing this topic.

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particular provider of settlement services, and (3) the only thing of value that is received from the arrangement, other than payments that are otherwise permitted under RESPA, is a return on the ownership interest. *See* 12 USC 2607(c)(4). As you are aware, the Division is unable to offer legal interpretations of federal laws and regulations. However, in Opinion 01-163 the Division confirmed that while there is no separate disclosure requirement under Massachusetts law that would be applicable to the proposed arrangement, a mortgage broker licensed with the Division would be examined for compliance with RESPA during its compliance examination. The Division would expect, therefore, that any mortgage broker licensed by the Division would comply with all applicable laws and regulations regarding their business arrangements, including the relevant disclosure requirements under RESPA.

The conclusions reached in this letter are based solely on the facts presented. Fact patterns which vary from those stated above may result in a different position statement by the Division. Likewise, the Division's review and opinion is limited solely to the question presented and is not an evaluation of any other licensing, registration, or permissibility questions under Massachusetts or federal law. In addition to ensuring ongoing compliance with RESPA, your client should also review and ensure compliance with the Attorney General's regulation, 940 CMR 8.00 *et seq*, regarding mortgage brokers and mortgage lenders, as well as any applicable requirements of the Massachusetts Board of Registration of Real Estate Brokers and Salespersons.

Sincerely,

Barbara Keefe
Deputy Commissioner of Banks
and General Counsel

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