



The Commonwealth of Massachusetts

Office of the Commissioner of Banks

One South Station

Boston, Massachusetts 02110

JANE SWIFT
GOVERNOR

THOMAS J. CURRY
COMMISSIONER

July 9, 2001

Margaret B. Crockett, Esq.
Goodwin, Procter & Hoar
Exchange Place
Boston, Massachusetts 02109

Dear Ms. Crockett:

This letter is in response to your letter of June 13, 2001 to the Division of Banks (the "Division") relative to whether a Small Loan Company license is required in order for your client First Marblehead Education Resources, Inc. ("FMER") to perform certain lending related activities. FMER recently filed an application for a Small Loan Company license from the Division.

According to your correspondence, FMER, a Delaware Corporation, is a subsidiary of FMC, also a Delaware Corporation, headquartered in Marblehead, Massachusetts. FMC designs education loan programs which are funded by lenders and arranges periodic securitization transactions to provide capital markets funding for education financing. FMC does not finance, hold, broker or sell loans. The Education Resources Institute, Inc. ("TERI") is a Massachusetts not-for-profit corporation headquartered in Boston, Massachusetts. TERI is a licensed Small Loan Company. TERI provides a number of services to institutions that make student loans and also provides services to students and their families located throughout the United States including Massachusetts. In connection with these programs, TERI provides these lenders with loan application processing, loan origination and loan underwriting services. While TERI provides these services, TERI does not lend money.

As stated in your correspondence, TERI plans to outsource to FMER all of TERI's loan application processing, loan origination and loan underwriting functions. FMER will hire the TERI employees who currently provide these services and TERI will subcontract these services to FMER. Specifically, TERI will reimburse FMER for its out-of-pocket expenses and overhead, such as employee expenses associated with providing the services. TERI will not otherwise compensate FMER for such services relative to these employees. Your letter indicates that these employees will no longer be employed by TERI when the subcontract begins.



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Relative to the subcontract with FMER, TERI will handle all solicitation and advertising of education loans. FMER will not close, finance, buy, hold, broker or sell small loans. FMER will not send out loan applications nor solicit nor advertise loans. FMER will not engage in telemarketing relative to loan products. FMER will provide telephone assistance to borrowers calling TERI for loan information and will take telephone applications on behalf of the lenders as a subservicer for TERI. FMER's processing center locations generally will not be accessible to the public. Furthermore, your letter states that FMER does not intend to create the impression that loans are being made or solicited from the processing center locations. All correspondence with borrowers will reference TERI or the respective lender but not FMER. TERI will continue to maintain its Small Loan Company license. You further state that these services to be "outsourced" to FMER will be services provided to "lenders that will be making small loans." Your letter concludes that FMER will not have any contact with loan applicants or borrowers unless and until the Division determines that FMER does not need a Small Loan Company license or the Division approves its Small Loan Company license application.

The question you raise in your correspondence is whether FMER would be required to obtain a Small Loan Company license from the Division. Your letter cited the Division's Opinion 97-247 in support of your position that FMER would not require a Small Loan Company license.

Massachusetts General Laws Chapter 140, sections 96 to 114A inclusive (the "Small Loan Act") requires any person that is engaged in the business of making small loans to obtain a Small Loan Company license. Under this statute, the business of making small loans includes the making of loans of \$6,000 or less with interest rates and expenses in excess of 12% per annum. This same statute also states that the business of making small loans includes the activity of "... directly or indirectly engaging, for a fee, commission, bonus or other consideration, in the business of negotiating, arranging, aiding or assisting the borrower or lender in procuring or making" such loans of that amount and at that rate.

Prior opinions of the Division interpretive of the above statutory language relative to brokering small loans and similar language in Massachusetts General Laws chapter 255E, section 2 relative to mortgage brokers have focused on, among other factors, an entity's or individual's activities and involvement with the consumer/borrower. See for example, Opinions O99067 and O00146.

Based on your letter, FMER will not close, finance, buy, hold, broker or sell small loans. You state that FMER will not solicit or advertise loans or initiate telephone marketing relative to such loans. FMER's processing centers generally will not be open to the public. FMER does not intend to create the impression that it makes or solicits loans. No correspondence with borrowers will refer to FMER.

It is the position of the Division that FMER, performing the functions as described in your letter, would not be engaged in the business of making small loans under the Small Loan Act. Therefore, FMER is not required to have a Small Loan Act license.

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Accordingly, if FMER will only engage in the activities in the manner provided in your letter, then FMER should contact Dennis C. Otis at (617) 956-1500, extension 548 relative to seeking to withdraw its application for a small loan company license.

The conclusions reached in this letter are based solely on the facts presented. Fact patterns which vary from that presented may result in a different position statement by the Division.

Sincerely,

A handwritten signature in cursive script, reading "Joseph A. Leonard, Jr.", written in dark ink.

Joseph A. Leonard, Jr.
Deputy Commissioner of Banks
and General Counsel

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