



THE COMMONWEALTH OF MASSACHUSETTS
DIVISION OF BANKS

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DAVID J. COTNEY
COMMISSIONER OF BANKS

September 30, 2014

Benjamin Giumarra, Esq.
Regulatory & Compliance Consultant
Spillane Consulting Associates, Inc.
501 John Maher Highway, Suite 101
Braintree, MA 02184

Dear Mr. Giumarra:

This letter is in response to your correspondence dated February 7, 2014 to the Division of Banks (Division) in which you request an opinion relative to whether a licensed mortgage broker in the Commonwealth may issue mortgage financing eligibility letters, so-called, to potential mortgage borrowers based on the facts presented in your letter.

In your letter you state that your firm has a client which is a licensed mortgage company in Massachusetts. As a licensed mortgage company, the client may act as either a mortgage lender or a mortgage broker in a mortgage loan transaction, but it is prohibited from serving in both capacities in the same transaction. The issue raised in your letter is based on the client acting in a mortgage broker capacity in a particular transaction.

As a mortgage broker, your client would like to issue a "mortgage financing eligibility" letter (Eligibility Letter) to a borrower under the following circumstances: (1) there is no subject property; (2) a credit report is obtained and the prospective borrower's loan application, or information collected through a borrower interview, is entered into an automated underwriting system for an approval recommendation prior to issuing the Eligibility Letter; and (3) no other verifying information is required of the borrower before issuing the Eligibility Letter although the company is often voluntarily provided much of the verification documentation by the borrower. You indicated that the client had traditionally offered pre-approvals, but had developed the Eligibility Letter to replace the pre-approval.

Through a previous Opinion letter, O98-258, the Division stated that a licensed mortgage broker was prohibited from issuing a commitment letter, a conditional approval letter, or any similar letter relative to a mortgage loan. Providing such a letter was deemed to be beyond the authority of a mortgage broker and likely to confuse the applicant about the role of the mortgage broker in the transaction. You described in your letter, however, that providing a "pre-qualification" letter to a prospective borrower has been viewed as a permissible activity for a licensed mortgage broker in Massachusetts. You therefore request clarification whether the Eligibility Letter is analogous to a pre-qualification letter and therefore permitted to be provided by the mortgage broker or whether the Eligibility Letter is the equivalent of a pre-approval letter and its issuance by the mortgage broker therefore likewise prohibited.

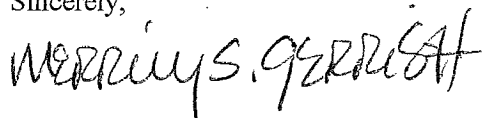
The position presented in Opinion letter O98-258 was based upon the definition of a mortgage lender as a person or entity engaged in the business of making mortgage loans or issuing commitments for mortgage loans. Neither "pre-qualification" nor "pre-approval" is a defined term under the residential mortgage lending laws of the Commonwealth. However, the regulations of both the Office of the Attorney General and the Division articulate prohibited activities relating to representations made by a mortgage broker in a residential loan transaction. As referenced in your letter, pursuant to the Attorney General's regulation, 940 CMR 8.04(3), "It is an unfair or deceptive act or practice for a mortgage broker to represent in any advertisement that the mortgage broker will fund a mortgage loan." Similarly, the Division's regulation 209 CMR 42.12A(4) states, in part, that "No advertisement by a mortgage broker in any media shall contain language which indicates or suggests that the mortgage broker will fund or approve a mortgage loan or guarantee any rate."

In order to determine whether an Eligibility Letter should be considered the equivalent of a pre-qualification letter or more closely analogized to a pre-approval letter, the Division reviewed the information considered by the mortgage broker in issuing the Eligibility Letter. As described above, the mortgage broker is obtaining sufficient information from the prospective borrower to allow the mortgage broker to perform an automated underwriting evaluation of the borrower as well as ordering a credit report on the borrower. Based upon the approval recommendation generated from the automated underwriting system, the mortgage broker is issuing the Eligibility Letter to the borrower and proceeding with the mortgage transaction. Although not reduced to definition or a universal standard, the combination of a credit report review, subjecting the mortgage application to automated underwriting, and thereafter issuing a "certificate of financing eligibility" shares characteristics typically associated with the pre-approval process.

However, rather than defining the procedure undertaken by the mortgage broker to produce the Eligibility Letter, the referenced regulations define the prohibited conduct within the context of the representations made by the mortgage broker to the prospective borrower. You expressed your concern that issuing an Eligibility Letter implies that the mortgage broker has the authority to rate lock and/or constitutes the false promise that the company is a mortgage lender and has authority to fund the loan. The Division's longstanding policy has been that it will neither review nor approve proposed forms that a licensed entity seeks to use in the conduct of the licensed business. However, to the extent that the Eligibility Letter contains a representation to the prospective borrower that the mortgage broker has underwritten and approved the borrower for a mortgage loan, that the mortgage broker can guarantee the loan terms, that the mortgage broker will fund the loan, or any other misrepresentation that is beyond the authority of the mortgage broker in the residential mortgage loan transaction, such representations could violate the regulations referenced above.

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,



Merrily S. Gerrish
Deputy Commissioner of Banks
and General Counsel