The Commonwealth of Massachusetts
Office of the Commissioner of Banks
One South Station
Boston, Massachusetts 02110

JANE SWIFT
GOVERNOR

THOMAS J. CURRY
COMMISSIONER

June 4, 2001

Charles H. DeBevoise
Bowditch & Dewey, LLP
P.O. Box 9320
Framingham, MA 01701-0320

Dear Mr. DeBevoise:

This letter is in response to your correspondence dated January 23, 2001 to the Division of Banks (the "Division") relative to the recent amendments to 209 CMR 32.32. The amendments govern high cost home loans. Your letter raised five specific issues relative to the amended regulations. The effective date of the regulations was delayed from January 22, 2001 to March 22, 2001. The Division's response addresses each of the issues you have raised by summarizing each issue.

Your first question concerns the treatment of legal fees. You state that it appears the Division considers the lender's attorney fees as finance charges even though no portion of the fee is retained by the lender. This issue is raised by the provisions of 209 CMR 32.32(2) (a) 1. Please be advised that this provision of the regulation was not changed by the recent amendments. Moreover, treatment of such legal fees is consistent with the provisions of federal Regulation Z. This section cross-references 209 CMR 32.04(1) and (2). Said 209 CMR 32.04(2) provides that the items described therein are finance charges "except for charges specifically excluded by 209 CMR 32.04(3) through (5)." It is under 209 CMR 32.04(3) that functions performed by the attorney are excludable in a transaction secured by real property. However, a fee to attend the closing is a finance charge under Truth in Lending.

In the second question the author was asking for the timing and type size of the notice required by 209 CMR 32.32(3)(a). The only change to this section was a correction to referral of "other disclosures required by 209 CMR 32.00." It would seem prudent to have (a) through (d) in this section disclosed together in a separate notice, prior to consummation, in 12 point type.

Similarly, the notice required by 209 CMR 32.32 (3) (a) is not new. It was not changed by the recent amendments. It tracks the provisions of federal Regulation Z.

Your third issue relates to 209 CMR 32.32 (3) (e) 2 and the disclosures required therein. The following paragraph states that such disclosures can be combined with the disclosures required by section 17D of chapter 184 of the General Laws. Specifically you ask if that last paragraph applies to all the disclosures required by 209 CMR 32.32 (3) (a) through (e), inclusive or just the notices set out in 209 CMR 32.32 (3) (e). The last paragraph set out in 32.32 (3) applies only to the statements required by 209 CMR 32.32 (3) (e).

The fourth issue raised in your letter concerns the retroactivity of the amendment to 209 CMR 32.32 concerning the refinancing of an existing high cost home loan. You ask if a loan which would be a high cost home loan was made prior to the effective date of the amended regulations would be subject to the provisions governing the refinancing of a high cost home loan. It is the long standing position of the Division to analyze the legality of a transaction at the time it occurs. Therefore, if a loan was not a high cost loan at the time it was originated and the loan was made before the effective date of the amendments to 209 CMR 32.32, it would not be considered as a refinancing of a high cost home loan for the purposes of 209 CMR 32.32 (6)(b).

The last issue raised by your letter concerns 209 CMR 32.32 (6) (b). In summary you ask in which situations do the provisions governing the frequent refinancing of an existing high cost home loan with a new high cost home loan apply. The provisions of the regulation shall apply in those instances in which the same creditor, or an affiliate of the same creditor, who made the existing high cost loan makes the new high cost loan. The regulation, however, places an exception to this provision by excluding any new high cost loan that involves the use of a mortgage broker. This exception was placed in the regulation to recognize that a borrower may independently approach a mortgage broker and that broker could place the new high cost loan through the same creditor or an affiliate of the creditor. Furthermore, the provisions of 209 CMR 32.32(6)(b) will also apply to all existing high cost home loans in which the new high cost loan is made by a different creditor or a creditor not affiliated with the existing high cost loan creditor and involves the use of a mortgage broker.

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,

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

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The Commonwealth of Massachusetts

Office of the Commissioner of Banks
One South Station
Boston, Massachusetts 02110

JANE SWIFT
GOVERNOR

THOMAS J. CURRY
COMMISSIONER

June 25, 2001

Sharon L. Clarke
Compliance Officer
Meritage Mortgage Corporation
6000 SW Meadows Road
Suite 500
Lake Oswego, OR 97035-3268

Dear Ms. Clarke,

This letter is in response to your correspondence dated May 2, 2001 to the Division of Banks (the "Division") relative to the Division's interpretation of the calculation of the Annual Percentage Rate (the "APR") for the purpose of determining whether or not a loan is a high cost mortgage loan as defined by the amendments to the Division's regulation 209 CMR 32.32.

Your letter states that it is your understanding that when determining whether a loan is a high cost mortgage loan, the lender must employ the fully indexed rate. The fully indexed rate is determined by calculating the index and margin together. Your letter states that the lender should not use the APR calculated using discount or "teaser" rates since the loan's interest rate could increase significantly upon the termination of these discounted rates. The Division agrees with these conclusions.

As further clarification, you provided an example in your letter that stated the following. Your company offers a 30 year variable rate first mortgage to a Massachusetts customer on May 2, 2001. The 30-year Treasury Securities Index, as of April 15, 2001, per the regulation, was stated in your letter as 5.29%. (The Division will follow the numbers used in your example although a review of the Federal Reserve interest rate publications disclosed a rate of 5.59% as of the week ending April 13.) The APR trigger, therefore, for a loan to be classified as a high cost mortgage would be 13.29%, which is calculated by adding 8% to the 30 year treasury of 5.29%. Your company utilizes the LIBOR index, which as of May 2, 2001 was 4.710%, and utilizes a margin of 6.50%. The fully indexed rate is, therefore, 11.21%. Your company may charge any discounted rate it wishes, however, the Division's examiners will use the fully indexed rate to determine if your company is complying with the high cost mortgage regulations. Your letter states the correct conclusion that as long as a rate is discounted, the fully indexed rate must be used to determine whether a loan is a high cost loan in Massachusetts.

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,

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

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The Commonwealth of Massachusetts

Office of the Commissioner of Banks
One South Station
Boston, Massachusetts 02110

JANE SWIFT
GOVERNOR

THOMAS J. CURRY
COMMISSIONER

July 12, 2001

Roberta Pek
Vice President, Internal Controls
IndyMac Bank, F.S.B.
303 Lippincott Drive, 3rd Floor
Marlton, NJ 08053

Dear Ms. Pek:

This letter is in response to your correspondence dated June 14, 2001 to the Division of Banks (Division) requesting an opinion relative to the Division's amended high cost home loan regulations found at 209 CMR 32.32.

Specifically, you ask the Division to define the term "all compensation paid to mortgage brokers" as found at 209 CMR 32.32(2)(a)2 as part of the definition of "points and fees." It is important to note that many aspects of the Division's regulations were not changed by the recent high cost home loan amendments, including 209 CMR 32.32(2)(a). In particular, there has been no change in the Division's definition of points and fees.

With regard to your approach to the treatment of payment to mortgage brokers, it has been the Division's consistent position that payment to a broker by a creditor (also known as "yield spread premium") is not included in the definition of "points and fees." However, all compensation paid by the borrower must be included in the calculation of "points and fees."

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,

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

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The Commonwealth of Massachusetts

Office of the Commissioner of Banks
One South Station
Boston, Massachusetts 02110

JANE SWIFT
GOVERNOR

THOMAS J. CURRY
COMMISSIONER

August 6, 2001

Kevin P. Wentzell, Vice President
Marlborough Savings Bank
166 Main Street
Marlborough, Massachusetts 01752-0019

Dear Mr. Wentzell:

This letter is in response to your correspondence dated June 28, 2001 to the Division of Banks (the "Division") in which you request an opinion relative to whether Marlborough Savings Bank (the "Bank") may change the index used to calculate interest rate charges on its variable-rate home equity lines of credit pursuant to regulation 209 CMR 32.05B(6)(c). The Division's regulation 209 CMR 32.00 *et seq.* implements the Commonwealth's Truth In Lending law, chapter 140D of the General Laws.

In your letter, you state that the Bank presently has in its portfolio a group of variable rate home equity lines of credit whose interest rate is indexed to the "Prime" interest rate issued by FleetBoston Financial ("FleetBoston"). The Bank's borrowers could obtain information regarding FleetBoston's prime rate by telephoning a recorded line. You indicate in your letter that the telephone number has been recently disconnected and your customers must now visit a branch office site of FleetBoston or call a toll free number and go through a series of prompts to obtain the current information on the prime rate. Your position is that the interest rate is "no longer readily available" and you wish to change the current index on this group of variable rate home equity lines of credit to the Wall Street Journal prime rate published in the Money Rate section of that newspaper. You ask if this would be permissible pursuant to 209 CMR 32.05B(6)(c) 2.

The regulation at 209 CMR 32.05B(6)(c)2. states, in part, that a creditor may not, by contract or otherwise, change the index used to determine the interest rate on a variable rate home equity loan unless the current index is no longer available. The standard set in the regulation is "no longer available" as opposed to the reference in your letter to no longer readily available. While FleetBoston now does not provide a specific telephone number for its prime rate, a customer of the Bank may still obtain this information in person at a FleetBoston branch office or through the use of a toll free telephone number. It is the position of the Division that the present index used by the Bank on this group of variable rate home equity lines of credit remains available to the borrowers. Therefore, the standard set forth in 209 CMR 32.05B(6)(c) 2. has not been met and the Bank may not replace the current index on these loans.

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,

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

JAL/NTT/mhc
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