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February 5, 1999

Dear Ms. :

I write in response to your January 26, 1999 letter on behalf of a client which originates residential mortgage loans in West Virginia from a location outside of West Virginia. You represent that your client is qualified to do business in West Virginia and has a business license from the Department of Tax and Revenue. If your client originates any second lien residential mortgage loans that are not exempt under WV code 31-17-2(b) I will assume for the purposes of this letter that it also has a secondary mortgage lender license from the West Virginia Division of Banking.

Your letter posed two questions and I will answer them in turn.

1.) Does the solicitation of loans constitute a "consumer good or service" which subjects such solicitation to West Virginia's telemarketing act, WV Code 46A-6F-101, et seq.?

The West Virginia telemarketing act, at WV Code 46A-6F-112(a), defines "telemarketing solicitation" as:

any communication between a telemarketer and a prospective purchaser for the purpose of selling or attempting to sell the purchaser any consumer goods or services, if it is intended by the telemarketer that an agreement to purchase the consumer goods or services will be made after any of the following events occur:

...

(2) The telemarketer communicates with a consumer by any means and invites or directs the consumer to respond by any means to the telemarketer's communications, and the telemarketer intends to enter into an agreement with the consumer for the purchase of consumer goods or services at some time during the

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course of one or more subsequent telephone communications with the consumer.
(emphasis added)

The telemarketing act further defines “consumer goods or services” as:

(1) **Any** property or services offered or sold to a natural person primarily for personal, family, household or agricultural purposes;

...; or

(3) Any property intended to be attached to or installed in any real property, ... as well as timeshare estates and licenses, resort and campground memberships, and **any** services related to such property.

West Virginia Code 46A-6F-104 (emphases added).

It is our view that the term “consumer goods and services” includes the residential mortgage loans originated by your client. Indeed, any loan secured by residential real estate that provides for the purchase money thereof or, for example, renovation or repairs, refinancing, or the establishment of a home equity line of credit would also fall within the term “consumer goods and services”.

2.) Does your client qualify for an exemption from the telemarketing act as a “supervised financial organization”?

Part II of the telemarketing act provides an extensive list of persons and entities that are exempt from the provisions of the act. Included in the list is a “supervised financial organization”. WV Code 46A-6F-209. This section provides that the term “supervised financial organization’ ...shall have the same meaning as ascribed... in [WV Code 46A-1-102].” West Virginia Code 46A-1-102(48) defines a “supervised financial organization” as:

any organization, corporation or person, other than an insurance company ... required under state law to register or obtain a license from the commissioner of banking before conducting business in this state; or which is authorized under federal law to make consumer loans without a license from the state commissioner of banking, **provided** such loans are subject to supervision **and** examination by an official or agency of the United States. (emphasis added)

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Your letter states that last fall I told you the term “supervised financial organization” includes those entities that are “supervised **or** examined by FNMA, Freddie Mac, etc.” I do not recall saying that. My recollection is that you would have to contact your client and determine the extent of oversight by a federal agency before a judgment could be made. It is our view that since the definition of “supervised financial organization” requires supervision **and** examination by an official or agency of the federal government, mere “supervision” would not be sufficient. “Examination”, when used in the context of financial organizations, is a specific term of art that contemplates a close inspection and supervision of the lending practices of a financial organization to ensure safety and soundness and compliance with relevant consumer laws.

Your letter states that your client has “approvals” from HUD, GNMA, FNMA, Freddie Mac, that it is a FHA-approved mortgagee, and that it is a “supervised” VA lender. **If** these relationships involve both supervision **and** examination by the respective governmental agency, then it is our opinion that your client would qualify for exemption from the provisions of the telemarketing act pursuant to WV Code 46A-6F-209 as a “supervised financial organization”.

I hope this letter answers your questions. If you need further information, please feel free to contact me.

Sincerely,

Robert J. Lamont
General Counsel