State of Washington

DEPARTMENT OF FINANCIAL INSTITUTIONS

P.O. Box 41200, Olympia, Washington 98504-1200

ISGC – 2011 – 002 – DFI

Supersedes ISGC 2008-005-DFI (6/11/2008)

April 22, 2011

[redacted]

Subject: Notice of Intent to Withdraw Agency Interpretation dated June 11, 2008 (ISGC 2008-005-DFI) [redacted]

Dear Mr. Bley:

I am writing on behalf of the Division of Consumer Services ("Division of Consumer Services") and Division of Banks ("Division of Banks") of the Department of Financial Institutions ("Department") in reference to your client, [redacted] Bank ("Bank"), and its first- and second-tier subsidiaries, [redacted] ("HS-WMS"), [redacted] ("HHS"), [redacted] ("WMSS"), and [redacted] ("HSS"), in relation to the interpretive statement dated June 11, 2008, ISGC 2008-005-DFI ("2008 Agency Interpretation"), and a certain advance alert email that was sent to you dated August 24, 2010, which discussed the prospective effect of then-newly enacted Subtitle D of Title X of the Dodd-Frank Act ("Relevant Dodd-Frank Amendments") in relation to the 2008 Agency Interpretation ("2010 Email Alert").

Please be advised that as of July 21, 2011, the effective date of the Relevant Dodd-Frank Amendments ("Dodd-Frank Effective Date"), the 2008 Agency Interpretation is withdrawn and is superseded by the interpretive statement contained in this letter.

As you know and as we indicated in our 2010 Email Alert, the 2008 Agency Interpretation preceded the enactment or relevant effective dates of the S.A.F.E. Mortgage Licensing Act (enacted July 30, 2008, with delayed effective dates) ("S.A.F.E. Act") and the Dodd-Frank Act (enacted July 21, 2010). The 2008 Agency Interpretation was a reasonable reading of RCW 31.04.025 and other applicable law prior to the Dodd-Frank Act, affording Washington State-chartered commercial banks and savings banks an "equal playing field" with federal charters, whose non-depositary subsidiaries were exempt from licensing and regulation by this

Department pursuant to *Wachovia v. Watters*, *Cuomo v. The Clearinghouse Association*, and various cases in the Circuit Courts of Appeal. However, the Relevant Dodd-Frank Amendments *specifically* empower states to maintain laws that would authorize the license, regulation and exercise of "visitorial power" (including the power of administrative subpoena) over state-incorporated, non-depositary subsidiaries of national banks and federal thrifts.[1]

As of the Dodd-Frank Effective Date, the Washington Consumer Loan Act (Chapter 31.04 RCW) will once again apply to state-incorporated, non-depositary subsidiaries of national banks and federal thrifts and thereafter require the licensure of non-depositary subsidiaries of national banks and federal thrifts (including mortgage banking *and* mortgage servicing subsidiaries).[2] As a result of the Relevant Dodd-Frank Amendments, the sole reason for issuing the 2008 Agency Interpretation, which was based upon the afore-mentioned public policy concern, will no longer apply. Indeed, to maintain the 2008 Agency Interpretation beyond the Dodd-Frank Effective Date would actually create, as a matter of law, an "unequal playing field" in favor of operating subsidiaries of domestic *state*-chartered banks and savings banks. We are of the view that such disparate treatment of the subsidiaries of federal and state charters would violate the Dormant Commerce Clause and thereby threaten the enforceability of the Consumer Loan Act against the operating subsidiaries of national banks and federal thrifts.[3]

Notwithstanding the above, we do *not* read the Relevant Dodd-Frank Amendments[4] as an implied repeal of the S.A.F.E. Act with respect to federal registration (as opposed to *state licensing*) of mortgage loan originators. While consumer loan *companies* that are subsidiaries of federal- and state-chartered banks and thrifts will be subject to licensing, regulation and examination under the Consumer Loan Act, their mortgage loan officers will remain exempt from the loan originator licensing provisions of the Mortgage Broker Practices Act, Chapter 19.146 RCW.

Provided that the representations contained in the 2008 Agency Interpretation have not materially changed, HS-WMS and HHS are wholly owned subsidiaries of Bank and *passive* holding companies of second-tier subsidiaries, WMSS and HSS, respectively. The third-tier subsidiaries of these second-tier Delaware master series limited liability companies ("LLCs") are the storefront series LLCs represented in the 2008 Agency Interpretation, including the ones doing business in approximately 23 [redacted] Real Estate franchise offices and known as

[1] The Relevant Dodd-Frank Amendments that support this conclusion are the following provisions of the Dodd-Frank Act [Pub.L. 111-203] are §§ 1042(a)(1), 1042(b)(1)(a), 1044(b)(2) [codified at 12 U.S.C. § 25b(b)(2)], 1045 [codified at 12 U.S.C. § 25b(h)], 1046, and Subsection 1047(b) [codified at 12 U.S.C. §1465(a)-(c)].

[2] These consumer loan operating subsidiaries of national banks and federal thrifts are aware of this already and have been voluntarily submitting to licensure with the Division of Consumer Services after a hiatus since 2003.

[3] Subsection 1044(a) of the Dodd-Frank Act specifically requires that "state consumer financial laws" not *discriminate* against national banks. The term "state consumer financial laws," as used in its special context in Section 1044, appears to only refer to substantive state laws affecting transactions and not to licensure or "visitorial power." However, we are of the view that, in like manner with Subsection 1044(a) of the Dodd-Frank Act, the Dormant Commerce Clause would place in doubt the enforceability of a state law as to non-depositary subsidiaries of national banks and federal thrifts if such a state law continued to be interpreted in such a way as to require that such non-depositary subsidiaries be licensed and examined while at the same time exempting non-depositary subsidiaries of its own domestic, state-chartered banks.

[4] See Section 1045 of the Dodd-Frank Act [12 U.S.C. § 25b(h)(2)].

[redacted] Mortgage ('[redacted] Mortgage"). While the individual mortgage loan officers of [redacted] Mortgage are subject to federal registration, it does not appear that they are subject, as employees of Bank subsidiaries,[5] to individual licensing of mortgage loan originators under either the S.A.F.E. Act or the Mortgage Broker Practices Act.

Please confer with your client and advise the Bank to begin making arrangements for the licensing and regulation of WMSS and HSS under the Consumer Loan Act after the Dodd-Frank Effective Date. If you have any questions related to this letter, please do not hesitate to call upon Deborah Bortner at (360) 902-0511 or dbortner@dfi.wa.gov.

Yours very truly,

WASHINGTON STATE DEPARTMENT OF
FINANCIAL INSTITUTIONS

By: Joseph M. Vincent
Joseph M. Vincent
General Counsel

[redacted]

[5] We have previously concluded that, since each of these third-tier subsidiaries known as Windermere Mortgage is *50%* beneficially owned by the Bank, they are "subsidiaries" of Bank for purposes of the S.A.F.E. Act and Mortgage Broker Practices Act exemption from individual *licensing* of mortgage loan originators.