



IDAHO
DEPARTMENT OF FINANCE

C. L. "BUTCH" OTTER
Governor

GAVIN M. GEE
Director

April 9, 2010

Re: Interpretive Opinion

Dear M

We have reviewed your request for an interpretive opinion regarding certain activities related to the offer and sale of notes by (the "Company"). The request is attached and incorporated herein.

The Company is interested in pursuing a business involving the introduction of buyers and sellers of promissory notes for compensation. The Company requests that the Department opine on whether this activity (and various potential modified iterations of the activity) would come under the jurisdiction of the Idaho Uniform Securities Act (2004) (the "Act"). The Department's response to the Company's request is limited to the application of the Act and does not consider federal or other state or local laws.

Rule 3 of the Rules Pursuant to the Act states that the Administrator may honor requests for interpretive opinions relating to an actual specific factual circumstance. Subsection 03 of Rule 3 states: "*The names of the company ...and all other persons involved should be stated and should relate and be limited to a particular factual circumstance. Letters relating to hypothetical situations will not warrant a formal response.*" The "Questions" section of the Company's request is primarily hypothetical in nature. We have provided limited information in response to these questions and our answers are not to be construed as interpretive opinions from this Department. The Department reserves the right to decline any future requests by the Company of a similar nature.

The basic business activity described by the Company is to locate people who hold one or more promissory notes secured by a mortgage or deed to trust and who are interested in selling their notes ("note holder"). The Company will also find investors interested in purchasing such notes and introduce them to the note holder. If an investor purchases a note from a note holder, the Company receives a fee or commission.

The threshold issue related to these questions is whether the notes offered are securities. A security is defined in Section 30-14-102(28) of the Act and includes a wide variety of financial instruments. The definition includes the following: "*Security means a note; stock; treasury stock; security future; bond; debenture; evidence of indebtedness....*" A note secured by a

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mortgage or deed of trust on real property is a security. In fact, Section 30-14-202(11) of the Act exempts transactions involving notes or other debt securities from the registration requirements of the Act (Sections 14-30-301, *et seq.*) if the transaction is, "*in a note...secured by a mortgage or other security agreement if the note...is offered and sold with the mortgage or other security agreement as a unit.*" Therefore, the note holder is not required to register such notes prior to offering them to investors if the notes were sold as a unit with the mortgage or deed of trust. However, the note holder and potentially the Company would still be subject to any applicable anti-fraud provisions of the Act (Sections 30-14-501, *et seq.*).

The second issue arising in connection with these scenarios is whether the Company is acting as a broker-dealer. A broker-dealer is defined in Section 30-14-102(4) as: "*...a person engaged in the business of effecting transactions in securities for the account of others or for the person's own account.*" The Act excludes issuers, agents, banks, savings institutions, trust companies and credit unions from the definition of a broker-dealer. The Company is certainly in the business of pairing buyers and sellers of securities and its compensation is tied to the successful completion of the transaction. In the first scenario, the Company does not negotiate the terms of the transaction, but is involved in "effecting" the transaction by bringing the parties together and receives compensation for those integral services. The Company offers no argument why they are not in the business of effecting transactions in securities and, in the absence of a compelling argument, the Department construes the act broadly, particularly when the Company is only compensated for its efforts if a transaction is completed.

The third issue arising in connection with these scenarios is whether the Company is acting as an investment advisor. An investment advisor is defined in Section 30-14-102(15) of the Act and includes: "*a person that, for compensation, engages in the business of advising others...as to the value of securities or the advisability of...purchasing or selling securities....*" The Company has not provided sufficient facts to determine an answer to this question. However, it seems possible from the statements made in the request that activities of the Company might include advising note holders or investors as to the value of a note as part of inducement to note holders and investors to utilize the services of the Company.

The following are the questions posed by the Company and the Department's response. Please review the Company's request for references to specific examples.

1. *Would these activities require any form of securities license with the state?*

Yes, under the facts as described in the Company's request, it appears the Company is acting as a broker-dealer and would need to be registered as a broker-dealer in Idaho or qualify for an exemption from registration. The notes would be exempt from registration under Section 30-14-301 *et seq.* of the Act pursuant to Section 30-14-202(11) if the notes are sold with the mortgage or deed of trust as a unit. The Company may also need to register as an investment advisor if its services provided to note holders and investors cause the Company to fall within the parameters of the definition of an investment advisor under the Act.

2. *Would the Company's involvement in actually representing A or C in the negotiation of a purchase price between A or C make any difference? If so, the Company would merely introduce and let A and C negotiate a purchase price.*

No.

3. *Would your answer to Question No. 1 change if the original loan was not secured by a deed of trust on real estate and was simply an unsecured promissory note?*

Probably, but only as it relates to the registration of the securities and additional facts would be necessary to make a determination. Unsecured promissory notes do not qualify for an exemption from registration under Section 30-14-202(11) of the Act. The note holders would need to register or qualify for another exemption from registration if the notes are not sold with a mortgage or deed of trust as a unit.

4. *Would your answer to Question No. 1 change if the Company decided to group promissory notes from several holders of those notes and then sell the group of notes to an end-buyer.*

Probably not, but additional facts would be necessary to make a determination. The additional act by the Company to simply group the notes together for sale to a buyer(s) merely adds weight to the argument that the Company is "in the business of effecting transactions in securities." Any other type of grouping or pooling of the notes by the Company may result in the Department having a different opinion.

5. *Would your answer to Question No. 1 change if the Company actually purchased the notes themselves and then re-sold those notes to a buyer.*

Probably not, but more facts would be necessary to make a determination. If the Company purchased the notes merely to resell to new investors it would still be in the business of effecting transactions in securities and would therefore need to be registered as a broker-dealer.

The Department's opinion is based on the written facts presented by the Company. If those facts or circumstances change, are inaccurate, or incomplete our position may be different.

Please contact the undersigned at (208) 332-8046 with any questions regarding these comments.

Sincerely,



Kurt Merritt
Securities Analyst
Department of Finance

VIA US MAIL

March 1, 2010

Idaho Department of Finance
Securities Bureau
ATTN: Marylyn T. Chastain
PO BOX 83720
Boise, ID 83720-0031

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STATE OF IDAHO
DEPT OF FINANCE

RE: Request for Interpretive Opinion

To Whom It May Concern:

This office represents the interests of _____ an Idaho Corporation ("Company"). The Company is interested in pursuing a line of business involving the introduction of buyers and sellers of promissory notes and we are requesting an opinion from the Securities Division regarding any necessary licensing requirements (broker/dealer licenses) for doing so. Please find the enclosed \$50 to obtain the interpretive opinion.

As an aside, we have reviewed the Idaho Residential Mortgage Practices Act and other Idaho laws that seem to apply to any mortgage licensing issues and have found no rules that would require a mortgage license for performing these services. Furthermore, the Consumer Finance Division has responded in writing regarding their opinion that no mortgage license is required for the activities in which the Company hopes to engage.

Facts:

Simply stated, the Company desires to provide a business to introduce holders of Idaho promissory notes to interested buyers of those notes in exchange for a fee. In many cases, the holders of these promissory notes are prior owners of homes that were able to secure a buyer for their homes by offering "seller-financed" notes. In the case of a seller-financed note, the note is secured by the seller's real estate being purchased by the buyer. Now, the owners of the seller-financed notes are interested in liquidating the notes rather than waiting out the term of the notes to be paid back by the buyers. The Company would simply introduce the owner/holder of the seller financed note to a willing buyer in exchange for a fee.

Also, the Company may work with private money lenders who are lending to residents of Idaho (aka "Hard Money Lenders"). The Company does not intend to work with commercial lenders. The Company would simply be the "middle man" in introducing a private lender (who is the owner/holder of a promissory note and deed of trust) to an end-buyer who then purchases all of the rights to that same promissory note and deed of trust. My client would then receive a fee, like a commission, for merely introducing the parties.

A hard-money loan example: A lends to B (an Idaho resident) an amount of \$100,000 for the purchase of piece of Idaho real estate. A would receive a promissory note and a deed of trust from B upon B's purchase of the property. A later wants to liquidate the note by selling the promissory note to C for \$80,000. C would purchase all rights to the promissory note and deed of trust and the stream of income being paid by B. My client would have a business introducing A to C and then receive a fee or commission for introducing those parties.

The Company would not be involved in the origination of the loan from A to B, nor is my client engaging in any offer to B to "refinance" the loan B has with A. My client is not involved in servicing the loan for either A or C and essentially has no contact with B. The Company is simply introducing A to C for a fee.

A seller-financed loan example: A is selling their Idaho home to B for \$100,000. B is unable to obtain traditional financing through a commercial lender or through a hard money lender, so A offers to finance the purchase by transferring the property to B in exchange for a promissory note secured by a deed of trust on the property. A has an income stream from the payments being received from B on the promissory note. A later wants to liquidate the note by selling the promissory note to C for \$80,000 instead of waiting for B to pay off the note over the course of several years. C would purchase all rights to the promissory note and deed of trust and the stream of income being paid by B. The Company would have a business introducing A to C and then receive a fee or commission for introducing those parties.

Again, the Company would not be involved in the origination of the loan from A to B, nor is my client engaging in any offer to B to "refinance" the loan B has with A. My client is not involved in servicing the loan for either A or C and essentially has no contact with B. The Company is simply introducing A to C for a fee.

Questions:

1. Would these activities require any form of securities license with the State of Idaho?

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2. Would the Company's involvement in actually representing A or C in the negotiation of a purchase price between A or C make any difference? If so, the Company would merely introduce and let A and C negotiate a purchase price.
3. Would your answer to Question No. 1 change if the original loan was not secured by a deed of trust on real estate and was simply an unsecured promissory note?
4. Would your answer to Question No. 1 change if the Company decided to group promissory notes from several holders of those notes and then sell the group of notes to an end-buyer?
5. Would your answer to Question No. 1 change if the Company if the Company actually purchased the notes themselves and then re-sold those notes to an end-buyer?

Thank you for your assistance and please let me know if you need any additional information or clarification.

Sincerely,