THE COMMONWEALTH OF MASSACHUSETTS
DIVISION OF BANKS
1000 Washington Street, 10th Floor, Boston, Massachusetts 02118

DEVAL L. PATRICK
GOVERNOR

GREGORY BIALECKI
SECRETARY OF HOUSING AND
ECONOMIC DEVELOPMENT

BARBARA ANTHONY
UNDERSECRETARY, OFFICE OF
CONSUMER AFFAIRS AND
BUSINESS REGULATION

DAVID J. COTNEY
COMMISSIONER OF BANKS

January 31, 2014

[redacted]

Dear [redacted]

This letter is written in response to your correspondence of December 4, 2013 to the Division of Banks (Division) in which you seek an opinion as to whether a small loan license is required based upon the activities described in your letter.

Your correspondence states that [redacted] is a motor vehicle sales finance company that takes assignment of retail installment sales contract from dealers, including dealers located in Massachusetts. [redacted] maintains a Massachusetts motor vehicle sales finance company license pursuant to General Laws chapter 255B. A small number of contracts that [redacted] acquires involve trade-ins where the customer owes more money on the trade-in vehicle than its actual value. The resulting "negative-equity" is paid to the existing creditor and is financed as part of the customer's retail installment sales contract which is then acquired for value by [redacted]. You reference an example in which a customer owes $10,000 on a trade-in, but the trade-in is only worth $8,000, the resulting "negative-equity" of $2,000 becomes part of the amount financed in the retail installment sales contract for the new vehicle.

You indicate that in addition to obtaining a motor vehicle sales finance company license, [redacted] also obtained a small loan company license pursuant to General Laws chapter 140, section 96. This was done as a result of legal guidance [redacted] received based on the fact that certain of the contracts that had "negative-equity" involved amounts of under $6,000 and an annual percentage rate of greater than 12% as well as an "abundance of caution" approach to licensing. You have asked the Division whether [redacted] does, in fact, need to maintain its Massachusetts small loan license. You have also provided the following additional facts for the Division's consideration in its determination: (1) no separate loans are made other than the financing of the vehicle, including any "negative-equity"; (2) [redacted] engages in a single point-of-sale transaction with the customer; and (3) there is no additional funding, separate disbursement, or subsequent loan made to any consumer.

General Laws chapter 140, section 96 provides, in part, that, "[T]he buying or endorsing of notes or the furnishing of guarantee or security for compensation shall be considered to be engaging in the business of making small loans within said sections, but the foregoing provisions of this sentence shall not apply in the case of any transaction which involves any note or other instrument evidencing the indebtedness of a buyer to the seller of goods, services or insurance for a part or all of the purchase price; *provided, however, that any advance of money by such seller or, by a person acting on his behalf for the*

purpose of paying an existing indebtedness of such buyer or for any other purpose shall constitute a loan of money subject to the provisions of this section." (Emphasis supplied).

The above highlighted proviso to said section 96 was added by Chapter 190 of the Acts of 1967, following the 1966 Supreme Judicial Court decision Commonwealth v. Security Acceptance Corp., 350 Mass. 159, 214 N.E.2d 47 (Mass. 1966). The essence of the Court's holding in the Security Acceptance Corp. case was that a transaction involving a time sale of goods which included an additional amount to repay a pre-existing debt of the consumer owed to another creditor was not a loan subject to General Laws chapter 140, section 96 *et seq*. Under the statutory language at that time, the Court viewed the transaction as one single time-price installment sale transaction and found the inclusion of an amount to pay off the pre-existing debt not to constitute a small loan subject to licensing or regulatory provisions of the Commonwealth's small loan statute. The 1967 legislative amendment to include the proviso appears to specifically address the Court's conclusion in the Security Acceptance Corp. decision and provides that any advance of money by a seller for the purpose of paying an existing indebtedness or any other purpose shall constitute a loan of money subject to the provisions of General Laws chapter 140, section 96. This would appear to directly address the issue you have presented and require [redacted] to maintain its small loan license.

The Division would conclude that the inclusion of the "negative-equity" or pre-existing debt as part of the retail installment sales contract acquired by [redacted] to the extent that such balance reflects an amount of $6,000 or less and an interest rate exceeding 12% per annum, would require that [redacted] maintain its Massachusetts small loan license.

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

013022

M:\Legal\FileRoom\Archives\ApprovalOpinions\2013\O13022.doc