



In order to adequately supervise licensees and determine compliance with RSA Chapter 397-A and the Consumer Credit Protection Act (15 USC 1601 et seq.), the Department “may examine the books, accounts, records, files, and other documents or matters of any licensee or person” within its jurisdiction. RSA 397-A:12, I. The Department must examine entities like Respondent TMS every 18 months. RSA 383:9, I.

To determine if a licensee has violated any part or provision of RSA 397-A, the Department may “examine, during business hours, the records of any licensee and of any person by whom any such loan is made, whether such person shall be licensed to act, or claim to act, as principal, agent, or other representative...and for that purpose, the banking department shall have access to the books, papers, records, files and vaults of all such persons.” RSA 397-A:12, II.

RSA 397-A:12, II imposes an affirmative duty on a licensee and its employees to provide all records “in their possession or control relating to the subject of the examination....” It states in pertinent part the following: “Every person being examined, and all of the officers, directors, employees, agents, and representatives of such person shall make freely available to the commissioner or his or her examiners, the accounts, records, documents, files, information, assets, and matters....” RSA 397-A:12, VII, also states that the licensee “shall make freely available” its records “relating to the subject of the examination” and “shall facilitate the exam.”

Licensees may maintain their records in electronic format as long as they provide the Commissioner with the information requested from electronic records “in the form requested by the commissioner” when requested. RSA 397-A:22, III. If a licensee chooses to store its records in another state and the Department asks it to return its files for review, the licensee “must return such files” to a New Hampshire office, the Department, or its New Hampshire agent’s office within “21 calendar days.” RSA 397-A:11, II. Failure to provide the records “shall subject” the licensee to a \$50 per day fine for every day after the 21st day the licensee does not provide the requested documents or files. RSA 397-A:11, II.

Pursuant to RSA 397-A:17, I, the New Hampshire Bank Commissioner (“Commissioner”) “may issue an order requiring a person to whom any license has been granted or any person under the Commissioner’s jurisdiction to show cause why...penalties [should not be] imposed.” The Commissioner may also issue an order requiring a licensee to take “affirmative action as [the Commissioner] deems necessary.” RSA 397-A:17, 11. Such action is necessary to facilitate the exam per RSA 397-A:12, VII.

### FACTUAL ALLEGATIONS

In support of this order pursuant to RSA 397-A:17, II (d), the Petitioner makes the following factual allegations:

1. On March 4, 2013, the Department initiated an examination of The Mortgage Specialists (“TMS”). On March 11, 2013, after conducting a partial review of documents on-site, the Department’s examiners asked to review TMS employee e-mails covering a six month period.
2. The examiners were seeking these emails to determine in part whether the Respondents had complied with a 2008 consent order. See Consent Order, In re State of N. H. Banking Dept. and The Mortgage Specialists, Inc., Michael Gill et al., Case No. 08-223, (August 18, 2008). In the order, the Respondents agreed to create a compliance program that would in relevant part “provide for records retention and document destruction procedures to include, but not be limited to, maintenance and preservation of ... (ii) all e-mail transmissions and receipts from or to each business computer and all business related email transmissions and receipts from or to privately owned computers.” Id. at 5, para. 14(d.) (emphasis added).

3. The examiners had already noted some loans that they believed warranted further review, and were seeking these emails also to determine if there were relevant communications regarding those loans or communications regarding other possible loan irregularities.
4. Furthermore, if a licensee conducts business via email, it is not uncommon for examiners to ask to review emails as part of the regular examination process. Email communications between loan officers and borrowers, or underwriters and appraisers or lenders, are necessary for examiners to understand both the licensee's loan process and business practices.
5. In this case, TMS informed the examiners that e-mails were stored off site at an unaffiliated third party facility (the "Storage Facility"). Examiners reviewed a contract between TMS and the Storage Facility, but after review, the examiners returned the contract and did not retain a copy for Department records.
6. On March 14, 2013, TMS mailed a letter to the Department setting forth its objections to the Department's request for production of TMS e-mails located at the Storage Facility. In its letter, TMS raised concerns about redacting attorney-client privileged materials. In response, the Department reduced the request for emails to a four month period, November 1, 2012, through March 1, 2013. The Department also made assurances to TMS that it was not seeking to review privileged information, and should any inadvertent disclosures of privileged material occur, the Department would not review such e-mails.
7. On March 22, 2013, TMS General Counsel Edward Little, Jr. ("Attorney Little") e-mailed the Department and indicated TMS had received 22 e-mail account files (out of approximately 130 which were previously mentioned to the Department).

8. On March 25, 2013, the Department mailed a letter to Attorney Little outlining the Department's statutory authority and legal positions in the matter. The Department asked TMS to provide a timeline for production of the e-mails and the method TMS intended to use to provide them. The Department also asked for a list of other redacted corporate records from TMS Compliance Officer Lisa Tracy's electronic storage.
9. On March 28, 2013, Department General Counsel Ingrid White spoke with Attorney Little and asked for the name and contact information of the Storage Facility. Attorney Little represented he would provide that information via e-mail by the end of the same day. The information was not made available to the Department as promised.
10. On April 2, 2013, General Counsel White sent a letter to Attorney Little regarding TMS's failure to provide the Department with the following: the timeline and method for producing the e-mails, the promised contact information for the Storage Facility, and a list of redacted documents from Compliance Officer Lisa Tracy's electronic storage. The letter required a response from TMS by the end of the business day on April 3, 2013, and indicated that failure to respond could result in administrative action.
11. In a telephone discussion with General Counsel White near the end of the business day on April 3, 2013, Attorney Little explained TMS would no longer respond to the Department's requests and would instead be filing a lawsuit against the Department.
12. The facts as alleged above, if true, show the following:
  - a. The Respondent TMS violated the following: RSA 397-A:11, I, by failing to maintain the records in a reasonably accessible location; and 397-A:12, VII, by failing to facilitate the exam when they refused to respond to the Department inquiries and refused to provide status reports on the requested records stored off-

site. Accordingly, Respondent TMS should be assessed an administrative fine of \$5,000 (\$2,500 for each violation)..

- b. Respondent Michael Gill, as owner of Respondent TMS, directly or indirectly controls Respondent TMS pursuant to RSA 397-A:21, V. Because Respondent TMS violated both RSA 397-A:11, I, and 397-A:12, VII, Respondent Gill should be should be assessed an administrative fine of \$5,000.
  - c. The requested records are necessary to complete the Respondents' examination in a timely manner.
  - d. The Respondents have failed to return the requested records maintained in another state to their New Hampshire office within 21 days of the Department's request as required by RSA 397-A:11, II, and as such are subject to an ongoing violation and fine of \$50 per day for each day after April 2, 2013 that the Respondents have failed to produce the requested documents.
13. To facilitate the exam, the Respondents should be ordered, pursuant to RSA 397-A:17, II (d), to produce the requested records in their possession within five days of receiving this Order.

Accordingly, the Petitioner respectfully requests that the Banking Commissioner issue the following order:

**RECOMMENDED by:**

4/11/13  
Date

/s/  
J. Spencer Culp  
Hearings Examiner  
State of New Hampshire Banking Department

**ORDER**

1. The Respondents shall within five days of receiving this order produce the requested emails from November 1, 2012 to March 1, 2013, in their possession and present them to the Department in the requested format.
2. The Respondents TMS and Michael Gill shall show cause why they should not be fined \$5,000 each for violating both RSA 397-A:11, I, and 397-A:12, VII.
3. Absent good cause, the Respondents shall pay a fine of \$50 per day for each day after April 2, 2013, that they fail to produce the requested emails pursuant to RSA 397-A:11, II,.
4. The Department will hold a hearing in this matter on May 15, 2013 at its offices located at 53 Regional Drive, Suite 200, Concord, New Hampshire. However, if the Respondents request a hearing prior to May 15, 2013, the Commissioner will amend this order to conform with the requirement of RSA 397-A:17, I.
5. Imposition of any fine under this Order does not waive any additional administrative action for continuing violation or preclude the Department from issuing a separate order for such continuing violations and imposition of additional penalties under RSA 397-A:21.

6. Pursuant to RSA 397-A:20, VI, this Order is necessary and appropriate to the public interest, for the protection of consumers, and consistent with the purposes fairly intended by the policy and provisions of RSA Chapter 397-A.

**NOTICE OF HEARING**

A hearing in this matter shall be held on May 15, 2013 (Wednesday), at the Department's offices, located at 53 Regional Drive, Suite 200, Concord, New Hampshire. The Respondents have a right to request in writing that the hearing take place before that date. See RSA 397-A:17, I. If the Respondents make such a request, the hearing will be rescheduled not later than 10 calendar days after I receive the Respondent's written request, in accordance with RSA 397-A:17, I.

If the Respondents fail "to request a hearing within 30 calendar days of receipt or valid delivery of this [Order to Show Cause and Produce Records] or fail to appear at [the] hearing after being duly notified, or cannot be located after a reasonable search, [the Respondents] shall be deemed in default and the proceeding may be decided against the person upon consideration of the order to show cause . . . the allegations of which may be deemed to be true." Id.

**ORDERED by:**

4/11/13  
Date

\_\_\_\_\_/s/\_\_\_\_\_  
Glenn A. Perlow  
Bank Commissioner

**CERTIFICATE OF SERVICE**

I, J. Spencer Culp, hereby certify that on April 11, 2013, a copy of this Order to Show Cause and Produce Records was sent to the following parties via U.S. Certified Mail First Class:

The Mortgage Specialists, Inc. and Micheal Gill at 2 Main St, Plaistow, NH, 03865, and their attorney of record, Edward Little.

/s/

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J. Spencer Culp  
Hearings Examiner  
New Hampshire Banking Department