

BANKING
DEPARTMENT OF BANKING AND INSURANCE
DIVISION OF BANKING

Predatory Lending

Proposed New Rules: N.J.A.C. 3:5

Authorized By: Donald Bryan, Acting Commissioner, Department of Banking and Insurance in Consultation and Collaboration with Kimberly S. Ricketts, Director, Division of Consumer Affairs, Department of Law and Public Safety.

Authority: N.J.S.A.17:1-8.1, 17:1-15e, and 46:10B-22 et seq. and P.L. 2004 c.84.

Calendar Reference: See Summary below for explanation of exception to calendar requirement.

Proposal Number: PRN 2005-332

Submit comments by November, 2005 to:

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The agency proposal follows:

Summary

The proposed new rules implement the New Jersey Home Ownership Security Act of 2002, N.J.S.A. 46:10B-22 et seq., and the amendments to that statute effected by P.L. 2004, c. 84, signed into law on July 6, 2004 (hereinafter collectively referred to as the "Act.") The Act addresses abusive lending practices, and is designed to regulate certain home loans that can be harmful to consumers. On July 25, 2003, November 18, 2003 and October 28, 2004, the Department issued interpretative Bulletins. The proposed new rules will, among other things, codify the analyses and conclusions set forth in those Bulletins.

Proposed N.J.A.C. 3:5-1.1 sets forth the purpose of the chapter.

Proposed N.J.A.C. 3:5-1.2 sets forth the scope of the chapter.

Proposed N.J.A.C. 3:5-1.3 contains the definitions of “affiliate,” “banking day,” “bona fide discount points,” “borrower,” “business day,” “business hours,” “Commissioner,” “construction loan,” “consumer credit,” “conventional mortgage rate,” “conventional prepayment penalty,” “creditor,” “Department,” “depository institution,” “escrow,” “escrow charge,” “high-cost home loan,” “home improvements,” “home loan,” “manufactured home,” “mortgage insurance premiums” or “private mortgage insurance,” “points and fees,” “rate,” “received,” “seller,” “threshold,” “total amount paid by the borrower in connection with the transaction,” and “total loan amount,” as used in the chapter. Of particular note is that the Department has crafted the definition of “seller” to incorporate by reference the definition of “seller” in 16 C.F.R. 433.1(J), the Federal Trade Commission’s “Holder Rule.” This definition is sufficiently broad as to encompass the term “seller” as defined in the Home Improvement Practices rules promulgated by the Division of Consumer Affairs at N.J.A.C. 13:45A-16. The Department’s intent is that all persons who are considered sellers of home improvements by that Division will likewise be deemed to be sellers under these rules.

Proposed N.J.A.C. 3:5-2, 3 and 4 are reserved.

Proposed N.J.A.C. 3:5-5 sets forth the requirements for posting payments received from borrowers. The proposed new rules require depository institutions, that is banks, savings banks, savings and loans and credit unions, to post a payment on the banking day it is received. The proposed new rules require that all other creditors post a payment on the business day it is received.

Proposed N.J.A.C. 3:5-6 and 7 are reserved.

The Act permits borrowers of home loans to recover certain damages and avoid financial liability for loans if predatory lending has occurred. The Act also provides that certain creditors and purchasers and assignees of loans may avoid some types of liability if certain conditions are met.

Proposed N.J.A.C. 3:5-8 codifies the Act's provisions limiting borrowers' affirmative claims or defenses to the amounts required to reduce or extinguish liability under a home loan, plus the amount paid in connection with such a transaction plus costs. Proposed N.J.A.C. 3:5-8.1 applies to a home loan made, arranged or assigned by a seller of manufactured homes or of home improvements and to loans that were made by or through a creditor to whom the borrower was referred by such a seller. The section provides that borrowers on such loans may assert against the original creditors and any purchasers or assignees of the loans referenced in the section all affirmative claims or any defenses the borrower may have against a seller of manufactured homes or of home improvements, including any claims and defenses available under the Act against a home improvement contractor who was retained by a seller of home improvements to make home improvements on the borrower's dwelling. Claims or defenses related to the quality of the workmanship of the home improvement contractor, as opposed to claims and defenses related to the financing of the purchase of the home improvements, would not be among those that could be asserted by the borrower pursuant to this section. This approach is consistent with that taken in the Home Repair Financing Act, N.J.S.A. 17:16C-62 et seq. The Home Repair Contractor's Regulatory Act, P.L. 2004, c. 16, N.J.S.A. 56:8-136, addresses issues related to quality of workmanship.

Proposed N.J.A.C. 3:5-8.2(a) specifies actions which may be taken by purchasers or assignees on the basis of which the Department will presume, for purposes of administrative liability, that the purchaser or assignee has exercised reasonable due diligence in its efforts to determine whether a loan it purchased or on which it took an assignment was a high-cost home loan. Proposed N.J.A.C. 3:5-8.2(b), (c) and (d) codify the Act's provisions limiting the liability of purchasers and assignees of high-cost home loans. Different limitations, based on particular factual situations, are recited in these respective subsections. Subsections (e) and (g) through (j) in proposed N.J.A.C. 3:5-8.2 explain the interaction of the Act with the New Jersey Consumer Fraud Act, set forth compliance standards applicable to purchaser or assignee liability, and reiterate the statutory prohibition against dividing transactions into parts or engaging in other subterfuges in an attempt to evade the Act. Proposed N.J.A.C. 3:5-8.2(f) makes it clear that the limitations on assignee liability are limited to the grounds set out in N.J.S.A. 46:10B-27.b. Subsection (h) references the possibility of damage recoveries under both N.J.S.A. 46:10B-27.a and 27.c in an action in which claims under both of those provisions are asserted simultaneously. In such a case, the damage limitations in the Act would apply to the respective claims. The general principle that no double recovery may be obtained for the same loss would apply.

Proposed N.J.A.C. 3:5-8.2 (k), (l) and (m) set out methods that purchasers or assignees of loans may utilize to avoid or minimize administrative liability to the Department under the Act.

Proposed N.J.A.C. 3:5-9.1(a) restates the statutory section located in the Act at N.J.S.A. 46:10B-30 indicating the possibility of alternate rights, remedies and prohibitions.

Proposed N.J.A.C. 3:5-9.1(b) restates the statutory section located in the Act at N.J.S.A. 46:10B-23.d indicating that recent amendments to the Act do not relieve creditors of the duty to abide by the Consumer Fraud Act, N.J.S.A. 56:8-1 et seq.

This rule proposal provides for a comment period of 60 days, and, therefore, pursuant to N.J.A.C. 1:30-3.3(a)5, is not subject to the provisions of N.J.A.C. 1:30-3.1 and 3.2 governing rulemaking calendars.

Social Impact

The proposed new rules should have a positive social impact on New Jersey home loan borrowers. The proposed new rules implement the Act, which was designed to eliminate certain predatory lending practices in the State without diminishing access to legitimate sources of credit. Consequently, it is anticipated that, as a result of the proposed new rules, borrowers will be better protected from unscrupulous lending practices, while New Jersey's active lending market will be preserved.

Predatory lending has a detrimental effect on New Jersey borrowers who purchase, improve, or refinance their homes. Predatory practices unfairly enrich predatory creditors while leaving New Jersey borrowers with burdensome monthly mortgage payments and depleted home equity. Further, predatory lending practices are a direct cause of foreclosures, which result in the borrower and his or her family completely losing their home. Strict regulation to curtail predatory lending will improve the general welfare of New Jersey home loan borrowers. By establishing disincentives for creditors to make predatory loans, the proposed new rules foster the likelihood that borrowers will only be offered home loan transactions with reasonable points and fees, interest rates and monthly mortgage payments that they can afford, thereby better

enabling them to retain valuable equity in their home. Further, the proposed new rules should deter predatory lending practices in New Jersey by giving home loan borrowers additional means by which to avoid entering into a predatory lending transaction altogether, and establishing grounds upon which, in addition to the civil avenues of relief afforded to borrowers under the Act, administrative action against creditors who engage in predatory lending may be pursued.

Economic Impact

The Department expects that the proposed new rules will, for the most part, have a positive economic impact. Because the proposed new rules balance the dual interests of protecting consumers and preserving New Jersey's home loan lending market, the proposed new rules should positively impact both borrowers, who now will have enhanced legal protections against predatory creditors, and legitimate creditors who will be able to continue to make loans to all New Jerseyans, including those with impaired credit.

Some creditors or others who purchase or take assignments of loans may use professionals such as accountants or attorneys to assist in designing and/or conducting compliance programs. Third party computer software packages or internally developed computer programs may also be used for compliance purposes. Costs for these will vary based upon the services provided.

The Department expects the proposed new rules will have a detrimental economic impact on predatory creditors, so that predatory creditors either will no longer do business in New Jersey, or will no longer use predatory lending schemes upon New Jersey home loan borrowers.

Based upon information received from lenders, as a result of the recent amendments to the Act, home loan lending activity in New Jersey may increase substantially. This would be a positive effect.

Federal Standards Analysis

The Federal Homeownership and Equity Protection Act of 1994 (HOEPA), P.L. 103-325, and the regulations adopted thereunder at 12 CFR 226 provide protections to certain consumers who enter into residential mortgages on their principal dwellings. Some of the protections are prohibiting an increase in the interest rate on a loan upon default, prohibiting loans with balloon payments, prohibiting terms under which more than two periodic payments required under the loan are consolidated and paid in advance from the loan proceeds and, in certain circumstances, extending liability on claims and defenses that the consumer could assert against the creditor to those who purchase or receive an assignment of home loans.

The protections of HOEPA apply if certain points and fees and/or interest rate “thresholds” are exceeded. HOEPA applies to loans where the total points and fees payable by the consumer at or before closing will exceed eight percent of the total loan amount or \$400.00, whichever is greater; or if the annual percentage rate will exceed by more than eight percentage points for first lien loans, or by more than 10 percentage points for subordinate lien loans, the yield on Treasury securities having comparable periods of maturity on the 15th day of the month immediately preceding the month in which the application for credit is received by the creditor.

The proposed new rules set forth similar protections for consumers as does HOEPA in the area of affirmative claims and defenses. In the Act and the proposed new rules, the

protections apply to “high cost home loans” which are defined in the Act and in the proposed new rules at N.J.A.C. 3:5-1.3, as those exceeding either the “rate threshold” or the “total points and fees threshold.” The definitions of “rate threshold” in HOEPA and in the proposed new rules are identical. The “total points and fees threshold” in the proposed new rules is lower; therefore, the proposed new rules contain standards that exceed those established by HOEPA. The proposed new rules extend the protections set forth in both HOEPA and the Act to a larger group of loans because of the lower threshold. Although the proposed new rules exceed Federal standards, they implement the Legislature’s clear intent, as set forth in the definition of “high-cost home loan” at N.J.S.A. 46:10B-24, to extend these protections to borrowers who pay total points and fees in excess of the total points and fees threshold specified in that statutory definition. Borrowers on loans that exceed the “total points and fees threshold” in these proposed rules, but would not exceed the HOEPA threshold, enjoy these protections, which are a benefit to this group of borrowers. They are also a potential cost to their respective lenders. Potential costs would be limiting an increase in the interest rate on a loan in the event of default, preventing more than two loan payments from being paid in advance to the lender from the loan proceeds and preventing the lender or purchaser or assignee of the loan from collecting the loan balance when there has been a violation of the proposed rules.

The proposed new rules also contain restrictions and/or prohibitions with regard to loans not found in HOEPA. Therefore, the proposed new rules contain standards that exceed those established by HOEPA in addition to those discussed above. Some of these are prohibitions against attempting to avoid the proposed new rules by dividing a transaction into separate parts or any other subterfuge, and providing a six-year time frame from the closing of a high cost

home loan to assert against a creditor or subsequent holder or assignee a violation of the Act as an original action and not just as a defense. Although the proposed new rules exceed Federal standards, they carry out the Legislature's clear intent, as set forth at N.J.S.A. 46:10B-27, that consumers whose loans are high-cost home loans be provided with this higher level of protection. This would be a benefit to this group of borrowers and could result in costs being incurred by their respective lenders. The potential costs could include preventing the lender or purchaser or assignee of the loan from collecting the loan balance when there has been a violation of the proposed rules.

An extension of credit under HOEPA is defined as a consumer credit transaction secured by the consumer's principal dwelling, but does not include a mortgage given in connection with the acquisition or initial construction of a dwelling or a transaction under an open end credit plan. The proposed new rules cover a mortgage given in connection with the acquisition or initial construction of a dwelling and a loan under an open end credit plan. This is a larger group of loans and, therefore, the proposed new rules also contain standards in this area that exceed those established by HOEPA. Again, these proposed new rules carry out the Legislature's clear intent on this issue, as set forth in the definition of "home loan" at N.J.S.A. 46:10B-24, to afford this additional level of protection to consumers. Borrowers whose mortgage loans are given in connection with the acquisition or initial construction of a dwelling or a transaction under an open-end credit plan would enjoy protections not available to them under HOEPA. This would be a benefit to this group of borrowers and result in potential costs being incurred by their respective lenders. The potential cost could include preventing a lender or purchaser or assignee

of the loan from collecting the loan balance when there has been a violation of the proposed rules.

The proposed new rules at N.J.A.C. 3:5-8.1 permit affirmative claims and defenses against creditors, assignees or holders in any capacity where the home loan was made, arranged or assigned by a person selling either a manufactured home or home improvements to the dwelling of a borrower or was made by or through a creditor to whom the borrower was referred by such seller. This is a broader approach than that taken in HOEPA, which does not provide for such liability. Therefore, these proposed new rules also contain standards that exceed those established by HOEPA. Although they exceed Federal standards, the proposed new rules implement the Legislature's clear intent, as set forth at N.J.S.A. 46:10B-27a, to provide this higher level of protection to consumers who receive such loans. Borrowers who qualify under the rules would enjoy the protections of N.J.A.C. 3:5-8.1 set forth earlier in this paragraph. This would be a benefit to this group of borrowers and a potential cost to their respective lenders. The potential cost could be preventing the lender or purchaser or assignee of the loan from collecting the loan balance when there has been a violation of the proposed rules.

Lastly, certain definitions contained in 12 U.S.C. § 1841, 15 U.S.C. §§ 1601, 1602(aa), and 1605, 42 U.S.C. § 5401, HOEPA Pub. L. 103-325, 12 C.F.R. 226 and 16 C.F.R. 433 are incorporated by reference in the proposed new rules, making the requirements of the proposed new rules with regard to the scope of these definitions the same as those imposed by Federal standards .

Jobs Impact

The Department does not anticipate that any jobs will be gained or lost as a result of the proposed new rules.

The Department invites commenters to submit any data or studies concerning the jobs impact of the proposed new rules together with their written comments on other aspects of this proposal.

Agriculture Industry Impact

The Department does not expect any agriculture industry impact from the proposed new rules.

Regulatory Flexibility Analysis

Some New Jersey creditors and others who purchase loans or take assignments of loans are small businesses as defined in the Regulatory Flexibility Act, N.J.S.A. 52:14B-16 et seq. The proposed new rules will impose compliance requirements on these entities.

Part of the compliance requires prompt posting of loan payments received by creditors from borrowers. Additional compliance requirements, which also impose recordkeeping responsibilities, affect creditors and purchasers or assignees of loans who seek to avoid liability related to their involvement with high cost loans. This compliance and recordkeeping would involve having policies and systems in place to prevent the purchase or acceptance of assignments of high cost loans. Such systems would include computer programs to screen loans, random sampling, exercising due diligence in operations and recordkeeping to document the steps taken.

Some creditors and others who purchase or take assignments of loans may use outside vendors or professionals to undertake or assist in the compliance and recordkeeping requirements imposed by the proposed new rules. Costs are discussed in the Economic Impact above.

The intent of the proposed new rules and of the Act is to protect borrowers of certain home loans, home improvement loans and manufactured home loans from predatory lending practices. Given this purpose, and the strong public policy of the State of New Jersey to protect its citizens from the negative impact of predatory lending, no differentiation is made in the proposed new rules based upon the size of the creditor or of a business that purchases or takes an assignment of a loan.

Smart Growth Impact

The proposed new rules will have no impact on the achievement of smart growth and implementation of the State Development and Redevelopment Plan.

Full text of the proposed new rules follows:

CHAPTER 5

PREDATORY LENDING

SUBCHAPTER 1. GENERAL PROVISIONS

3:5-1.1 Purpose

The purpose of this chapter is to implement the New Jersey Home Ownership Security Act of 2002, N.J.S.A. 46:10B-22 et seq.

3:5-1.2 Scope

This chapter shall apply to all creditors and borrowers as defined in N.J.A.C. 3:5-1.3.

3:5-1.3 Definitions

The following words and terms, when used in this chapter, shall have the following meanings, unless the context clearly indicates otherwise.

"Affiliate" means any company that controls, is controlled by, or is under the common control with any company, as set forth in 12 U.S.C. §§ 1841 et seq.

"Banking day" means the part of a day on which a depository institution is open to the public for carrying on substantially all of its banking functions.

"Bona fide discount points" means loan discount points that:

1. Are knowingly paid by the borrower;
2. Are paid for the express purpose of reducing, and which result in a reduction of, the interest rate or time-price differential applicable to the loan;
3. Reduce the interest rate or time-price differential applicable to the loan from an interest rate that does not exceed the conventional mortgage rate for a home loan secured by a first lien, by more than two percentage points, or for a home loan secured by a junior lien by more than three and one half percentage points; and

4. Are recouped within the first five years of the scheduled loan payments. Loan discount points will be considered to be recouped within the first five years of the scheduled loan payments if the reduction in the interest rate that is achieved by the payment of the loan discount points reduces the interest charged on the scheduled payments such that the borrower's dollar amount of savings in interest over the first five years is equal to or exceeds the dollar amount of loan discount points paid by the borrower.

"Borrower" means any natural person obligated to repay the loan, including a coborrower, cosigner, or guarantor.

"Business day" means any day on which the office or offices of the creditor are open to the public to provide financial services.

"Business hours" means the hours during which a creditor, agent or servicer processes payments of the type received from the borrower.

"Commissioner" means the Commissioner of the New Jersey Department of Banking and Insurance.

"Construction loan" means a loan to a natural person having a term of two years or less, that is used to finance the construction of buildings or other structures and that does not automatically convert to permanent financing.

"Consumer credit" means a home loan to a borrower.

"Conventional mortgage rate" means the most recently published annual yield on conventional mortgages published by the Board of Governors of the Federal Reserve System, as published in Statistical Release H.15 or any publication that may supersede it, as of the applicable time set forth in 12 C.F.R. 226.32(a)1(i).

"Conventional prepayment penalty" means any prepayment penalty or fee that may be collected or charged in a home loan, and that is authorized by law other than by N.J.S.A. 46:10B-22 et seq., provided the home loan:

1. Does not have an annual percentage rate that exceeds the conventional mortgage rate by more than two percentage points; and
2. Does not permit any prepayment fees or penalties that exceed two percent of the amount prepaid.

"Creditor" means a person who extends consumer credit that is subject to a finance charge or is payable by written agreement in more than four installments, and to whom the obligation is payable at any time. Creditor shall also mean any person brokering a home loan, which shall include any person who directly or indirectly solicits, processes, places, or negotiates home loans for others or who closes home loans that may be in the person's own name with funds provided by others and which loans are thereafter assigned to the person providing the funding of such loans, provided that creditor shall not include a person who is an attorney providing legal services to the borrower or a person or entity holding an individual or organization insurance producer license in the line of title insurance or a title insurance company, as defined by N.J.S.A. 17:46B-1, or any officer, director or employee thereof, providing services in the closing of a home loan who is not also funding the home loan and is not an affiliate of the creditor or an assignee that is subject to the provisions of N.J.S.A. 46:10B-27.

"Department" means the New Jersey Department of Banking and Insurance.

"Depository institution" means any bank, savings bank, savings and loan association or credit union chartered by this or another state, the Federal government or a foreign jurisdiction.

“Escrow” means monies deposited by the borrower for payment of real estate taxes and homeowner’s insurance expenses in conjunction with a home loan. Escrow monies shall be passed through dollar for dollar to the tax collector or insurance company or agent and are not a point or fee for the purpose of calculating the total points and fees threshold.

“Escrow charge” means a reasonable fee for maintaining or managing an escrow paid to a person other than a creditor or an affiliate of the creditor or to the mortgage broker or an affiliate of the mortgage broker that meets the conditions set forth in 12 CFR 226.4(c)7 and 226.4(d)2.

“High-cost home loan” means a home loan for which the principal amount of the loan did not exceed \$350,000, in the first year following enactment of the Act, which amount was, pursuant to N.J.S.A. 46:10B-24, adjusted effective January 1, 2005 and shall thereafter be adjusted annually to include the last published increase of the housing component of the national Consumer Price Index, New York -- Northeastern New Jersey Region, in which the terms of the loan meet or exceed one or more of the thresholds as defined in this chapter.

“Home improvements” means the remodeling, altering, painting, repairing, or modernizing of a principal dwelling or the making of additions thereto, and includes, but is not limited to, the construction, installation, replacement, improvement, or repair of driveways, sidewalks, swimming pools, terraces, patios, landscaping, fences, porches, windows, doors, cabinets, kitchens, bathrooms, garages, basements and basement waterproofing, fire protection devices, security protection devices, central heating and air conditioning equipment, water softeners, heaters, and purifiers, solar heating or water systems, insulation installation, aluminum siding, wall-to-wall carpeting or attached or inlaid floor coverings, and other changes, repairs, or improvements made in or on, attached to or forming a part of the principal dwelling.

"Home loan" means an extension of credit primarily for personal, family or household purposes, and includes an open-end credit plan, but shall not include a reverse mortgage transaction or a construction loan, in which the loan is secured by:

1. A mortgage or deed of trust on real estate in this State upon which there is located or there is to be located a one to six family dwelling which is or will be occupied by a borrower as the borrower's principal dwelling; or

2. A security interest in a manufactured home which is or will be occupied by a borrower as the borrower's principal dwelling.

"Manufactured home" means a structure, transportable in one or more sections, that in the traveling mode is eight body feet or more in width or 40 body feet or more in length or, when erected on site is 320 or more square feet and which is built on a permanent chassis and designed to be used as a dwelling with a permanent foundation when erected on land, secured in conjunction with the real property on which the manufactured home is located and connected to the required utilities and includes the plumbing, heating, air-conditioning and electrical systems contained therein; except that such term shall include any structure which meets all the requirements of this paragraph except the size requirements and with respect to which the manufacturer voluntarily files a certification required by the Secretary of the United States Department of Housing and Urban Development and complies with the standards established under the Federal National Manufactured Housing Construction and Safety Standards Act of 1974, 42 U.S.C. §§ 5401 et seq. Such term does not include rental property or second homes or manufactured homes when not secured in conjunction with the real property on which the manufactured home is located.

“Mortgage insurance premiums” or “private mortgage insurance” mean premiums for insurance protecting the lender against the borrower’s default or other credit loss.

"Points and fees" means:

1. All items listed in 15 U.S.C. §§ 1605(a)(1) through (4), except interest or the time- price differential;
2. All charges listed in 15 U.S.C. § 1605(e);
3. All compensation paid directly or indirectly to a mortgage broker, including a broker that originates a loan in its own name in a table-funded transaction;
4. The cost of all premiums financed by the creditor, directly or indirectly, for any credit life, credit disability, credit unemployment or credit property insurance, or any other life or health insurance, or any payments financed by the creditor directly or indirectly for any debt cancellation or suspension agreement or contract, except that insurance premiums calculated and paid on a monthly basis shall not be considered financed by the creditor;
5. The maximum prepayment fees and penalties that may be charged or collected under the terms of the loan documents;
6. All prepayment fees or penalties that are incurred by the borrower if the loan refinances a previous loan made or currently held by the same creditor or an affiliate of the creditor, except that this paragraph shall not apply to a loan which refinances a previous loan made by the same broker and funded by another creditor; and
7. For open-end loans, the points and fees are calculated by adding the total points and fees known at or before closing, including the maximum prepayment penalties which may be charged or collected under the terms of the loan documents if prepayment penalties are

authorized by law other than by N.J.S.A. 46:10B-22 et seq., plus the minimum additional fees the borrower would be required to pay to draw down an amount equal to the total credit line.

"Points and fees" shall not include the following items: title insurance premiums and fees, charges and premiums paid to a person or entity holding an individual or organization insurance producer license in the line of title insurance or a title insurance company, as defined by N.J.S.A. 17:46B-1; taxes, filing fees, and recording and other charges and fees paid or to be paid to public officials for determining the existence of or for perfecting, releasing, or satisfying a security interest; and reasonable fees paid to a person other than a creditor or an affiliate of the creditor or to the mortgage broker or an affiliate of the mortgage broker for the following, provided that the conditions in 12 C.F.R. 226.4(c)(7) are met; fees for tax payment services; fees for flood certification; fees for pest infestation and flood determinations; appraisal fees; fees for inspections performed prior to closing; fees for credit reports; fees for surveys; attorneys' fees; notary fees; escrow charges; fire and flood insurance premiums, provided that the conditions in 12 C.F.R. 226.4(d)(2) are met.

"Rate" means that annual percentage rate for the loan calculated at closing based on the points and fees set forth in this chapter and according to the provisions of 15 U.S.C. §§ 1601 et seq. and the regulations promulgated thereunder by the Federal Reserve Board.

"Received" means the actual receipt at any office designated by the creditor as a place to which the payments may be submitted or by a person designated by the creditor as a person to whom the payments may be submitted or, if no such place or person is so designated, at the creditor's principal office or any of its branch offices.

“Seller” means a seller as defined in the Federal Trade Commission (FTC) Holder Rule at 16 C.F.R. 433.1(J), incorporated herein by reference, and includes sellers, as defined therein, of manufactured homes and home improvements.

“Threshold” means any one of the following two items, as defined:

1. “Rate threshold” means the annual percentage rate of the loan at the time the loan is consummated such that the loan is considered a "mortgage" under section 152 of the federal Home Ownership and Equity Protection Act of 1994, P.L. 103-325 (15 U.S.C. §1602(aa)), and the regulations promulgated by the Federal Reserve Board, including 12 C.F.R. 226.32, without regard to whether the loan transaction is or may be a "residential mortgage transaction," as defined in 12 C.F.R. 226.2(a)(24). The definition of “points and fees” in 15 U.S.C. § 1605 shall be used for this determination. This section of Federal law shall also be used for determining the rate of interest on variable rate loans.

2. "Total points and fees threshold" means that the total points and fees payable by the borrower at or before the loan closing, excluding either a conventional prepayment penalty or up to two bona fide discount points, exceed:

i. Four and a half percent of the total loan amount if the total loan amount is \$40,000 or more; or

ii. The lesser of six percent of the total loan amount or \$1,000, if the total loan amount is less than \$20,000, and six percent if the total loan amount is \$20,000 or more but less than \$40,000.

“Total amount paid by the borrower in connection with the transaction” means all amounts paid by the borrower to the original creditor, including principal and interest, and all

amounts paid to subsequent holders. Payments made to a seller who is not also the original creditor, such as a down payment or trade-in, are not part of the credit transaction and as such are not considered to be part of the “total amount paid in connection with the transaction.” Where the seller also acts as the original creditor, down payments, deposits, periodic payments, late fees, and other payments to the seller are included in the calculation of the maximum amount a borrower may recover through a claim brought pursuant to N.J.S.A. 46:10B-27a.

"Total loan amount" means the principal of the loan minus those points and fees as defined in this section that are included in the principal amount of the loan. For open-end loans, the total loan amount shall be calculated using the total line of credit allowed under the home loan.

SUBCHAPTERS 2. THROUGH 4 (RESERVED)

SUBCHAPTER 5. HOME LOANS

3:5-5.1 Posting payments received

(a) When a creditor that is a depository institution receives a home loan payment, the creditor shall treat the payment as posted on the banking day that the payment is received. For purposes of the posting requirements in this section, payments received by a servicer or agent of a depository institution shall be treated as received by the depository institution.

(b) A payment received by a creditor that is not a depository institution shall, if received before the end of business hours, be posted on the business day that it is received or, if received after the end of business hours, on the next business day. For purposes of the posting requirements in this section, payments received by a servicer or agent of a non-depository entity shall be treated as received by the non-depository entity.

SUBCHAPTERS 6. AND 7. (RESERVED)

SUBCHAPTER 8. AFFIRMATIVE CLAIMS AND DEFENSES

3:5-8.1 Loans in which sellers, including sellers of manufactured homes and home improvements, are involved

(a) If a home loan was made, arranged or assigned by a seller of manufactured homes or of home improvements to the dwelling of a borrower, or was made by or through a creditor to whom the borrower was referred by such a seller, the borrower may assert against the original creditor and any person who purchases or is otherwise assigned the loan all affirmative claims and any defenses that the borrower may have against such a seller of manufactured homes or home improvements, including any claims and defenses available under N.J.S.A. 46:10B-22 et seq. against a home improvement contractor retained by the seller of home improvements to make home improvements on the borrower's dwelling. The amounts of any such affirmative claims and defenses shall be limited to amounts required to reduce or extinguish the borrower's liability under the home loan, plus the total amount paid by the borrower in connection with the

transaction, plus amounts required to recover costs, including reasonable attorney's fees against the creditor, any assignee or holder, in any capacity.

(b) If a loan covered by (a) was made by the seller or assigned to a creditor by the seller, all payments made to the seller including down payments, deposits, periodic payments, late fees and other payments are considered paid in connection with the transaction.

(c) If a loan covered by (a) was made by a creditor by way of a referral or arrangement through the seller, down payments, deposits, periodic payments, late fees and other payments made to the seller are not considered paid in connection with the transaction.

3:5-8.2 Purchaser and assignee liability under N.J.S.A. 46:10B-27

(a) Pursuant to N.J.S.A. 46:10B-27b, any person who purchases or is otherwise assigned a high-cost home loan shall be subject to all affirmative claims and any defenses with respect to the loan that the borrower may assert against the original creditor or broker of the loan; except that the liability thereunder shall not arise if the purchaser or assignee demonstrates, by a preponderance of the evidence, that a reasonable person exercising reasonable due diligence could not determine that the loan was a high-cost home loan.

1. In any administrative action commenced under N.J.S.A. 46:10B-22 et seq. or this chapter, it shall be presumed by the Department that a purchaser or assignee of a high cost home loan has exercised such due diligence if the purchaser or assignee demonstrates by a preponderance of the evidence that it:

i. Has in place, at the time of the purchase or assignment of the loan, policies that expressly prohibit its purchase or acceptance of assignment of any high-cost loan;

ii. Requires by contract that all sellers or assignors of home loans represent and warrant to the purchaser or assignee that either:

(1) It will not sell or assign any high-cost home loan to the purchaser or assignee, or

(2) That the seller or assignor is a beneficiary of a representation and warranty from a previous seller or assignor to that effect; or

iii. Exercises reasonable care and applies reasonable scrutiny at the time of the purchase or assignment of home loans or within a reasonable period of time thereafter, which care and scrutiny are intended by the purchaser or assignee to prevent it from purchasing or taking assignment of any high-cost loan.

(b) With respect to a claim brought under N.J.S.A. 46:10B-27c, notwithstanding any other law to the contrary, a borrower acting only in an individual capacity may, within six years of the closing of a high-cost home loan, assert against the creditor or any subsequent holder or assignee of the home loan a violation of N.J.S.A. 46:10B-22 et seq. in connection with the loan as an original action.

(c) With respect to a claim brought under N.J.S.A. 46:10B-27c, notwithstanding any other law to the contrary, a borrower acting only in an individual capacity may, at any time during the term of a high-cost home loan after an action to collect on the home loan or foreclose on the collateral securing the home loan has been initiated or the debt arising from the home loan has been accelerated or the home loan has become 60 days in default, assert against the creditor or any subsequent holder or assignee of the high-cost home loan any defense, claim or counterclaim.

(d) Pursuant to N.J.S.A. 46:10B-27c, the damages sought in any original action as referenced in (b) above, or in any claim or counterclaim as referenced in (c) above, shall be limited to amounts required to reduce or extinguish the borrower's liability under the home loan plus amounts required to recover costs, including reasonable attorney's fees not included in the principal amount of the loan.

(e) No person shall, in bad faith or otherwise in an attempt to avoid the application of N.J.S.A. 46:10B-22 et seq.:

1. Divide any loan transaction into separate parts; or
2. Undertake any other such subterfuge, with the intent of evading the provisions of N.J.S.A. 46:10B-22 et seq.

(f) The limitations on assignee liability with respect to high cost home loans as set forth in (a) above shall not apply to assignee liability asserted on any ground other than N.J.S.A. 46:10B-27.b.

(g) The limitations in this chapter shall apply to any assignee liability arising under N.J.S.A. 46:10B-27 regardless of whether an individual asserting assignee liability pursuant to this chapter chooses to pursue such an action under the Consumer Fraud Act, as authorized under N.J.S.A. 46:10B-29a, or under the Act, as authorized under N.J.S.A. 46:10B-29b. Regardless of which alternative method for seeking damages against an assignee the borrower chooses to pursue, whenever a borrower alleges assignee or holder liability pursuant to N.J.S.A. 46:10B-27, the limitations and conditions set forth in the applicable subsections of N.J.S.A. 46:10B-27 shall apply to such assignee liability.

(h) Any borrower asserting a claim under N.J.S.A. 46:10B-22 et seq. may, in appropriate circumstances, recover damages under both N.J.S.A. 46:10B-27.a and 27.c from one assignee on the basis of separate claims brought simultaneously under N.J.S.A. 46:10B-27.a and 27.c in connection with the same loan transaction. In such a case the limitations on damages set forth in N.J.S.A. 46:10B-27 would apply to the respective claims made under N.J.S.A. 46:10B-27.a and 27.c.

(i) The limitations upon and conditions for assignee liability prescribed by N.J.S.A. 46:10B-27 may not be avoided by a borrower seeking to obtain separate compensatory and punitive damages against the same assignee. The limitations on damages set forth in N.J.S.A. 46:10B-27 apply to the total of all types of damages.

(j) If a seller of home improvements or manufactured homes is not otherwise involved in the transaction as specified in N.J.S.A. 46:20B-27.a, the loan shall not give rise to assignee liability pursuant to N.J.S.A. 46:10B-27.a. This rule applies irrespective of whether the loan is secured by a first lien, or by a second or subsequent lien (sometimes referred to as a “junior lien”), whether the transaction is a cash-out refinance, and whether the proceeds of the loan are used to pay for home improvements or to purchase a manufactured home.

1. A seller of manufactured homes or home improvements who has referred a borrower to a creditor shall be deemed to be otherwise involved as set forth in N.J.S.A. 46:10B-27.

2. Where a borrower refinances without the involvement of a seller of manufactured homes or home improvements as set forth in N.J.S.A. 46:10B-27.a and subsequently uses the funds obtained in the process to pay for a manufactured home or for home

improvements, the seller of manufactured homes or home improvements shall not be deemed to be otherwise involved in the transaction.

(k) The exercise of reasonable due diligence as referenced in N.J.S.A. 46:10B-27.b(3) does not, in all cases, require compliance review of one hundred percent of the loans being acquired. Depending upon the size of the loan pool being purchased or acquired by an assignee and/or the assignee being aware of information material to the determination of whether a lender engages in making high-cost home loans, including but not limited to any indication of the presence of high cost home loans in a loan pool, sampling, if properly performed, shall be considered reasonable due diligence by the Department. In order for sampling to be considered reasonable due diligence by the Department, purchasers or assignees shall, at a minimum, conduct quality control review of appropriate loan documentation at the beginning of the buyer/seller relationship, whenever a particular problem is identified, and throughout the relationship by random sampling. When a loan pool is very small or initial review has uncovered a high number of high cost loans, more extensive review is required to meet the reasonable due diligence standard.

(l) Creditors may utilize third party software packages or internally developed computer programs to comply with the requirements of N.J.S.A. 46:10B-27.b(3) or to determine whether loans are home loans or high cost home loans. Such software programs shall be calibrated and tested prior to use and periodically tested as part of an ongoing compliance review process. Periodic manual oversight and monitoring shall be done to ensure that the software is performing adequately and to evaluate matters not addressed by the software.

(m) A creditor may secure documentation from the borrower in which the borrower represents that no contractor or seller referred the borrower to the creditor, arranged the loan or was otherwise involved in facilitating the loan transaction. The Department shall consider such documentation when contemplating the exercise of its administrative authority pursuant to the Act.

SUBCHAPTER 9. ENFORCEMENT

3:5-9.1 Rights, remedies, prohibitions declared additional, cumulative

(a) Pursuant to N.J.S.A. 46:10B-30, the rights, remedies, and prohibitions accorded by the provisions of this chapter are hereby declared to be in addition to and cumulative of any other right, remedy, or prohibition accorded by the common law or statutes of the United States or of this State, and nothing herein shall be construed to deny, abrogate, or impair any such common law or statutory right, remedy, or prohibition. Without limiting the foregoing, the rights, remedies and prohibitions accorded by this chapter are hereby further declared to create no presumption that any home loan or any term in a home loan is not unconscionable, whether or not the home loan or loan term, alone or in conjunction with other terms of the loan, violates the provisions of this chapter.

(b) In accordance with N.J.S.A. 46:10B-23.d, the amendments in P.L. 2004, c. 84 to the New Jersey Home Ownership Security Act of 2002, N.J.S.A. 46:10B-22 et seq., deleting the covered home loan category from N.J.S.A. 46:10B-25 and the prohibition on flipping a home loan, shall create no presumption that any home loan that has been refinanced is not

unconscionable. The deletions of the covered home loan category and of the prohibition on flipping from N.J.S.A. 46:10B-25 shall also create no presumption that any home loan that is refinanced does not constitute an unlawful practice under the Consumer Fraud Act, N.J.S.A. 56:8-1 et seq.

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