

BANKING
DEPARTMENT OF BANKING AND INSURANCE
DIVISION OF BANKING

Advertising

Readoption with Amendments: N.J.A.C. 3:2

Proposed: September 6, 2005 at 37 N.J.R. 3101(a)

Adopted: January 20, 2006 by Donald Bryan, Acting Commissioner, Department of
Banking and Insurance

Filed: January 20, 2006 as R. 2006 d.73, **with substantive changes** not requiring
additional public notice and comments (see N.J.A.C. 1:30-6.3).

Authority: N.J.S.A. 17:1-15(e) and 17:16H-1 et seq.

Effective Date: January 20, 2006, Readoption.
February 21, 2006, Amendments.

Expiration Date: January 20, 2011.

Summary of Public Comments and Agency Responses:

The Department of Banking and Insurance received written comments from E. Robert Levy, Executive Director and Counsel, Mortgage Bankers Association of New Jersey/New Jersey Association of Mortgage Brokers; John N. Hale, Founder and CEO, Glendenning Mortgage Corporation; James R. Silkensen, CAE, Executive Vice President, New Jersey League of Community Bankers; and Levy and Watkinson, P.C.

COMMENT: One commenter stated that the proposed amendment to N.J.A.C. 3:2-1.3(c) requiring all advertisements for loan products by a mortgage broker (or a mortgage banker acting solely as a mortgage broker with respect to the advertised products) shall contain a statement to the effect that the mortgage broker (or mortgage banker acting as set forth above) arranges loans with third-party providers is redundant to N.J.A.C. 3:2-1.4(b)5 and should not be adopted. The

commenter stated that N.J.A.C. 3:2-1.4(b)5 already provides that an advertisement by a mortgage broker, or a mortgage banker acting as a broker, must conspicuously state that the advertiser will not make any commitments or fund any mortgage loans under the advertised program.

RESPONSE: The Department believes that requiring brokers (or mortgage bankers acting solely as broker) who advertise specific loan products to disclose that they arrange loans with third party providers would be beneficial to consumers to insure that prospective borrowers have a full understanding that the advertised loan product will be funded by a third party provider and not by the advertiser. The references in N.J.A.C. 3:2-1.4(b)5 to the advertiser not making loan commitments or funding loans may not be sufficiently clear to convey to borrowers unfamiliar with the lexicon of the lending business the fact that the advertiser will be brokering a loan transaction between the borrower and a third party lender.

The Department has, however, decided that the text of the amendment would be better placed in N.J.A.C. 3:2-1.4(b)5, as it elaborates on the references therein to a failure of an advertisement to conspicuously state that the advertiser will not make any mortgage loan commitment or fund any mortgage loan under the advertised program. Accordingly, N.J.A.C. 3:2-1.3(c) as proposed is not being adopted and N.J.A.C. 3:2-1.4(b)5 is being amended upon adoption to include that text.

COMMENT: One commenter stated that proposed amendment N.J.A.C. 3:2-1.3(c) does not accurately describe the activities of a broker by stating that a broker “arranges” loans, when brokers are required to perform services including, but not limited to, reviewing credit and ordering the appraisal to justify fees.

RESPONSE: The Department is aware of the various services performed by brokers and does not intend the word “arrange” to be taken as a limiting term. However, these rules are intended to regulate the advertisement of loan products by brokers (or mortgage bankers acting solely as brokers) and do not require the inclusion of a comprehensive list of the activities of mortgage brokers, such as the reviewing of credit and the ordering appraisals, in advertisements by brokers.

COMMENT: One commenter stated, with respect to requiring advertisements by mortgage brokers or mortgage bankers acting as brokers to state that the broker or banker arranges loans with third party providers, it is unclear whether such a statement is intended to be used only with a loan product or products that will be brokered, and what responsibility a mortgage banker has if he does not initially intend to broker an advertised loan product but later does so.

RESPONSE: The third party provider disclosure requirement applies only to mortgage loan products advertised by a mortgage broker (or by a mortgage banker that acts solely as a mortgage broker) that will be brokered or may be brokered. If, at the time of making the advertisement, a mortgage banker is unsure of the capacity in which it will function with respect to one or more advertised loans, the inclusion of a statement in the advertisement to the effect that it may arrange loans with the third-party providers would, absent other material facts that were inconsistent with such a statement, be deemed substantial compliance with the amended rule.

COMMENT: One commenter stated the proposed amendment regarding the advertisement of “unqualified access to credit” in N.J.A.C. 3:2-1.4(b)3 is inherently inconsistent in that it requires

that only when advertising “unqualified access to credit” one must disclose specific material limitations on the availability of credit.

RESPONSE: The Department notes that the proposed amendment to N.J.A.C. 3:2-1.4(b)3 provided examples of “material limitations on the availability of such credit” as that phrase reads in the current text of the rule. The examples all refer to the terms of the loan in question. In contrast, the reference to the advertisement of “unqualified access” to credit is intended to refer to the absence of qualifications pertaining to the creditworthiness of the borrower. Thus, there is no inconsistency created by the requirement to disclose material limitations on the availability of credit that relate to loan terms when advertisements indicate that loans are available regardless of the qualifications of the borrower.

COMMENT: Several comments were received with respect to the applicability of N.J.S.A. 46:10B-33, et seq., the New Jersey Home Ownership Security Act (“HOSA”), to N.J.A.C. 3:2-1.4(e) as proposed. The issues raised by the commenters are: a) whether or not a New Jersey licensee who brokers a mortgage loan product to an out-of-State lender that may require acceptance of a prepayment penalty provision to qualify should bear the responsibility for the legal validity of the loan’s terms under HOSA if those terms are legally valid under federal law through Federal preemption; b) that N.J.A.C. 3:1-16.10(c) provides that a mortgage broker cannot promise any specific loan term or condition to borrower; c) that, in the context of HOSA, a mortgage broker is only liable for acts performed by the mortgage broker and not acts performed by the lender; d) that the mortgage broker is not a party to any attempt to collect a prepayment fee, the collection of which, as opposed to the advertisement of which, would be a violation of New Jersey Law but which would, in any event, be legal through Federal

preemption; and e) that no statute or regulation should hold the broker responsible for violating State law at a stage in the process when the terms of the loan are not finalized and are subject to change, particularly if the loan is ultimately legal.

RESPONSE: The comments raise significant questions with respect to Federal preemption of State law, specifically, the proposed N.J.A.C. 3:2-1.4(e). The Department has decided to further analyze and review the issues raised in these comments and, consequently, has determined not to adopt proposed N.J.A.C. 3:2-1.4(e) at this time.

Full text of the readopted rules may be found in the New Jersey Administrative Code at N.J.A.C. 3:2.

Full text of the adopted amendments follows (additions to proposal indicated in boldface with asterisks ***thus***; deletions from proposal indicated in brackets with asterisks ***[thus]***):

3:2-1.3 Required disclosure

(a) - (b) (No change from proposal.)

[(c) All advertisements for loan products by a mortgage broker (or a mortgage banker acting solely as a mortgage broker with respect to the advertised products) shall contain a statement to the effect that the mortgage broker (or mortgage banker acting as set forth above) arranges loans with third-party providers.]

3:2-1.4 Violations of the Act

(a) (No change.)

(b) Without limiting (a) above, the following conduct shall be deemed deceptive or misleading:

1.- 4. (No change from proposal.)

5. The advertisement of a mortgage loan by a mortgage broker (or mortgage banker that acts merely as a mortgage broker with regard to the advertised loan) that does not specifically and conspicuously state that the advertiser will not make any mortgage loan commitments or fund any mortgage loans under the advertised program ***and does not contain a statement that conspicuously states that the mortgage broker (or mortgage banker acting as set forth above) arranges loans with third-party providers***;

6. – 8. (No change from proposal.)

(c) – (d) (No change.)

[(e) No financial institution shall advertise a loan that does not comply with the provisions of the New Jersey Home Ownership Security Act (HOSA), N.J.S.A. 46:10B-27 et seq., even if the entity to whom the financial institution may broker such loan is not subject to HOSA by operation of Federal preemption.]