**Filed February 20, 2014**

**BANKING**

**DEPARTMENT OF BANKING AND INSURANCE**

**DIVISION OF BANKING**

**Predatory Lending**

**Readoption with Amendments: N.J.A.C. 3:30**

Proposed: September 16, 2013, at 45 N.J.R. 2063(a).

Adopted: February 11, 2014, by Kenneth E. Kobylowski, Commissioner, Department of Banking and Insurance.

Filed: February 12, 2014, as R.2014 d.042, **with substantial and technical changes** not requiring additional public notice and comment (see N.J.A.C. 1:30-6.3).

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

Effective Date: February 12, 2014, Readoption;

March 17, 2014, Amendments.

Expiration Date: February 12, 2021.

**Summary** of Public Comments and Agency Responses:

The Department of Banking and Insurance (Department) received comments from Joseph E. Mayk of the law firm of Anderson Cook, LLP.

COMMENT: The Federal Standards Analysis published in the proposal at 45 N.J.R. 2063(a) states that the Home Ownership Security Act, N.J.S.A. 46:10B-22 et seq. (HOSA) uses the same "rate threshold" as the Federal Homeownership and Equity Protection Act (HOEPA). The HOSA and the rules proposed for readoption define "rate threshold" by reference to 15 U.S.C. § 1602(aa) and regulations promulgated by the Federal Reserve Board at 12 CFR § 226.32. This

definition has created uncertainty in the industry because neither HOSA nor the rules proposed for readoption expressly provide that creditors should follow the annual percentage rate (APR) threshold in the HOEPA and its implementing regulation as it is amended from time to time. The absence of such a clarification is problematic because the HOEPA APR threshold will change significantly on January 10, 2014. Without clarification from the Department that creditors should use the HOEPA APR threshold as it is amended from time to time, there will be uncertainty after January 10, 2014, as to whether creditors have to apply an APR threshold test for HOSA purposes that is different than the APR threshold test for HOEPA purposes.

As a result of amendments made by the Dodd-Frank Wall Street Reform and Consumer Protection Act (Dodd-Frank), the Federal statutory definition of a "high cost" mortgage has been relocated from 15 U.S.C. § 1602(aa) to 15 U.S.C. § 1602(bb).

Also, based on changes to the HOEPA rules now codified at 12 CFR § 1026, for applications received by creditors on or after January 10, 2014, creditors will have to apply a very different APR test under Federal law than they do at this time. For these reasons, the commenter asks that the Department revise the definition of "rate threshold" in N.J.A.C. 3:30-1.3 to refer to 15 U.S.C. § 1602(bb) and 12 CFR § 1026.32, as the same may be amended from time to time.

RESPONSE: The Department thanks the commenter for the comment. The Department recognizes the major changes to the Federal rules that will become effective on January 10, 2014, with regard to disclosure and solvency protection for certain high cost mortgage loans. The Department intends that its definition of rate threshold in these rules should be consistent with and refer to the applicable Federal authorities. This was also the intention of the Legislature in enacting the HOSA. (See N.J.S.A. 46:10B-24.) In addition to the revision to 15

U.S.C. § 1602 noted by the commenter, one of the changes made by Dodd-Frank to Federal law transferred the authority to promulgate regulations on "high cost" mortgages from the Federal Reserve Board to the Consumer Financial Protection Bureau (CFPB). As was noted in the comment, the CFPB has recently issued rules which amend the definition of "high cost" mortgage and recodify it from 12 CFR § 226.32 to 12 CFR § 1026.32. Accordingly, upon adoption the Department is amending the definition of "rate threshold" in N.J.A.C. 3:30-1.3 to reference the Federal statutes and rules that will be applicable to loans covered by the HOSA subsequent to January 10, 2014. However, the Department is not amending the rules to include the phrase "as the same may be amended from time to time" because doing so would be a substantive change that cannot be made upon adoption. See N.J.A.C. 1:30-6.3.

The Department further declines to add the language "as the same may be amended from time to time" because adding that language would continuously link the rules to all future Federal changes, which was not the Department's intent when the rules were initially adopted or proposed for readoption. Rather, it was the Department's intent, as reflected in the Federal Standards Analysis included in the notice of proposed readoption, that the definitions in the rule track the current Federal authorities applicable to loans subject to the HOSA.

COMMENT: The commenter also suggested that the Department amend N.J.A.C. 3:30-1.3 to delete the last two sentences in the definition of "rate threshold," which refer to 15 U.S.C. § 1605. The commenter notes that 15 U.S.C. § 1605 does not contain a definition of "points and fees." Rather, it specifies what costs are included in and excluded from a loan's finance charge. In addition, the commenter noted that 15 U.S.C. § 1605 does not provide any guidance on determination of the interest rate for variable rate loans.

RESPONSE: The commenter is correct that 15 U.S.C. § 1605 does not contain a definition of "points and fees," but lists costs that are included in and excluded from a loan's finance charge, and that it does not provide any guidance on the determination of the interest rate for variable rate loans.

Therefore, for the reasons noted above related to ensuring that the readopted rules do not contain inaccurate references to the current applicable Federal authorities, upon adoption the Department is also amending the definition of "rate threshold" by revising the penultimate sentence in the definition to have it refer to the "description" of points and fees, rather than the "definition" of points and fees in 15 U.S.C. § 1605 and, as suggested by the commenter, to delete the final sentence in the definition.

COMMENT: N.J.A.C. 3:30-1.3 defines "rate" as the "annual percentage rate calculated at closing … and according to the provisions of 15 U.S.C. § 1601, et seq. and the regulations promulgated by the Federal Reserve Board." Under current Regulation Z, the annual percentage is the same for both disclosure purposes and for purposes of the HOEPA APR trigger. However, as of January 10, 2014, there will be a new and different methodology of determining the APR for HOEPA coverage purposes. Under amended 12 CFR § 1026.32(a)(3), a creditor generally will have to determine the APR for HOEPA coverage purposes using the interest rate in effect on the date the interest rate for the transaction is set. This change was required by Dodd-Frank. See 15 U.S.C. § 1602(bb)(1)(B).

Since the current definition of "rate" in N.J.A.C. 3:30-1.3 does not contemplate that Regulation Z may have one method of determining the APR for HOEPA coverage purposes and a different method of determining the APR for all other purposes, the definition will create

uncertainty as of January 10, 2014. The commenter suggested that the Department revise the definition of "rate" in N.J.A.C. 3:30-1.3 to refer to "15 U.S.C. § 1602(bb) and 12 C.F.R. § 1026.32(a)(3) as the same may be amended from time to time."

RESPONSE: The Department agrees with the commenter and, for the reasons set forth above, is making the suggested change upon adoption to the Federal citations in the definition and declines to add "as the same may be amended from time to time" for the reasons set forth in an earlier Response.

COMMENT: The commenter also suggested the Department delete the reference in the definition of "rate" to the APR calculated "at closing" because it conflicts with new 12 CFR § 1026.32(a)(3) to the extent that section 1026.32(a)(3) requires use of the interest rate as of the date the interest rate for the transaction is set.

RESPONSE: Upon adoption, the Department is deleting the language "at closing" to maintain consistency between its rules and the applicable Federal rule. Failing to do so would create confusion with respect to the funding for mortgage loans to New Jersey homeowners that are subject to the HOSA and make compliance more difficult for lenders. Again, it has been the Department's consistently expressed intent that the definitions in its rules conform to the applicable Federal standards except in those instances where a more strict standard is imposed by the HOSA.

COMMENT: The current definition of "conventional rate mortgage" in N.J.A.C. 3:30-1.3 requires identification of the published annual yield on conventional mortgages "as of the applicable time set forth in 12 CFR § 226.32(a)(1)i." That time is presently the 15th day of the

month immediately preceding the month in which the application is received. However, under amended 12 CFR § 1026.32(a)(1)(i), that time will be the date the transaction's interest rate is set. See amended 12 CFR § 1026.32(a)(1)i effective January 10, 2014. The commenter suggested that the Department clarify that the "applicable time" as used in the definition of the "conventional mortgage rate" is the time set forth by amended 12 CFR § 1026.32(a)(1)i as amended from time to time.

RESPONSE: The Department agrees and is amending upon adoption the definition of "conventional mortgage rate" to refer to the applicable time as set forth in 12 CFR § 1026.32(a)(1)i. For the reasons set forth in an earlier Response, the Department declines to add the language "as amended from time to time."

COMMENT: The commenter suggested that the Department change any other references in N.J.A.C. 3:30 to 15 U.S.C. § 1602(aa) to 15 U.S.C. § 1602(bb), "and references to 12 C.F.R. § 226. ___ to 12 C.F.R. § 1026. ___." The commenter also suggested that appropriate references to "as amended from time to time" be included.

RESPONSE: The Department agrees and, in addition to the amendments discussed above, upon adoption is making the requested changes to reflect the correct Federal citations in the definitions of "escrow charge" and "points and fees" in N.J.A.C. 3:30-1.3. For the reasons set forth in an earlier Response, the Department declines to add the language "as amended from time to time."

**Federal Standards Analysis**

The Federal Homeownership and Equity Protection Act of 1994 (HOEPA), P.L. 103-325, as amended, and the regulations adopted thereunder at 12 CFR § 1026 provide protections to certain consumers who enter into residential mortgages on their principal dwellings. Some of the protections include 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. As of January 10, 2014, HOEPA will apply to loans where the total points and fees payable by the consumer at or before closing will exceed five percent of the total loan amount for a transaction with a loan amount of $20,000 or more; the $20,000 figure shall be adjusted annually on January 1 by the annual percentage change in the Consumer Price Index that was reported on the preceding June 1; or the lesser of eight percent of the total loan amount or $1,000 for a transaction with a loan amount of less than $20,000; but the $1,000 and $20,000 figures shall be adjusted annually on January 1 by the annual percentage change in the Consumer Price Index that was reported on the preceding June 1.

As of January 10, 2014, HOEPA will apply to loans where the annual percentage rate applicable to the transaction will exceed the average prime offer rate, as defined in 12 CFR § 1026.35(a)(2), for a comparable transaction by more than 6.5 percentage points for a first-lien transaction; or 8.5 percentage points for a first-lien transaction if the dwelling is personal property and the loan amount is less than $50,000; or 8.5 percentage points for a subordinate-lien transaction; or under the terms of the loan contract or open-end credit agreement, the creditor can

charge a prepayment penalty more than 36 months after consummation or account opening, or prepayment penalties that can exceed, in total, more than two percent of the amount prepaid.

The readopted rules set forth similar protections for consumers as does HOEPA in the area of affirmative claims and defenses. In the Act and the readopted rules, the protections apply to "high cost home loans" which are defined in the Act and in the readopted rules at N.J.A.C. 3:30-1.3 as those exceeding either the "rate threshold" or the "total points and fees threshold." The definitions of "rate threshold" in HOEPA and in the readopted rules are identical. The "total points and fees threshold" in the rules is lower; therefore, the readopted rules contain standards that exceed those established by HOEPA.

The readopted 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 readopted 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" as defined in these readopted 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 rules.

The readopted rules also contain restrictions and/or prohibitions with regard to loans not found in HOEPA. Therefore, the readopted 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 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 readopted 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 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 initial construction of a dwelling. The rules cover a mortgage given in connection with the acquisition or initial construction of a dwelling. This is a larger group of loans and, therefore, the rules also contain standards in this area that exceed those established by HOEPA. Again, these readopted 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 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 rules.

The readopted rules at N.J.A.C. 3:30-8.1 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 readopted rules also contain standards that exceed those established by HOEPA. Although they exceed Federal standards, the rules implement the Legislature's clear intent, as set forth at N.J.S.A. 46:10B-27.a, 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. 3:30-8.1 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 rules.

Lastly, certain definitions contained in 12 U.S.C. § 1841, 15 U.S.C. §§ 1601, 1602(bb), and 1605, 42 U.S.C. § 5401, HOEPA Pub. L. 103-325, 12 CFR § 1026, and 16 CFR § 433 are incorporated by reference in the readopted rules as amended upon adoption, making the requirements of the rules with regard to the scope of these definitions the same as those imposed by Federal standards.

**Full text** of the readopted rules can be found in the New Jersey Administrative Code at N.J.A.C. 3:30.

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

3:30-1.3 Definitions

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

…

"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)]*** *1026.32(a)(1)(i)***.

. . .

"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]*** *1026.4(c)(7)*** and *****[226.4(d)2]***** ***1026.4(d)(2)***.

. . .

"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)]*** *1026.4(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)]*** *1026.4(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.]* ***1602(bb)*** and the regulations promulgated thereunder by the *****[Federal Reserve Board]*** *Consumer Financial Protection Board including 12 CFR 1026.32(a)(3)***.

. . .

"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)]* ***(bb)***), and the regulations promulgated by the *****[Federal Reserve Board]*** *Consumer Financial Protection Board***, including 12 C.F.R. ***[**226.32]***** ***1026.32*** 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)]*** *1026.4(a)(24)***. The *[definition]* ***description*** 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. (No change.)

…