

PUBLIC NOTICE

BANKING AND INSURANCE

DIVISION OF BANKING

OFFICE OF CONSUMER FINANCE

Notice of Action on Petition for Rulemaking

Requested Reduction in Surety Bond Requirements for Residential Mortgage Brokers

Petitioner: Wayne M. Watkinson, Esq.

Authority: N.J.S.A. 52:14B-4(f); and N.J.A.C. 1:30-4.2 and 3:3-4.3.

Take notice that on June 3, 2014, the Department of Banking and Insurance (Department) received a petition for rulemaking from the above petitioner. On July 21, 2014, a notice of receipt of the petition was published in the New Jersey Register at 46 N.J.R. 1719(a). The petitioner requested the Department to decrease the required bond amount specified in N.J.A.C. 3:15-3.1 for mortgage brokers licensed by the Department pursuant to the New Jersey Residential Mortgage Lending Act, P.L. 2009, c. 53, codified at N.J.S.A. 17:11C-51 et seq. The minimum surety bond amount for residential mortgage lenders and brokers is currently set by N.J.A.C. 3:15-3.1 at \$150,000. For companies with closed loan volumes exceeding \$50,000,000 on an annual basis, the amount of the required bond increases to a maximum amount of \$300,000. The petitioner requested that the Department reduce the required surety bond amount for licensed mortgage brokers to \$50,000. On August 1, 2014, a notice of action on the petition referring it for further deliberations was filed with the Office of Administrative Law. The notice was published in the New Jersey Register at 46 N.J.R. 1908(a) on September 2, 2014.

Take further notice that the Commissioner certifies that the petition was duly considered pursuant to law and, upon due deliberation, has determined that the requested amendments of rules providing for amounts of surety bond coverage required of a residential mortgage broker licensee (Broker) under the New Jersey Residential Mortgage Lending Act (RMLA), N.J.S.A. 17:11C-51 et seq., is denied.

The basis for the petition is essentially an assertion that, because the type of fees collectible by Brokers are fewer under the rules applicable today than when the bond schedules set forth at N.J.A.C. 3:15-3.1 were first adopted in 1997, the amount of the surety bond needed for Brokers may now be “substantially diminished.” As added support for this argument, the petition cites information which reveals that “no surety bond claims of more than \$50,000 were made against licensed mortgage brokers in 2011, 2012 or 2013.”

The RMLA requires a Broker to be covered by a blanket bond in a minimum penal amount of \$25,000 or such other amounts as may be prescribed by the Commissioner pursuant to rulemaking. N.J.S.A. 17:11C-63. The bond is available for claims by “any person injured by the wrongful act, default, fraud or misrepresentation” of a licensee or its employees or agents. *Ibid.* The statutory scope of bond coverage is restated in the implementing rules at N.J.A.C. 3:15-3.2 and 3.3. The relevant rule states that the bond runs to the State “for the benefit of consumers injured by the wrongful act, omission, default, fraud or misrepresentation of the . . . mortgage broker . . . and for the benefit of the Department for unpaid examination bills, unpaid penalties, unpaid assessments and any other unpaid obligations of the . . . mortgage broker.” N.J.A.C. 3:15-3.2. Thus, the scope of acts by a Broker or employee or agent of a Broker upon which a bond claim can be made is not limited to the charging of impermissible fees. Rather, it extends to fraud and misrepresentation by the Broker or its employees or agents, and to the damages that

a consumer can prove were the direct result of such actions. Furthermore, pursuant to N.J.A.C. 3:15-3.2, Broker bonds are available for the payment of regulatory amounts due to the Department and not paid by the insured Broker directly. For example, Department claims may seek payment of unpaid penalties imposed in a final administrative order or order of a court of competent jurisdiction, unpaid consumer refunds required pursuant to an examination, and unpaid assessments. In light of the legislative determination to create a bond coverage requirement and a claim mechanism made available to cover such a broad range of potential causes of action, the Department does not view rule amendments reducing required Broker bond coverages based on an assumption that bond coverage is available only to a narrow class of fee recovery claims, as consistent with the statutory language.

This determination is also supported by the administrative history of the relevant rules. When the first increase, doubling the surety bond requirements, was adopted in October 2002, the Department noted that the increase was a result of extensive discussions within the Department and was based upon the fact that they had not been increased in five years since the bond schedules were first adopted in 1997. 34 N.J.R. 3795(a). Further, the Department determined that “[t]he amount of the bond must strike a balance between the burden on the industry, and the need to protect consumers.” *Ibid.* Similarly, when the second, and most recent, increase of the bond schedule was adopted in May 2010, the Department balanced the industry interests and the interest in consumer protection. 42 N.J.R. 1139(b). Therefore, in denying this petition for rulemaking, the Department is guided by the same factors considered in amendments of the surety bond coverage.

Moreover, while the Broker bond claim history indicates a low risk of claims during the three-year period 2011-2013, that history does not, in the Department’s view, suffice as a basis

for reducing bond coverage amounts that were designed to protect consumers from the full range of misdeeds cited by the Legislature in N.J.S.A. 17:11C-63.

A similar concern was raised during the public comment on the most recent proposal to the increase of the bond requirements. 42 N.J.R. 1139(b). A commenter stated that a surety bond expert advised that the average loss on surety bonds is approximately \$15,000 and that the industry shows a low incidence of claims on such bonds. In response, the Department submitted that the average loss and low incidence of claims “should operate to mitigate the risk associated with the bonds and lower their cost.” *Ibid.* Similarly, a commenter wrote that a survey conducted by a major surety bond producer revealed that a typical surety bond in other jurisdictions was in the range from \$25,000 to \$50,000 at a minimum volume, and from \$100,000 to \$150,000 at a maximum volume. *Ibid.* To that, the Department responded that higher amounts in New Jersey were “necessary to protect New Jersey consumers, after weighing the competing factors of reasonable business expense and consumer protection.” *Ibid.* Specifically, the Department considered “the historically high property values in New Jersey” to conclude that “an adequate bond amount is essential to provide a minimum level of consumer protection to the clients of licensed residential mortgage lenders and brokers. *Ibid.*”

A copy of this public notice has been mailed to the petitioner.