

BANKING

DEPARTMENT OF BANKING AND INSURANCE

DIVISION OF BANKING

Predatory Lending

Proposed Readoption: N.J.A.C. 3:30

Authorized By: Kenneth E. Kobylowski, Commissioner, Department of Banking and Insurance.

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 2013-133.

Submit comments by November 15, 2013 to:

Robert J. Melillo, Chief

Legislation and Regulation

New Jersey Department of Banking and Insurance

P.O. Box 325

Trenton, NJ 08625-0325

Fax: (609) 292-0896

Email: Legsregs@dobi.state.nj.us

The agency proposal follows:

Summary

The rules proposed for readoption 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.

The Department of Banking and Insurance (Department) proposes to readopt N.J.A.C. 3:30, which is scheduled to expire on August 21, 2013 pursuant to N.J.S.A. 52:14B-5.1.b. In accordance with N.J.S.A. 52:14B-5.1.c(2), the submission of this notice to the Office of Administrative Law extended the expiration date 180 days to February 17, 2014.

N.J.A.C. 3:30-1.1 sets forth the purpose of the chapter.

N.J.A.C. 3:30-1.2 sets forth the scope of the chapter.

N.J.A.C. 3:30-1.3 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.

N.J.A.C. 3:30-2, 3, and 4 are reserved.

N.J.A.C. 3:30-5 sets forth the requirements for posting payments received from borrowers. The 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 rules require that all other creditors post a payment on the business day it is received.

N.J.A.C. 3:30-6 and 7 are reserved.

N.J.A.C. 3:30-8 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. N.J.A.C. 3:30-8.1 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.

N.J.A.C. 3:30-8.2(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. N.J.A.C. 3:30-8.2(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 N.J.A.C. 3:30-8.2 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. N.J.A.C. 3:30-8.2(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.

N.J.A.C. 3:30-8.2 (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.

N.J.A.C. 3:30-9.1(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.

N.J.A.C. 3:30-9.1(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.

The Department has reviewed the rules proposed for readoption and determined them to be necessary, reasonable, and proper for the purposes for which they were originally promulgated.

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 rules proposed for readoption have a positive social impact on New Jersey home loan borrowers. The rules proposed for readoption implement the Act, which was designed to eliminate certain predatory lending practices in the State without diminishing access to legitimate sources of credit. Consequently, as a result of the 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 rules proposed for readoption 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 rules proposed for readoption 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 believes that the rules proposed for readoption have a positive economic impact. Because the rules proposed for readoption balance the dual interests of protecting consumers and preserving New Jersey's home loan lending market, the rules proposed for readoption positively impact both borrowers, who will continue to 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.

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 rules proposed for readoption set forth similar protections for consumers as does HOEPA in the area of affirmative claims and defenses. In the Act and the rules proposed for readoption, the protections apply to “high cost home loans” which are defined in the Act and in the rules proposed for readoption 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 rules are identical. The “total points and fees threshold” in the rules is lower; therefore, the rules proposed for readoption contain standards that exceed those established by HOEPA.

The rules proposed for readoption extend the protections set forth in both HOEPA and the Act to a larger group of loans because of the lower threshold. Although the rules proposed for readoption 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 rules proposed for readoption, 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 rules proposed for readoption also contain restrictions and/or prohibitions with regard to loans not found in HOEPA. Therefore, the rules proposed for readoption 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 rules proposed for readoption 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 acquisition or initial construction of a dwelling or a transaction under an open end credit plan. The 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 rules also contain standards in this area that exceed those established by HOEPA. Again, these rules proposed for re adoption 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 rules.

The rules proposed for re adoption 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 rules proposed for re adoption 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(aa), and 1605, 42 U.S.C. § 5401, HOEPA Pub. L. 103-325, 12 CFR 226 and 16 CFR 433 are incorporated by reference in the rules proposed for readoption, making the requirements of the 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 rules proposed for readoption.

The Department invites commenters to submit any data or studies concerning the jobs impact of the rules proposed for readoption 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 rules proposed for readoption.

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 rules proposed for readoption 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 rules. Costs are discussed in the Economic Impact above. The intent of the rules proposed for re adoption 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 rules proposed for re adoption based upon the size of the creditor or of a business that purchases or takes an assignment of a loan.

Housing Affordability Impact Analysis

The rules proposed for re adoption will have no impact on the affordability of housing in New Jersey because the rules proposed for re adoption concern prevention of predatory mortgage lending.

Smart Growth Development Impact Analysis

The rules proposed for re adoption will have no impact on smart growth and there is an extreme unlikelihood that the rules proposed for re adoption would evoke a change in housing

production in Planning Areas 1 or 2 or within designated centers under the State Development and Redevelopment Plan in New Jersey because the rules proposed for re-adoption concern prevention of predatory mortgage lending.

Full text of the rules proposed for re-adoption may be found in the New Jersey Administrative Code at N.J.A.C. 3:30.