

New Jersey Improves and Clarifies Its Residential Mortgage Lending Act

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The State of New Jersey recently enacted Assembly Bill 2035, making significant and important amendments to the Residential Mortgage Lending Act, which comprehensively regulates the New Jersey mortgage loan origination activities of nonbank residential mortgage lenders and brokers doing business in New Jersey and their individual mortgage loan originators.

Nonbank residential mortgage lenders and brokers (“Mortgage Companies”) doing business in New Jersey have received some welcome news. On August 24, 2018, the State of New Jersey enacted a bill, Assembly Bill 2035, that makes significant and important amendments (“Amendments”) to the Residential Mortgage Lending Act (“RMLA”),¹ which had not been amended since it was passed in 2009. The Amendments became effective November 22, 2018, 90 days after signing.

The RMLA is a law that comprehensively regulates the New Jersey mortgage loan origination activities of Mortgage Companies and their individual mortgage loan originators (“MLOs”). Among other things, it establishes licensing requirements for Mortgage Companies and MLOs, sets forth the qualifications needed to obtain those licenses, lists the fees that Mortgage Companies may charge to

consumers and otherwise regulates the manner in which Mortgage Companies deal with consumers, gives the New Jersey Department of Banking and Insurance (“Department”) supervisory and enforcement authority over Mortgage Companies and MLOs, and imposes upon Mortgage Companies various reporting requirements.

Over the years following the RMLA’s enactment, Mortgage Companies have had to grapple with a number of issues arising from ambiguities and/or a lack of clarity in various provisions in the RMLA. The Amendments seek to resolve many of these issues, in most cases in a manner that Mortgage Companies should find helpful.

Besides making a number of changes that might appropriately be characterized as “housekeeping” changes, the Amendments effect several important substantive changes.

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One such change will allow MLOs who are either (1) federally registered bank MLOs looking to begin working for a New Jersey-licensed Mortgage Company, or (2) state-licensed MLOs (in states other than New Jersey) looking to start originating New Jersey loans for a New Jersey-licensed Mortgage Company (which could be their current employer or a new employer), to start taking New Jersey loan applications while awaiting approval of their New Jersey license applications.

Another important change is the creation of an “approved conditional” license status that will allow a license applicant to engage in licensed activities while striving to meet the required standards for financial responsibility, and an “approved inactive” license status that will allow licensed MLOs essentially to put their licenses “on the shelf” for a period of time while they are not employed by a New Jersey-licensed Mortgage Company.

Yet another significant change — actually, a long-needed clarification — concerns the fees and charges that Mortgage Companies may charge or pass through to their customers when originating loans on their behalf. These and other significant changes are discussed in more detail below.

Transitional MLO Licenses

The Amendments establish a statutory framework for the issuance of “transitional MLO licenses.” These transitional licenses will allow many MLOs — those who have been working for a bank or a bank subsidiary (Bank MLOs) and those who have been working for a Mortgage Company not licensed in New Jersey (“Out-of-State MLOs”) — to begin working for and earning commissions from a New

Jersey-licensed Mortgage Company without having to first obtain a New Jersey MLO license. The inflexibility of the current licensing requirement that MLOs obtain a New Jersey license before acting as an MLO in New Jersey, coupled with the delays inherent in the licensing process, have impeded the free movement of MLOs from one employer to another and caused significant financial hardship to many.

Specifically, the Amendments will permit Bank MLOs to obtain transitional licenses if they:

- (1) were validly registered in the Nationwide Multistate Licensing System & Registry (NMLS&R) with a depository institution or a depository institution subsidiary (and thus exempt from state licensing requirements under the SAFE Act²) for at least the one-year period immediately preceding submission of their application for a New Jersey MLO license;
- (2) become employed by a New Jersey-licensed Mortgage Company; and
- (3) submit an application for a New Jersey MLO license.

The Amendments will also permit Out-of-State MLOs to obtain transitional licenses if they:

- (1) are validly licensed as an MLO in at least one state;
- (2) are or become employed by a New Jersey-licensed Mortgage Company; and
- (3) submit an application for a New Jersey MLO license.

Bank MLOs and Out-of-State MLOs who obtain a transitional license will be immediately

authorized to take New Jersey loan applications for their New Jersey-licensed Mortgage Company employer, while awaiting approval of their pending New Jersey MLO license application. If, however, they are unable to obtain such approval after 120 days, their transitional license will expire, and they will have to cease acting as an MLO for their New Jersey-licensed Mortgage Company employer until their application is approved.

Note, however, that the Department will not be able to issue any transitional licenses until November 2019, which is the effective date of recent amendments to the SAFE Act that were included in the Economic Growth, Regulatory Relief, and Consumer Protection Act³ passed earlier this year and that allow states for the first time to provide for transitional licenses.

“Approved Conditional” and “Approved Inactive” License Status

The Amendments allow applicants for an initial or renewal MLO license who have unresolved credit issues preventing them from qualifying for a license to be granted “approved conditional license” status and be designated as such in the NMLS&R. To achieve this status, applicants must be able to demonstrate to the Department’s satisfaction that they are making a good faith effort to achieve the level of financial responsibility required to qualify for a license, and to remain eligible for this status, they (1) must continue to demonstrate substantial progress in that regard, and (2) if they already hold an MLO license, they must renew it when required and meet their continuing education requirements. While in approved conditional license status, the individual is permitted to engage in the

same range of activities as any properly licensed MLO.

The Amendments also allow applicants for an initial or renewal MLO license who have satisfied all conditions for licensure except sponsorship by a New Jersey-licensed Mortgage Company (either because they are not yet employed by or have ceased employment with such an entity) to be shown on the Department’s records and designated in the NMLS&R as being in “approved inactive license” status. Such individuals may remain in approved inactive status as long as they renew that status annually and meet the RMLA’s continuing education requirements, and may be approved for an MLO license as soon as they become employed and sponsored by a New Jersey-licensed Mortgage Company.

Clarifications of Permitted Fees Seek to Remove Risks of Ambiguity

Before enactment of the Amendments, the RMLA permitted residential mortgage lenders to charge their customers only the following fees in connection with the origination of a New Jersey residential mortgage loan:

- (1) Credit report fees;
- (2) Appraisal fees;
- (3) Application fees;
- (4) Commitment fees;
- (5) Warehouse fees;
- (6) Fees necessary to reimburse the residential mortgage lender for charges imposed by third parties; and
- (7) Discount points.⁴

Also residential mortgage brokers were permitted under the RMLA to charge only (1) application fees, and (2) discount points.⁵ Definitions of each of these fees can be found in a regulation adopted by the Department to govern the residential mortgage loan application and commitment process (“Processing Regulation”).⁶ In particular, the Processing Regulation defined “discount points” without regard as to whether or not their payment by the borrower reduced the loan interest rate, i.e., it defined a “discount point” to mean simply “an amount of money equal to one percent of the principal amount of the loan and payable only at closing.”

The RMLA’s fee provisions coupled with the fee definitions in the Processing Regulation created many problems for lenders and brokers doing business in New Jersey. For example, it was common practice for lenders and brokers operating outside of New Jersey to refer to points that reduced the borrower’s interest rate as “discount points” and points that were paid to compensate the lender for its loan origination services as an “origination fee.” If those lenders and brokers decided to do business in New Jersey and charged their New Jersey borrowers “origination fees” instead of “discount points,” they might have found themselves faced with an examination directive and/or enforcement order to refund all of those fees back to the date of their prior examination or the date that they started originating New Jersey loans.

It also was not unusual for the Department to raise questions about whether brokers, who might order and obtain credit reports, appraisals and/or some other third-party service needed to originate the loan, were permitted to pass those charges through to the

borrowers. And lenders that charged “commitment fees” based on written commitments that were not presented to or signed by the borrower until the closing might have found themselves faced with a directive or order to refund all commitment fees collected under those circumstances. These directives and orders relied on a Department bulletin, never adopted as a regulation, which merely stated the Department’s view that it was a “best practice” for lenders to present written commitments to borrowers and have them sign them at least three business days before the closing, without indicating anywhere that lenders were required to do so in order to charge commitment fees.⁷

The Amendments appear to resolve many of these and other issues relating to fees. Specifically, the Amendments state that:

(1) Residential mortgage lenders may charge “application fees,” “origination fees” (or “points”), “lock-in fees,” “commitment fees,” “warehouse fees” and “discount points” (that reduce the loan interest rate);

(2) Residential mortgage brokers may charge “application fees” and “broker fees”;

(3) Both lenders and brokers may charge third-party fees that the Department, by regulation or in accordance with a procedure established by regulation, expressly allows each to charge, as well as appraisal and credit report fees; and

(4) No other fees may be charged by either lenders or brokers.

The Amendments also specifically define each of these fees, essentially adopting the definitions contained in the Processing

Regulation. The new statutory definitions make clear, however, that:

(1) While lenders and brokers are authorized to charge “application fees, both may not do so in connection with the same loan;

(2) “Broker fees” and “origination fees” may be based on a percentage of the principal amount of the loan;

(3) “Commitment fees” cannot be collected unless the borrower receives a written commitment no later than midnight of the third business day before closing and the borrower has accepted that commitment; and

(4) “Lock-in fees” may not be charged for a lock-in agreement executed after midnight of the third business day before closing.

Note that the definition of an “appraisal fee” in the Amendments (and in the Processing Regulation) appears to exclude any add-on fee charged by an appraisal management company.⁸

By giving express permission to lenders to charge (1) “origination fees” (which, as indicated above, may be based on a percentage of the loan amount or “points”), and (2) “discount points,” but only if their payment results in a reduction of the loan interest rate, the Amendments should resolve the problems faced by lenders in these regards. Similarly, the Amendments should resolve the problems faced by brokers in terms of the fees that they may charge, by giving them express permission to charge “broker fees” (which also may be based on a percentage of the loan amount), by making it clear that only lenders may charge discount points and by clarifying that brokers may charge credit report and appraisal fees.

Other Significant Changes

New Exemptions

In addition to the changes described above, the Amendments also create the following three new exemptions from the RMLA’s licensing requirement:

○ An exemption for companies and their employees that engage in the mortgage loan origination business solely by virtue of their performance of loan processing or underwriting functions. To qualify for this exemption, the companies must 1) register with the Department and the NMLS&R as exempt companies, 2) obtain a blanket bond in a qualifying amount, 3) employ at least one individual MLO licensee, and 4) satisfy certain other conditions.

○ An exemption for “bona fide not for profit entities” and their employees. This exemption applies so long as the entities retain their tax exempt status and meet certain other criteria.

○ An exemption for employees of any federal, state or local government agency or housing finance agency provided that they act as an MLO only pursuant to their official duties as such an employee.

Ability to Sponsor MLOs

The Amendments allow depository institutions that register with the Department as well as New Jersey-licensed Mortgage Companies to sponsor individuals licensed in New Jersey as MLOs, including transitional MLOs. This change would appear to allow registered Bank MLOs to apply for and obtain New Jersey MLO licenses while still employed by a depository institution or a depository institution subsidiary, which, in turn, would allow those MLOs to

move seamlessly and without any loss of income to a New Jersey-licensed Mortgage Company.

Branch Office Supervision

The Amendments require branch offices of a licensee to be supervised by a branch manager, who, unless approved to do so by the Department, may not supervise more than one branch office.

Cheating as Cause for License Disqualification

The Amendments provide that any individual MLO license applicant determined by the NMLS&R to have cheated or attempted to cheat on the qualifying written examination may be found, for that reason alone, to lack the character and fitness necessary to qualify for an MLO license.

Expungement; Pretrial Intervention

The Amendments allow individual MLO applicants who have been convicted of, or pled guilty or nolo contendere to, a disqualifying felony to be eligible for an MLO license if the conviction or plea has been expunged. Previously, the RMLA allowed such an applicant to qualify for a license only if the conviction or plea had been pardoned.

The Amendments also state that individual MLO applicants who have been charged with a disqualifying offense that was the subject of a New Jersey Pretrial Intervention (PTI) program and who successfully completed the program resulting in a dismissal with prejudice of the charge will not be considered to be disqualified for an MLO license on that basis. (Similar rules apply with respect to applicants

charged with disqualifying offenses in states other than New Jersey who are admitted into a program that is functionally equivalent to the New Jersey PTI program.)

Expanded Coverage of Secondary Mortgage Loans

The Amendments expand the RMLA's coverage of secondary mortgage loans, by eliminating the exceptions in the RMLA's definition of a "secondary mortgage loan" — for loans to be repaid in 90 days or less, loans taken as security for a home repair contract, and loans meeting certain conditions that are the result of private sale of a dwelling. All such loans will now be subject to the provisions of the RMLA.

New Continuing Education Requirement

The Amendments add a requirement that, of the 12 hours of continuing education needed to renew an individual RMLA license, at least two hours must relate to New Jersey residential mortgage lending laws and regulations.

Conclusion

In summary, the Amendments should make it easier for residential mortgage lenders and brokers to understand and adhere to the requirements in the RMLA. In addition, the common sense changes that the Amendments make to the rigid licensing regime established in the RMLA should allow deserving individuals to work in this industry while continuing to ensure that the public is adequately protected from bad actors.

NOTES:

¹N.J.S.A. 17:11C-51 et seq. ("RMLA").

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²The Secure and Fair Enforcement for Mortgage Licensing Act of 2008, 12 U.S.C. 5101 et seq.

³Public Law No: 115-174 (May 24, 2018).

⁴N.J.S.A. 17:11C-74(a).

⁵N.J.S.A. 17:11C-74(b).

⁶N.J.A.C. 3:1-16.1 et seq., see, specifically, N.J.A.C. 3:1-16.2(a).

⁷Bulletin No. 0712 (June 13, 2007).

⁸While this suggests that such add-on fees are

impermissible, the Department, in the preamble to its December 18, 2017, final rule in which it adopted the above definition of an “appraisal fee” as part of the Processing Regulation, stated that it had issued a letter dated Sept. 23, 2016, authorizing the charging of appraisal management company add-on fees by residential mortgage lenders and that the industry may rely on that letter. See 49 N.J.R. 3817(a) (Dec. 18, 2017). Hopefully, the Department will clarify this issue by amending the Processing Regulation.

