



STATE OF NEW YORK
BANKING DEPARTMENT
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NEW YORK, NY 10004-1417

RICHARD H. NEIMAN
Superintendent of Banks

August 27, 2008

Industry Letter: Chapter 472 of the Laws of 2008

To The Institution Addressed:

On August 5, 2008 Governor David A. Paterson signed into law a critical subprime lending reform bill to address the ongoing mortgage crisis in New York State. Chapter 472 of the Laws of 2008, which was part of the Governor's legislative program, targets the subprime lending crisis in two ways by providing assistance to homeowners currently at risk of losing their homes and by establishing further protections in the law to mitigate the possibility of a similar crisis in the future.

To assist the industry and public in understanding the impact of this broad and comprehensive legislation, we are providing an overview of the various components, including their effective dates. In addition, definitions for terms used throughout the law are included at the end of this letter.

The sections of the law that govern foreclosure proceedings (e.g. the 90-day pre-foreclosure notice, the foreclosure notice and the mandatory settlement conferences) apply to all persons who wish to foreclose a covered mortgage, including lenders, subsequent investors and servicers, whether or not such persons are chartered, licensed or supervised under New York State law. Several other sections of the law, including those involving mortgage loan servicers, distressed property consultants, and mortgage fraud apply to all persons who engage in the regulated activities in New York, whether or not they are otherwise subject to the jurisdiction of the New York State Banking Department.

ELEMENTS OF THE LAW TO ASSIST BORROWERS CURRENTLY FACING FORECLOSURE:

- **Pre-foreclosure Notice:** This provision of the law requires lenders to send a notice to borrowers of high-cost home loans, subprime home loans and non traditional home loans at least 90 days before the lender may commence legal action against the borrower. The notice must advise borrowers that they are at risk of losing their home, and that, if they are experiencing financial difficulty, they should consider contacting a housing counselor to help reach a resolution with their lender. The lender will be required to list in the notice the names and telephone numbers of at least five HUD-approved housing counselors or other housing counseling agencies designated by the Division of Housing and Community Renewal (DHCR) serving the region where the borrower resides.

A list of housing counseling agencies that meet the requirements outlined above will be available on the Banking Department website as of September 1, 2008.

Effective Date: September 1, 2008

- **Foreclosure Notice:** This provision revises the notice that the foreclosing party must provide to the mortgagor of any owner-occupied 1-to-4 family dwelling, not only those that are subprime home loans. The notice, delivered with the summons and complaint, advises borrowers to consult an attorney or local legal aid office, and that they may want to contact non-profit organizations and government agencies for information about possible options, including trying to work with their lender during this process. The letter notifies the borrower that information on organizations providing assistance with the foreclosure process is available from the Banking Department. It also warns borrowers about foreclosure prevention scams.

Effective Date: September 1, 2008

- **Mandatory Settlement Conference:** This provision of the law requires a court in a residential foreclosure action to schedule a settlement conference with the parties to a foreclosure action within 60 days of when the plaintiff files a proof of service of the complaint. The plaintiff, or its counsel, must appear with the authority to dispose of the matter. Representatives for the plaintiff may attend in person, via telephone conference call, or via video-conference. For those borrowers who cannot afford an attorney, the court may appoint one. This provision also applies to foreclosure proceedings that were commenced before September 1, 2008, where a final order has not been issued.

Effective Date: August 5, 2008

- **Affirmative Allegation of Ownership:** This provision of the law requires the plaintiff in an action to foreclose a high-cost or subprime home loan to make an affirmative allegation in the complaint that (i) the plaintiff is the holder of the note and mortgage at the time the action is commenced, or has been delegated the authority to institute an action against the homeowner by the holder of the note and mortgage, and (ii) the mortgage complies with the underwriting standards in § 6-m of the Banking Law, as well as the pre-foreclosure notice requirements.

Effective Date: Actions commenced on or after September 1, 2008

- **Rescue Scams:** This provision of the law targets foreclosure rescue scams operated by those who seek to take advantage of homeowners in default. Among other things, this provision of the law would prohibit distressed property consultants from: (1) performing any services for the homeowner without a written contract; (2) charging or accepting fees without first completing the service; and (3) taking power of attorney from a homeowner, except under very limited circumstances. The law also establishes strict standards for contracts, and provides homeowners with the right to cancel the consulting contract within five business days of consummation. Certain regulated entities, such as depository institutions and registered mortgage brokers, are exempt. However, exempt institutions are expected to conduct business based on the standards established by the statute.

Effective Date: September 1, 2008

ELEMENTS OF THE LAW TO PREVENT SIMILAR FUTURE CRISIS:

- **Extending Predatory Lending Prohibitions to a New Class of Subprime Loans:** The law provides for strict underwriting standards for a new class of mortgages called “subprime home loans.” These standards are in a new section of the Banking Law, § 6-m, to distinguish them from the state’s existing anti-predatory lending law, § 6-l, which governs “high-cost” mortgages.

A “subprime home loan” is defined under § 6-m as a home loan with a fully-indexed annual percentage rate (APR) that exceeds by more than 175 basis points for a first-lien loan, or by more than 375 basis points for a subordinate-lien loan, the average commitment rate for loans in the northeast region with a comparable duration as published in the weekly Freddie Mac Primary Mortgage Market Survey (PMMS) in the week prior to the week in which the lender received a completed loan application. Freddie Mac publishes rates for loans with four different durations – 15- and 30-year fixed rate mortgages, and so-called 5/1 and 1/1 adjustable rate mortgages, i.e. loans with an initial rate that is fixed for either five years or one year, and which adjusts annually thereafter. A subprime home loan would trigger the new standards if the principal amount is equal to or below the conforming loan size limit established by Fannie Mae. Current and historic conforming loan limits can be found on the Fannie Mae website at www.fanniemae.com.

If the Banking Superintendent determines that federal regulators have adopted different thresholds for determining underwriting standards for subprime home loans or the provisions of the new law have had an unduly negative effect on the availability or price of mortgage financing in New York, the Superintendent may adopt other rates that are necessary to achieve parity between New York and nationally-chartered institutions or to alleviate those unduly negative effects.

Listings of all relevant rates will be available on the Banking Department website as of September 1, 2008.

Effective Date: Loans consummated on or after September 1, 2008

- **Underwriting Standards for Subprime Home Loans:** The law establishes an ability to pay standard for making and arranging subprime home loans. Under this provision of the law, lenders have to make a reasonable and good faith determination of whether the borrower has the ability to repay the loan, including the principal, interest, taxes, insurance, assessments, points and fees, based upon the borrower’s income, employment status and other financial resources. The lender must take reasonable steps to verify the accuracy of the information provided by the borrower, using reasonable methods such as tax returns, payroll receipts, and bank records. This does not prevent a lender or mortgage broker from using commercially recognized underwriting standards and methodologies, including automated underwriting systems, provided the standards and methodologies comply with § 6-m of the Banking Law.

Effective Date: Loans consummated on or after September 1, 2008

- **Prohibitions for Subprime Home Loans:** This provision of the law, which applies specifically to subprime loans, provides for the following ability to pay and underwriting standards and prohibitions, among others:
 - no negative amortization (which will eliminate certain option adjustable rate mortgages where one or more options cause the loan balance to increase);
 - no prepayment penalties;
 - no loan flipping (making a refinancing loan where the borrower receives no tangible net benefit);

- no payments to mortgage brokers except for services actually rendered and reasonably related to the value of the services, and, in particular, no abusive yield spread premiums. The mortgage broker, at the time of the application, must disclose the exact amount of the total compensation the broker will receive from any source, including the borrower and the lender. Any compensation it receives over that amount must be credited to the borrower to pay for closing costs (i.e., the borrower may use a yield spread premium to offset upfront costs, as long as any compensation to the broker from the lender that exceeds the amount of broker compensation agreed to by the borrower is credited to the borrower);
- lender must require the escrow of taxes and insurance, although the borrower may opt out of escrow after one year;
- lender must disclose, if known, the amount of the initial taxes and insurance payments;
- no teaser rates of less than six months' duration.

Effective Date: Loans consummated on or after September 1, 2008

- **Duty of Care for Mortgage Brokers:** This provision of the law establishes a general duty of care for mortgage brokers with regard to **all** home loans. Among other things, this provision would require brokers to: (1) act in the borrower's interest; (2) act with reasonable care, skill and diligence; (3) act with good faith and fair dealing; (4) disclose all material facts known to the broker that might reasonably affect the borrower's rights and interests; (5) disclose all compensation; and (6) present a range of loans for which the borrower likely qualifies and which are most appropriate for the borrower's existing circumstances.

Effective Date: Loans consummated on or after September 1, 2008

- **Registration of Servicers:** The law requires mortgage loan servicers to be registered with the Banking Department in order to engage in the business of mortgage loan servicing. The law authorizes the Superintendent of Banks to adopt regulations on (i) providing for disclosures to borrowers on the basis for any interest rate resets, (ii) the provision of payoff statements; and (iii) the timing of the crediting of payments made by borrowers. By registering servicers, the state can help ensure that servicers are conducting their business in a manner acceptable to the Superintendent. The 2009 effective date of this provision is intended to provide the Banking Department sufficient time to do the necessary rulemaking to establish registration procedures. Certain institutions are exempt from registration as long as they notify the Superintendent that they act as a servicer and comply with any regulations issued by the Banking Department.

Effective Date: July 1, 2009

- **Mortgage Fraud:** This provision of the law defines and criminalizes the act of mortgage fraud and makes it easier for prosecutors to prosecute these cases. While today prosecutors may prosecute these cases under different theories such as criminal enterprise, scheme to defraud and larceny, the aim of this provision is to make it easier for prosecutors to target these particular types of frauds. Chapter 472 provides for the escalation of criminal penalties commensurate with the level of fraud committed and allows the prosecutor to aggregate the dollar amounts of fraud to charge more serious offenses.

Effective Date: November 1, 2008

- **Remedies:** To strike an appropriate balance between retaining consumer protection and limiting a negative effect on the availability and cost of mortgage financing in New York for borrowers with an ability to pay, the law establishes the following remedies:
 - Any provision in a subprime home loan that violates the underwriting standards is void.
 - Actions may be brought by the Superintendent and by the Attorney General to enforce the provision of § 6-m.
 - A borrower may use a violation of § 6-m as defense to payment in defense of foreclosure action. Anyone found by a preponderance of the evidence to have violated § 6-m is liable to the borrower of a subprime home loan for actual damages but not statutory damages or consequential or incidental damages.
 - The defense to a foreclosure action may also be asserted against assignees.
 - A mortgage broker who violates the duty of care is liable to the borrower for actual damages.
 - A lender or mortgage broker who violates the prohibitions on improper influence over appraisers is liable to the borrower for actual damages.
 - A mortgage broker who violates Section 590-b(1) (the broker duty of care) is liable to the borrower for actual damages.

Effective Date: November 1, 2008

DEFINITIONS

The following definitions apply to the new Banking Law § 6-m:

- **Subprime home loan** is defined under § 6-m as a home loan with a fully-indexed annual percentage rate (APR) that exceeds by more than 175 basis points for a first-lien loan, or by more than 375 basis points for a subordinate-lien loan, the average commitment rate for loans in the northeast region with a comparable duration as published in the weekly Freddie Mac Primary Mortgage Market Survey (PMMS) in the week prior to the week in which the lender received a completed loan application. Freddie Mac publishes rates for loans with four different durations – 15- and 30-year fixed rate mortgages, and so-called 5/1 and 1/1 adjustable rate mortgages, i.e. loans with an initial rate that is fixed for either 5 years or 1 year, and which adjusts annually thereafter.

The following definitions apply to the pre-foreclosure notice:

- **High-cost home loan** is defined as one with an annual percentage rate (APR) eight percentage points over comparable Treasuries for a first lien loan and nine percentage points over comparable Treasuries for a subordinate mortgage.
- **Subprime home loan** is a loan consummated between January 1, 2003 and September 1, 2008 with an APR of three percentage points over comparable Treasuries for a first lien loan and five percentage points for a subordinate lien mortgage. A subprime home loan principal amount is equal to or below the conforming loan size limit established by Fannie Mae.
- **Non traditional mortgage** is a loan consummated between January 1, 2003 and September 1, 2008 that is a payment option adjustable rate mortgage or an interest-only mortgage.

The following definitions apply to the mandatory settlement conference:

For foreclosure actions initiated on or after September 1, 2008:

- **High-cost home loan:** As defined above in ‘pre foreclosure notice’ and consummated between January 1, 2003 and September 1, 2008.
- **Subprime home loan:** As defined above in ‘pre-foreclosure notice’.
- **Non traditional mortgage:** As defined above in ‘pre-foreclosure notice’.


For foreclosure actions initiated before September 1, 2008:

- **High-cost home loan:** As defined above in 'pre-foreclosure notice'.
- **Subprime home loan:** As defined above in 'pre-foreclosure notice'.
- **Non traditional mortgage:** Not applicable.

The complete text of the law is available on the Banking Department website at www.banking.state.ny.us.

If you have any questions regarding this law or its implementation, please contact: Marjorie Gross, Deputy Superintendent and General Counsel, at (212) 709-1640 or marjorie.gross@banking.state.ny.us; or Rholda Ricketts, Deputy Superintendent, at (212) 709-5540 or rholda.ricketts@banking.state.ny.us.

Sincerely,

A handwritten signature in blue ink that reads "Richard H. Neiman". The signature is written in a cursive style with a large initial 'R'.

Richard H. Neiman
Superintendent of Banks
New York State Banking Department