



Maryland State Bar Association, Inc.

April 14, 2008

BY E-MAIL (bvictorine@dllr.state.md.us) AND FIRST CLASS MAIL

The Honorable Sarah Bloom Raskin
Maryland Commissioner of Financial Regulation
Division of Financial Regulation
500 North Calvert Street, Suite 402
Baltimore, Maryland 21202

Re: Comments on Proposed Regulations
Published in the March 14, 2008 Maryland Register

Dear Commissioner Raskin:

We are Co-Chairs of the Maryland State Bar Association Business Law Section Consumer Credit and Financial Institutions Committee (“Committee”). The Committee appreciates the opportunity to comment on three sets of proposed regulations that were published in the March 14, 2008 issue of the Maryland Register. The comments set forth below are intended to highlight legal issues raised by these regulations. These comments are not intended to address policy issues that arise under the regulations.

As to format, we provide our comments in the order of the various sections of these proposed regulations. We follow our comments with the text of the proposed regulations only if we have suggested language changes.

**Proposals to amend Regulations .02—.04 and .07 and adopt new Regulations .20 and .21
under COMAR 09.03.06. Mortgage Lenders**

Comments on Proposed changes to 09.03.06.02 - Definitions.

We believe that the Commissioner’s regulations should, and must, remain consistent with the Maryland statutes the regulations are intended to implement. We recognize that at the time the Commissioner drafted these regulations, certain definitions were contained in bills that had been introduced into the 2008 Maryland General Assembly. With the end of the legislative session we now know that these definitions will not become Maryland law but, instead, different definitions have or will become law.

We believe the following three definitions should be deleted from the regulations. If desired, the applicable definitions that are in Maryland’s new laws may be substituted.

[(11) "Fully indexed rate" means the interest rate that would have applied at the time of the closing to a mortgage loan for residential real property had the initial interest rate been determined by the application of the same interest rate formula (for example, an interest rate index plus or minus a margin) that applies under the terms of the loan documents to subsequent interest rate adjustments, disregarding any limitations on the amount by which the interest rate may change at any one time.]

Consider substituting the definition of "fully indexed rate" in Senate Bill 270/House Bill 363.

[(24) "Subprime mortgage loan" means:

(a) In the case of an adjustable rate mortgage loan secured by a first lien on residential real property that can increase in interest rate but not decrease in interest rate below the fully indexed rate at the time of origination, a mortgage loan for which the annual percentage rate (APR) is equal to or greater than 2 percentage points above the yield on United States Treasury securities having comparable periods of maturity:

(i) As of the 15th day of the preceding month if the rate is set between the 1st and 14th day of the month; and

(ii) As of the 15th day of the current month if the rate is set on or after the 15th day;

(b) For all other mortgage loans secured by a first lien on residential real property, a mortgage loan for which the APR is equal to or greater than 3 percentage points above the yield on United States Treasury securities having comparable periods of maturity:

(i) As of the 15th day of the preceding month if the rate is set between the 1st and 14th day of the month; and

(ii) As of the 15th day of the current month if the rate is set on or after the 15th day; and

(c) For a mortgage loan secured by a subordinate lien on residential real property, a loan for which the APR is equal to or greater than 5 percentage points above the yield on United States Treasury securities having comparable periods of maturity:

(i) As of the 15th day of the preceding month if the rate is set between the 1st and 14th day of the month; and

(ii) As of the 15th day of the current month if the rate is set on or after the 15th day.]

There is no substitute definition.

[(23) "Residential real property" means owner-occupied real property having a dwelling on it designed principally as a residence with accommodations for not more than four families.]

Consider substituting the definition of the same terms currently in Financial Institutions Article § 11-501(m).

Comments on Proposed changes to 09.03.06.03 - Licensing Requirements.

We are unclear what it means for an individual to have "closed" a loan in this context and recommend clarification. Below we have suggested one possible clarification, but do not suppose to know the Commissioner's true intention.

(3) For purposes of Financial Institutions Article, §11-506(b)(1), Annotated Code of Maryland, an individual shall be considered to have at least 3 years of experience in the mortgage lending business if:

(a) The individual has **received compensation in connection with** [closed] a minimum of 12 **closed** mortgage loans per year for each of the 3 years; or

Comments on Proposed changes to 09.03.06.04 - Records.

We suggest a clarification in the proposal regarding whose records should be retained.

We are unclear when a “foreclosure action” is “commenced.” Is this when the docket or complaint to foreclose is filed with the court? Is this when the “notice of intent to foreclose” is sent? Again, we have suggested a possible clarification, but do not suppose to know the Commissioner’s true intention.

Finally, it is unclear what information must be retained when the licensee (for example, a third party loan servicer) does not know information about the mortgage originator. We encourage clarification in this regulation similar to clarification provided in the Advisory issued by the Commissioner dated April 7, 2008 and to be provided, presumably, in future regulations required by Senate Bill 216/House Bill 365.

(r) Records of any foreclosure action commenced by **the** [a] licensee including, if applicable:

(i) The name and mortgage originator license number of the mortgage originator that originated the loan, **if that information is contained in the security instrument underlying the foreclosure or is otherwise known to the licensee;** and

(ii) The name and mortgage lender license number of the mortgage lender that originated the loan.

Comments on Proposed changes to 09.03.06.07 - Agreements with the Borrower.

We anticipate this section of the proposed regulations will change so that it is consistent with regulations mandated by Senate Bill 216/House Bill 365.

Comments on Proposed changes to 09.03.06.20 - Duty of Care.

We believe there needs to be a context regarding the duty to only recommend loans that do not have less favorable terms than other loans for which the borrower would qualify. Many licensees are limited as to the types of loans they can offer; very few licensees can make available all types of mortgage loan products and terms. The changes suggested below may be more in line with what was intended and what can actually be achieved.

(2) The duty to recommend to or induce a borrower to enter only into a mortgage loan that does not have terms less favorable than other mortgage loans **that the licensee can make available and for which** [that] the borrower would qualify based upon the borrower's creditworthiness; and

Regarding “net tangible benefit,” we are unclear whether the converse of the items listed would be deemed as the opposite of a “net tangible benefit” and, if so, what happens if a conflict arises

when the analysis is applied to a particular borrower. For example, a particular borrower may obtain a shorter amortization schedule (e.g., net tangible benefit) which increases her monthly payment; alternatively, a different borrower may obtain a lower monthly payment (e.g., net tangible benefit) but only through increasing his amortization schedule. Would any particular “net tangible benefit” have greater weight or more persuasive value than (i.e., trump) other benefits?

We believe the particular net tangible benefit described in proposed 09.03.06.20(B)(1)(g) may not be what was intended. Why must “cash out” be only for “necessary expenses” and what is “necessary”?

We believe the provision in proposed 09.03.06.20(B)(2) is intended to grant a “safe harbor” to licensees if the mortgage lender has the borrower complete and sign the net tangible benefit worksheet prescribed by the Commissioner. This should be helpful toward avoiding uncertainty. However, the term “required” used in this portion of the regulation is confusing. Are we to understand that using the Commissioner-prescribed worksheet is required and not simply a practice available to those who want to take advantage of a “safe harbor?”

B. Method to Determine Net Tangible Benefit.

(1) When determining whether a refinance of a mortgage loan will provide a net tangible benefit to the borrower, a licensee shall make a reasonable inquiry of the borrower to determine what net tangible benefit, if any, the borrower will receive from a mortgage loan. Net tangible benefits may include, but are not limited to:

- (a) Obtaining a lower interest rate;*
- (b) Obtaining a lower monthly payment, including principal, interest, taxes and insurance;*
- (c) Obtaining a shorter amortization schedule;*
- (d) Changing from an adjustable rate to a fixed rate;*
- (e) Eliminating a negative amortization feature;*
- (f) Eliminating a balloon payment feature;*
- (g) Receiving cash-out from the new loan [to pay for necessary expenses];*
- (h) Avoiding foreclosure;*
- (i) Eliminating private mortgage insurance; and*
- (j) Consolidating other existing loans into a new mortgage loan.*

*(2) A licensee shall be considered to have conducted a reasonable inquiry of whether a refinance of a mortgage loan provides to a borrower a net tangible benefit if the mortgage lender has the borrower complete and sign a net tangible benefit worksheet on the form **prescribed** [required] by the Commissioner.*

Comments on Proposed changes to 09.03.06.21 - Nontraditional and Subprime Mortgage Loans.

We believe that this portion of the Commissioner's proposed regulations has defined terms and imposed obligations that are not consistent with the federal guidance. We question why the Commissioner has not adopted the federal guidance, as recommended by CSBS and AARMR, as so many other State Regulators have done. Adopting standards that have been adopted by other States allows for more consistency across the nation when Maryland lenders and brokers offer nontraditional and subprime mortgage loans. It also helps to make it clear for lenders and broker what actions are permitted and prohibited and avoids ambiguities and disputes.

**Proposals to amend Regulations .02 and .03 and adopt new Regulations .04 and .05 under
COMAR 09.03.09 Mortgage Originators**

Our comments on these proposed regulations are the same as those presented above as to the proposed Mortgage Lenders regulations. We have not repeated those comments but simply incorporate them by reference as to the proposed Mortgage Originators regulations.

**Proposals to adopt new Regulations .01 —.03 under a new chapter, COMAR 09.03.10
Credit and Other Regulation**

Comments on Proposed Regulation 09.03.10.01 - Definitions.

You might consider using the new statutory definition of "Mortgage Fraud" found in Senate Bill 217/House Bill 360 in these regulations. The current definition of "Fraud" is confusing and a change is recommended below.

(2) "Fraud" means any act that:

(a) Constitutes a criminal violation of any article of the Annotated Code of Maryland and is part of an attempt or scheme to defraud any person; or

(b) Whether or not a criminal offense, is an intentional misrepresentation of any material fact or is conduct that is intended to prevent the discovery of a material fact and [that] is part of an attempt or scheme to defraud any person.

Comments on Proposed Regulation 09.03.10.02 - Reporting Fraud, Other Violations of Law, and Convictions.

There is concern that by using the term "agent" in proposed 09.03.10.02(A)(1) and (2), the Commissioner has unintentionally caused the scope of coverage to be too broad. For example, third parties unrelated to the regulated person who are suspected of any type of fraud, theft, or forgery – even if wholly unrelated to the activities the agent performed on behalf of the regulated person – would need to be reported.

We note that under federal law, when certain criminal acts or suspected acts are reported to federal law enforcement authorities, there is a safe harbor provided to the reporting entity. Please consider the adverse effect (*e.g.*, claims of defamation, etc.) that could result to regulated persons who report suspected activities to the Commissioner and whether it is the Commissioner's intention to cause regulated persons to suffer that type of potential liability.

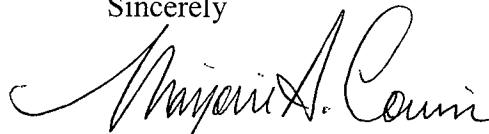
In proposed 09.03.10.02(D), for the first time, the term "financial crimes" is used. This term is undefined and unclear. Particularly because this proposed regulation mandates reporting to law enforcement, it must be very clear what actions trigger reporting obligations.

Also in proposed 09.03.10.02(D), it is unclear who would be "local law enforcement." If a regulated person has multiple locations in the state (*e.g.*, bank branches or licensed locations) but the regulated person manages its business affairs from one central location, who would be consider the "local" law enforcement to which a report is required?

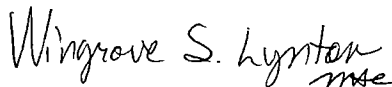
Further in proposed 09.03.10.02(D), a concern was raised that it violates the 5th Amendment of the Constitution. This appears to compel a regulated person to be a witness against himself under certain circumstances.

Again, we are making comments that we believe do not address policy but, rather, address legal issues raised by the proposed regulations. Thank you for your consideration of these comments. If you have any questions, please do not hesitate to call us.

Sincerely



Marjorie A. Corwin



Wingrove S. Lynton