

**Mortgage Bankers Association**  
**2008 Annual Legal Issues and Regulatory Compliance Conference**  
**Carlsbad, California, April 28-May 1, 2008**

**ABILITY TO REPAY: STATE LAWS MANDATING UNDERWRITING PROCEDURES**

<b>State Law or Regulation</b>	<b>Mandatory Standards</b>	<b>Entities Covered</b>	<b>Remedies/Liability</b>	<b>Other Comments</b>
Ohio S.B. 185; O.R.C. § 1345.031	Unconscionable act of engaging in pattern or practice of providing consumer loans based primarily on foreclosure or liquidation value of collateral without regard to consumer's ability to repay	Licensed "nonbank mortgage lenders" and "mortgage brokers"; assignees expressly excluded	CSPA (UDTPA) violation, including enhanced damages and attorneys' fees; Attorney General enforcement	Attorney General regulations create mandatory factors
Minnesota H.F. No. 1004; Minn. Stat. § 58.13	Make, provide or arrange for residential mortgage loan without verifying borrower's reasonable ability to repay PTI and MI; underwriting criteria must be verified through reasonably reliable methods and documentation	Licensed "residential mortgage originators" (banks, thrifts, CU's excluded)	Private right of action for damages and attorneys' fees	Evidence of high foreclosure rate led legislature to act

State Law or Regulation	Mandatory Standards	Entities Covered	Remedies/Liability	Other Comments
<p>Colorado SB 203 Colo. Code § 12-61-904.5</p>	<p>Duty of good faith and fair dealing includes duty to make reasonable inquiry into borrower's financial situation</p>	<p>"Mortgage brokers", including financial institution employees</p>	<p>Deceptive trade practice under Colorado Consumer Protection Act</p>	<p>Dept. of Regulatory Agencies has issued guidance</p>
<p>Nevada A.B. No. 440; NRS 598D.100</p>	<p>Unfair lending practice for lender to knowingly or intentionally make home loan without determining borrowers ability to repay, using any commercially reasonable means or mechanism</p>	<p>All residential mortgage lenders; holder of loan at time of action may require assignor to repurchase loan</p>	<p>Unfair lending practice; if willful, 3x damages, attorneys' fees</p>	<p>Legislative Counsel Bureau issued explanatory letter 10/9/07</p>
<p>Maine L.D. 1869 (P.L. 273); 9-A MRSA § 8-206-D</p>	<p>No extension of "subprime mortgage loan" unless reasonable creditor would believe at time loan closed that borrower will be able to make scheduled payments; mandatory determination/verification of various underwriting factors; "subprime mortgage loan" defined as "nontraditional mortgage loan," "rate spread home loan" or "high-rate, high fee mortgage"</p>	<p>Anyone making "subprime mortgage loans"</p>	<p>Actual damages, statutory damages and attorneys' fees; no assignee liability but rescission may apply to subsequent loan holder</p>	<p>Final Rule from DPFRC contains detailed underwriting requirements (issued 12/4/07)</p>

State Law or Regulation	Mandatory Standards	Entities Covered	Remedies/Liability	Other Comments
<p>North Carolina HB 1817; N.C.G.S. § 24-1.1F</p>	<p>For "rate spread home loans" lender must reasonably and in good faith believe that borrower(s) have ability to repay PTTI; lender must take reasonable steps to verify accuracy and completeness of specified information; AUS may be utilized but still must follow mandated underwriting procedures</p>	<p>All residential mortgage lenders (loans of less than \$300,000)</p>	<p>Usury, which may include reimbursement of 2X fees/interest collected and forfeiture of future collection; Attorney General and Banking Commissioner enforcement</p>	<p>Cure may be effected by restitution or changing loan terms</p>
<p>Massachusetts 940 CMR 800 (updated) Attorney General mortgage broker and lender regulations), Section 8.06</p>	<p>Unfair or deceptive act for mortgage broker to arrange or mortgage lender to make mortgage loan unless reasonably believes that will be able to repay, based on numerous factors; no doc, stated or other non-income-verified loans prohibited unless disclosure identifying income, etc.</p>	<p>Mortgage brokers and mortgage lenders, excluding exempted parties and banks</p>	<p>Unfair and deceptive act; Attorney General enforcement</p>	<p>Massachusetts legislature passed comprehensive mortgage reform law in November, 2007</p>
<p>Maryland SB 270 (eff. 6/1/08)</p>	<p>Lender must give due regard to borrower's ability to repay PTTI; "due regard" must include numerous considerations and verifications</p>	<p>Mortgage lenders and mortgage brokers; does not cover VA, FHA and CDA loans</p>	<p>Usury; civil penalties and forfeiture</p>	<p>Part of comprehensive emergency legislative package</p>

State Law or Regulation	Mandatory Standards	Entities Covered	Remedies/Liability	Other Comments
Illinois SB1167; 205 ILCS 635/5-6 (eff. 6/1/08)	Lender must verify borrower's reasonable ability to repay PTTI; verifications required	Licensees under Residential Mortgage License Act	Private rights of action; agency enforcement	Predatory lending database requirements expanded in this bill

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 This chart consists of general information only and should not be treated or relied upon as legal advice.

## ILLINOIS "ABILITY TO REPAY" STATUTE

(205

ILCS

635/5-6)

(This Section may contain text from a Public Act with a delayed effective date)

Sec. 5-6. Verification of borrower's ability to repay.

(a) No licensee may make, provide, or arrange for a residential mortgage loan without verifying the borrower's reasonable ability to pay the principal and interest on the loan, real estate taxes, homeowner's insurance, assessments, and mortgage insurance premiums, if applicable.

For residential mortgage loans in which the interest rate may vary, the reasonable ability to pay the principal and interest on the loan shall be determined based on a fully indexed rate, which rate shall be calculated by using the index rate prevailing at the time of origination of the loan plus the margin that will apply when calculating the adjustable rate under the terms of the loan, assuming a fully amortizing repayment schedule based on the term of the loan.

For loans that allow for negative amortization, the principal amount of the loan shall be calculated by including the maximum amount the principal balance may increase due to negative amortization under the terms of the loan.

(b) For all residential mortgage loans made by a licensee, the borrower's income and financial resources must be verified by tax returns, payroll receipts, bank records, or other reasonably reliable methods, based upon the circumstances of the proposed loan. Nothing in this Section shall be construed to limit a licensee's ability to rely on criteria other than the borrower's income and financial resources to establish the borrower's reasonable ability to repay a residential mortgage loan; however, such other criteria must be verified through reasonably reliable methods and documentation. A statement by the borrower to the licensee of the borrower's income and resources is not sufficient to establish the existence of the income or resources when verifying the reasonable ability to pay. Stated income should be accepted only if there are mitigating factors that clearly minimize the need for direct verification of ability to repay.  
(Source: P.A. 95-691, eff. 6-1-08.)

## MAINE "ABILITY TO REPAY" STATUTE

G. A subprime mortgage loan may not be extended to a borrower unless a reasonable creditor would believe at the time the loan is closed that the borrower will be able to make the scheduled payments associated with the loan.

(1) The determination of a borrower's reasonable ability to repay a subprime mortgage loan must include, but may not be limited to, consideration of the borrower's income, including statements submitted by or on behalf of the borrower in the loan application, except that a creditor may not disregard facts and circumstances that indicate that the income statements submitted by or on behalf of the borrower are inaccurate or incomplete, credit history, current obligations and employment status; the debt-to-income ratio of the borrower's monthly gross income, including the costs of property taxes and insurance; and other available financial resources other than the borrower's equity in the principal dwelling that secures or would secure the subprime mortgage loan.

(2) The calculation assumptions used in evaluating the ability to repay for subprime mortgage loans must include:

(a) The monthly payment amounts based on, at a minimum, the fully indexed rate, assuming a fully amortizing repayment schedule;

(b) Verification of all sources of income by tax returns, payroll receipts, bank records, reasonable alternative or reasonable 3rd-party verification; and

(c) For products that permit negative amortization, the repayment analysis based upon the initial loan amount plus any balance increase that may accrue from the negative amortization provision.

(3) The administrator shall adopt, amend and repeal routine technical rules in accordance with Title 5, chapter 375, subchapter 2-A defining with reasonable specificity the requirements set forth in subparagraphs (1) and (2). In adopting rules under this subparagraph, the administrator shall give due consideration and weight to the following federal regulations and guidelines, as amended from time to time:

(a) Final Interagency Guidance on Nontraditional Mortgage Product Risks;

(b) Credit Risk Management Guidance for Home Equity Lending;

(c) Expanded Guidance for Subprime Lending Programs; and

(d) Interagency Guidance on Subprime Lending.

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## Attorney General Martha Coakley

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# 940 CMR 8.00: Mortgage Brokers and Mortgage Lenders

**SEARCH**

Attorney Gene

## Section

[8.01: Purpose](#)[8.02: Scope](#)[8.03: Definitions](#)[8.04: Advertising Practices](#)[8.05: Mortgage Disclosures](#)[8.06: Prohibited Practices](#)[8.07: Severability](#)[8.08: Effective Date](#)

## 8.01: Purpose

In 1992, the Attorney General of Massachusetts promulgated 940 CMR 8.00 relating to mortgage lenders and mortgage brokers pursuant to the Attorney General's authority in M.G.L. c. 93A, s. 2(c). These regulations were designed to protect Massachusetts consumers seeking residential mortgage loans for home improvements and other purposes, other than for the purchase or initial construction of residential property or open-end home equity lines of credit, and to ensure that the mortgage industry is operating fairly and honestly by means of legitimate and responsible business acts and practices that are neither unfair nor deceptive.

In 2007 it is now clear that certain widespread acts and practices in the area of residential mortgage lending continue to unfairly harm consumers. The Attorney General, therefore, has updated and amended the 1992 mortgage broker and lender regulations to address problems experienced by consumers when they seek or obtain mortgage loans for the purchase or initial construction of residential homes, or when consumers refinance. The regulations will continue to address problems experienced by consumers when they obtain mortgage loans for purposes other than purchase money financing and initial construction, including the purpose of refinancing an existing loan.

## 8.02: Scope

The Attorney General's regulations define unfair or deceptive acts or practices. They are not intended to be all inclusive as to the types of activities prohibited by M.G.L. c. 93A, s. 2(a). Acts or practices not specifically prohibited by 940 CMR 8.00 are not necessarily consistent with Chapter 93A or otherwise deemed legitimate by the absence of regulation here. 940 CMR 8.00 is designed to supplement existing regulations. All references in 940 CMR 8.00 to statutes and other regulations shall include amendments made to such statutes and regulations after the promulgation of 940 CMR 8.00.

940 CMR 8.00 shall cover any mortgage lender or broker advertising or doing business within

Massachusetts, regardless of whether or not the lender or broker maintains an office in Massachusetts.

940 CMR 8.00 applies to all residential mortgage loan transactions in the Massachusetts, as more particularly defined in these regulations, except that it does not apply to either (i) reverse mortgages governed by M.G.L. c. 167E, s. 7, or (ii) open-end home equity lines of credit. Reduced interest rate mortgages originated under the auspices of affordable housing programs which are administered by state, quasi-public, or local government entities are also excluded.

Top of Page

## 8.03: Definitions

**Advertisement** (including the terms **advertise** and **advertising**) shall be defined in a manner which is consistent with the definition provided by the applicable sections of the Attorney General's Retail Advertising Regulations, 940 CMR 6.00, and means any oral, written, graphic, or pictorial statement made by a mortgage broker or lender in any manner in the course of the solicitation of business. Advertisement includes any representation made in a newspaper, magazine, or other publication or on the Internet, radio or television or contained in any notice, handbill, sign, billboard, banner, poster, display, circular, pamphlet, catalog, or letter. Advertisement includes any representation disseminated or accessible within Massachusetts if the advertisement is directed to consumers in Massachusetts.

**Bait advertising** means an offer to procure, arrange, or otherwise assist a borrower in obtaining a mortgage on terms which the broker or lender cannot, does not intend, or want to provide, or which the broker or lender knows cannot be reasonably provided. Its purpose is to switch borrowers from buying the advertised mortgage loan product to buying a different mortgage loan product, usually at a higher rate or on a basis more advantageous to the broker or lender.

**Borrower** means any natural person seeking, using, or paying for, directly or indirectly, the services of a mortgage lender or broker in connection with a mortgage loan.

**Broker fee** means any money, compensation, commission, fee, charge or other valuable consideration directly or indirectly imposed by a mortgage broker for the broker's services in negotiating, placing, finding, or otherwise assisting a borrower in obtaining a mortgage loan. The term broker fee does not include a fee charged by the lender (such as a commitment fee or a lock-in fee), wages or commissions paid to an employee of the mortgage broker or mortgage lender by his or her employer, nor does such term include bona fide and reasonable payments to be remitted to third party service providers, such as appraisal fees or fees for credit reports or payments or remittances to the mortgage lender.

**Clear and conspicuous** (including the terms **clearly and conspicuously**) shall be defined in a manner which is consistent with the definition provided by the applicable sections of the Attorney General's Retail Advertising Regulations, 940 CMR 6.00. 940 CMR 6.01 provides that **clear and conspicuous** (including the terms **clearly and conspicuously**) shall mean that:

the material representation being disclosed is of such size, color, contrast, or audibility and is so presented as to be readily noticed and understood by a reasonable person to whom it is being disclosed.

Further, without limiting the requirements of the preceding sentence, regulation 940 CMR 6.01 states that a representation in an advertisement is not clear and conspicuous unless:

1. for a printed, written, typed or graphic advertisement, such material representation appears in type which is at least one-third the size of the largest type of information which it modifies and is a minimum of eight point type;
2. for the video portion of a television advertisement, such material representation:

- a. is displayed in type not less than 14 scan lines in height;
  - b. contains letters of a color or shade that noticeably contrast with the background, and the background does not consist of colors and/or images which obscure or detract attention from the representation or are disparaging to its meaning or importance; and
  - c. appears on the screen for a duration equal to at least one second for every three words of the material representation but not less than a total of five seconds.
3. for a radio advertisement or the audio portion of a television advertisement, such material representation complies with the requirements of 940 CMR 6.01(c).

**Commissioner** means the Commissioner of Banks.

**Commitment for mortgage loans** (or the word **commitment** ) means an oral or written agreement to loan or to advance funds for a mortgage loan. A commitment can specify a loan amount, repayment terms, interest rate or conditions necessary to close the loan.

**Contractor or home improvement contractor** means any person who owns or operates a residential contracting business or who undertakes, offers to undertake, purports to have the capacity to undertake, or submits a bid for, by him or herself or through others, residential contracting work as defined in M.G.L. c. 142A.

**Mortgage broker or broker** means any person, who for compensation or gain, or in the expectation of compensation or gain, directly or indirectly negotiates, places, assists in placement, finds, or offers to negotiate, place, assist in placement or find mortgage loans on residential property for others, or as otherwise defined by M.G.L. c. 255E, s. 2 or by the Commissioner. Notwithstanding anything to the contrary in these regulations, the following persons shall not be deemed to be a mortgage broker:

- a. any person who is exempt from the licensing requirements of M.G.L. c. 255E, s. 2; provided, however, that individuals who work for or on behalf of brokers that are licensed pursuant to M.G.L. c. 255E, s. 2, shall not be exempt from these regulations; and
- b. any financial institution which is regulated by a federal and/or state bank regulatory agency and which, directly or indirectly, negotiates, places, assists in placement, finds, or offers to negotiate, place, assist in placement or find mortgage loans on residential property for a direct or indirect affiliate or subsidiary of such financial institution.

**Mortgage lender or lender** means any person engaged in the business of making mortgage loans or issuing commitments for mortgage loans, including, but not limited to, mortgage lenders licensed or regulated by M.G.L. c. 255E, s. 2 or the Commissioner, and shall include all individuals who work on behalf of such lenders.

**Mortgage loan or loan** means a loan to a natural person primarily for personal, family or household use secured wholly or partially by a mortgage on residential property, or as otherwise defined by M.G.L. c. 255E or the Commissioner, and shall include loans to refinance a mortgage.

**Mortgage loan or loan** shall not include either (i) reverse mortgages governed by M.G.L. c. 167E, s. 7, or (ii) open-end home equity lines of credit.

**No Income Loan Product** means a mortgage loan where: (i) in making its decision whether to underwrite the loan or extend credit, the mortgage lender does not account for or consider, in any manner whatsoever, the prospective borrower's income or employment status, and (ii) that fact is set forth in the lender's written underwriting or loan origination policies governing its No Income Loan Product

**Person** means a natural person or organization including a corporation, partnership, association, cooperative or trust or any other legal entity.

**Point** means an origination fee, finder's fee, or other fee, premium, service charge, or any other charge calculated as a percentage of the principal amount of the loan or a percentage of the amount financed. however such point may be called. which is charged by a mortgage lender at or

before the time the mortgage loan is made as additional compensation for the mortgage loan, or as otherwise defined by M.G.L. c. 183, s. 63 or the Commissioner. A point does not include:

- a. bona fide and reasonable fees for actual services performed including, but not limited to, attorney's fees, appraisal fees, credit reporting fees, private mortgage insurance premiums, and title insurance premiums or mortgage broker fees; or
- b. a charge which is credited to closing costs or other costs relating to such loan.

**Residential property** means real property located in Massachusetts having thereon a dwelling house with accommodations for four or fewer separate households and occupied, or to be occupied, in whole or in part by the obligor of the mortgage debt, or as otherwise defined in M.G.L. c. 255E.

[Top of Page](#)

## 8.04: Advertising Practices

1. It is an unfair or deceptive act or practice for a mortgage broker or lender to make any representation or statement of fact in an advertisement if the representation or statement is false or misleading or has the tendency or capacity to be misleading, or if the mortgage broker or lender does not have sufficient information upon which a reasonable belief in the truth of the representation or statement could be based.
2. It is an unfair or deceptive act or practice for a mortgage broker or lender to advertise without clearly and conspicuously disclosing its business name, and if required to be licensed pursuant to M.G.L. c. 255E, the words "broker" or "lender," as applicable, and the license number.
3. It is an unfair or deceptive act or practice for a mortgage broker to represent in any advertisement that the mortgage broker will fund a mortgage loan.
4. It is an unfair or deceptive act or practice for a mortgage broker or lender to engage in bait advertising or to misrepresent (directly or by failure to adequately disclose) the terms, conditions or charges incident to the mortgage loan being advertised in any advertisement. Violations of 940 CMR 8.04(4) shall include, but shall not be limited to:
  - (a) the advertisement of "immediate approval" of a loan application or "immediate closing" of a loan or words of similar import, such as "instant closing";
  - (b) the advertisement of a "no point" mortgage loan when points are required or accepted by the lender as a condition for commitment or closing;
  - (c) the advertisement of an incorrect specific number of points required for commitment or closing;
  - (d) the advertisement through terms such as "bad credit no problem" or words of similar import or that an applicant will have unqualified access to credit without clearly and conspicuously disclosing the material limitations on the availability of credit that may exist, such as:
    1. requirements for the availability of credit (such as income);
    2. that a higher rate or more points may be required for a consumer with bad credit; and
    3. that restrictions as to the maximum principal amount of the loan offered may apply.
  - (e) the use of "avoid foreclosure" or words of similar import in an advertisement unless the advertisement also clearly and conspicuously discloses, that:
    1. the borrower must refinance the mortgage in default and/or take a new mortgage loan;
    2. the borrower may be required to pay interest rates significantly higher than what other borrowers not facing foreclosures might pay; and
    3. the warning that "you may lose your home if you cannot make all the payments or if you

miss any of the payments on this loan."

5. It is an unfair or deceptive act or practice for a mortgage broker or lender who advertises any finance terms to fail to comply with the applicable state and federal advertising laws, Truth-in-Lending laws, M.G.L. c. 140D, s. 1, et seq., and 15 U.S.C. § 1601, et seq., and any regulations promulgated thereunder.

[Top of Page](#)

## 8.05: Mortgage Disclosures

1. It is an unfair or deceptive act or practice for a mortgage broker or mortgage lender to fail to make any disclosure, or fail to provide any document, to a consumer required by and at the time specified by any applicable state or federal law, regulation or directive.

2. It is an unfair or deceptive act or practice for a mortgage broker or lender to conceal or to fail to disclose to a borrower any fact relating to the loan transaction, disclosure of which may have influenced the borrower not to enter into the transaction with the broker or lender.

3. It is an unfair and deceptive act or practice for the mortgage broker or lender to fail to take reasonable steps to communicate the material facts of the transactions in a language that is understood by the borrower. Reasonable steps which shall comply with this regulation may include but shall not be limited to:

(a) using adult interpreters; and

(b) providing the borrower with a translated copy of the disclosure forms required by any applicable state or federal law, regulation or directive, in a language understood by the borrower.

4. It is an unfair or deceptive act or practice for a mortgage lender to fail to give to the borrower legible copies of the mortgage deed, promissory note, and the settlement statement when completed or at the time of closing.

[Top of Page](#)

## 8.06: Prohibited Practices

1. It is an unfair or deceptive act or practice for a mortgage broker or lender to make any representation or statement of fact if the representation or statement is false or misleading or has the tendency or capacity to be misleading, or if the mortgage broker or lender does not have sufficient information upon which a reasonable belief in the truth of the representation or statement could be based. Such claims or representations include, but are not limited to the availability, terms, conditions, or charges, incident to the mortgage transaction and the possibility of refinancing. In addition, other such claims and representations by the broker may include the amount of the brokerage fee, the services which will be provided or performed for the brokerage fee, the borrower's right to cancel any agreement with the mortgage broker, the borrower's right to a refund of the brokerage fee, and the identity of the mortgage lender that will provide the mortgage loan or commitment.

2. It is an unfair or deceptive act or practice for a broker or lender to charge an application and/or broker fee which significantly deviates from industry-wide standards or is otherwise unconscionable.

3. It is an unfair or deceptive act or practice for a mortgage broker or lender to accept any broker fee, application fee or other fee, prior to the borrower's receipt of the applicable disclosure forms mandated by 940 CMR 8.05(1), (2) or (3). Notwithstanding the foregoing, an appraisal fee may be accepted if the lender or brokers provides oral or written notice, prior to the receipt of such fee, as to whether the fee is refundable.

4. It is an unfair or deceptive act or practice for a mortgage broker or lender to engage the services of

(another) mortgage broker that will charge the borrower an additional fee without obtaining in advance the written permission of the borrower to charge that fee, the amount of which shall be specified in writing.

5. It is an unfair or deceptive act or practice for a mortgage broker or lender to directly or indirectly, regardless of the receipt or the expectation of receipt of compensation from the contractor, to:

- a. provide loan application documents to home improvement contractors for use by such contractor in connection with the financing by mortgage loans of home improvement contracts;
- b. use a home improvement contractor as an agent for its business; or
- c. accept mortgage applications from contractors.

This provision shall not prohibit contractors from referring consumers to mortgage brokers or lenders, or lenders from purchasing executed home improvement contracts.

6. It is an unfair or deceptive act or practice for a mortgage broker or lender to procure or negotiate for a borrower a mortgage loan with rates or other terms which significantly deviate from industry-wide standards or which are otherwise unconscionable. To determine whether the Annual Percentage Rate ("APR"), for example, is unconscionable, factors to consider include whether the APR at the time the loan was made is more than, the greater of:

- a. ten percent above the highest domestic "Prime Rate" listed in the Money Rates section of The Wall Street Journal; or
- b. twenty percent; and

whether the APR is consistent with comparable rates for borrowers in similar financial circumstances.

7. It is an unfair or deceptive act or practice for a mortgage lender to act also as a mortgage broker directly or indirectly in the same mortgage loan transaction, or to violate 209 CMR 42.04(4) or 42.07(4).

8. It is an unfair or deceptive act or practice for a lender to fail to disburse funds in accordance with any commitment or agreement with the borrower.

9. It is an unfair or deceptive act or practice for a mortgage broker or lender to conduct business with a person which should be licensed under M.G.L. c. 255E, and which it knows or should know is an unlicensed mortgage broker or lender.

10. It is an unfair or deceptive act or practice for any mortgage lender to charge a prepayment fee which:

- a. violates M.G.L. c. 183, s. 56;
- b. significantly deviates from industry-wide standards; or
- c. is otherwise unconscionable.

11. It is an unfair or deceptive act or practice for a mortgage broker or lender to fail to give to the borrower or his or her attorney the time and reasonable opportunity to review every document signed by the borrower and every document which is required pursuant to these regulations, and other applicable laws, rules or regulations, prior to the disbursement of the mortgage funds.

12. It is an unfair or deceptive act or practice for a mortgage broker or lender to accept any fees which were not disclosed in accordance with these regulations or applicable law.

13. It is an unfair or deceptive act or practice for a mortgage broker or lender to accept any attorneys' fees in excess of the fees that have been or will be remitted to its attorneys.

14. It is an unfair or deceptive act or practice for a mortgage broker or lender to refuse to permit the borrower to be represented by the attorney of his or her choice. Nothing contained herein shall limit the lender's right to choose its own attorney, which shall be paid for by the borrower.

15. It is an unfair or deceptive act or practice for a mortgage broker to arrange or mortgage lender to make a mortgage loan unless the mortgage broker or lender, based on information known at the time the loan is made, reasonably believes at the time the loan is expected to be made that the borrower will be able to repay the loan based upon a consideration of the borrower's income, assets, obligations, employment status, credit history, and financial resources, not limited to the borrower's equity in the dwelling which secures repayment of the loan. The determination under this section of a borrower's ability to repay a loan shall take into account, without limitation: i) the borrower's ability to repay at the fully indexed rate, assuming a fully amortizing repayment schedule, and the resulting scheduled payments that may be charged under the loan accounting for interest rates, financial terms or scheduled payments that may adjust upward; and ii) the property taxes that are required on the subject property at the time the loan is expected to be made and the reasonably anticipated insurance costs if the loan requires that insurance be maintained on the property, regardless whether the broker or lender will collect an escrow for such taxes or insurance in connection with loan payments. For purposes of this subsection, the "fully indexed rate," with respect to loan rates that may adjust upward, shall mean the index rate prevailing at the date of loan origination plus the margin to be added to it after the expiration of an introductory interest rate. For purposes of illustration, assume that a loan with an initial fixed rate of 7% will reset to the six-month London Interbank Offered Rate (LIBOR) plus a margin of 6%. If the six-month LIBOR rate equals 5.5% at the date of origination, the determination of ability to pay under this subsection shall take into account the borrower's ability to repay at 11.5% (5.5% plus 6%), regardless of any interest rate caps that limit how quickly the fully indexed rate may be reached.

16. It is an unfair or deceptive act or practice for a mortgage broker or lender to process or make a mortgage loan without documentation to verify the borrower's income (a so-called "no documentation," "no doc," "stated income" or "limited documentation" loan) unless the broker or lender, as applicable, first provides a written document to the borrower, which must be signed by the borrower in advance of the closing, and which: a) identifies the borrower's income and the source of the income; and b) provides detailed information, if true, that by applying for a mortgage loan on a no- or limited documentation basis, the consumer will pay a higher interest rate or increased charges, or have less favorable terms for the mortgage loan (including information concerning the precise increase in interest rate, charges, or the nature of the less favorable terms). Provided, however, that if a mortgage broker or lender arranges or makes a mortgage loan using a No Income Loan Product (as defined herein), which loans shall remain subject to Section 8.06(15), the requirement in clause (a) of the preceding sentence shall not apply. It is an unfair or deceptive act or practice for a mortgage lender or broker to process or make a mortgage loan on a no- or limited documentation basis if the stated income provided by the borrower with respect to the no- or limited documentation loan contradicts information previously obtained by the broker or lender with respect to that borrower in connection with the same proposed loan, absent a documented change in circumstances or other documented explanation for the discrepancy between the prior information and latter income representation. Notwithstanding the foregoing, it shall be an unfair or deceptive act or practice for a mortgage lender to underwrite or close a loan without first verifying the employment or income of the borrower when the amount of the income stated is not reasonable for the actual employment status or experience of the borrower known to the lender, or when the borrower's stated employment or stated income is not reasonable in light of the borrower's circumstances known to the lender.

17. It is an unfair or deceptive act or practice for a mortgage broker to process, make or arrange a loan that is not in the borrower's interest. Where the financial interest of a mortgage broker conflicts with the interests of the borrower (for example, where the broker's compensation will increase directly or indirectly if the borrower obtains a loan with higher interest rates, increased charges or less favorable terms than those for which a borrower would otherwise qualify), the broker shall disclose the conflict and shall not proceed to process, make or arrange the loan so long as such a conflict exists. It is an unfair or deceptive act or practice for a mortgage broker to disclaim the duty established by this subsection (17) in a written contract or to assert in oral representations that a broker does not have such a duty in communications with the borrower.

18. It is an unfair or deceptive act or practice for a mortgage lender (a) to use a pricing model for its mortgage loans which treats borrowers with similar credit criteria and bona fide qualification criteria differently; or (b) to make a mortgage loan when any or all of the cost features of the mortgage loan

are based on criteria other than the borrower's credit and other bona fide qualification criteria. For purposes of this paragraph, "bona fide qualification criteria" shall mean those criteria that a lender, pursuant to written loan underwriting or origination policies, takes into account in determining whether to extend a mortgage loan, including by way of example, income, assets, credit history, credit score, income-to-debt ratios or loan-to-value ratios. For purposes of sub-paragraph (b), the term "cost features" shall include, but not be limited to, the interest rate; the index; margin; and other adjustment features if the interest rate is adjustable; points; and prepayment penalties.

[Top of Page](#)

## 8.07: Severability

If any provision of these regulations or the application of such provision to any person or circumstances is held to be invalid, the validity of the remainder of these regulations and the applicability of such provision to other persons or circumstances shall not be affected.

## 8.08: Effective Date

The amendments to 940 CMR 8.00 shall be effective on January 2, 2008.



## **2008 MARYLAND MORTGAGE LENDING REFORM BILL PACKAGE**

Maryland Governor Martin O'Malley is expected to sign a sweeping mortgage reform package into law today that addresses loan origination, foreclosure, mortgage fraud, and foreclosure rescue transactions. Because the General Assembly has deemed three of the four bills "emergency" measures, they will take effect immediately upon the Governor's signature.

The bill package is a result of much negotiation between the O'Malley Administration, Legislators, lending trade groups, and community advocates. The result of the Governor's rational and inclusive approach is a product that carefully attempts to balance availability of mortgage credit with broad and meaningful reform of the industry.

The bills strike a careful balance that MBA believes will likely ensure the continued availability of credit in the State. It strengthens lending practice standards (H.B. 363/ S. 270), increases protections for consumers from foreclosure rescue scams (H.B. 361/ S. 218) and provides the means necessary for state law enforcement officials to prosecute mortgage fraud as a crime (H.B. 360/ S. 217). It also reforms the foreclosure process by providing for increased notification requirements and extends the time from the commencement of foreclosure to conclusion. Prior to the enactment of these bills, the minimum foreclosure timeline in Maryland from commencement to sale was 46 days.

MBA recognizes the importance of these positive steps to reform mortgage lending in Maryland. However, MBA does have a great concern about the immediate effective date of the new foreclosure reform procedures. Among its various provisions, the new law requires lenders to wait 90 days from default before filing foreclosure. Additionally, the new law will require lenders to send the borrower a uniform Notice of Intent to Foreclose 45 days prior to filing the foreclosure action. Consequently, due to its emergency nature, the new law creates a de facto 45-day moratorium on foreclosures in Maryland.

MBA believes that mortgage servicers and the Maryland Court system need more time to adjust to the new law's requirements. Without additional time, it will not be possible for this new law to be implemented in an efficient and effective manner that represents the intentions of the Governor, Legislature, and other parties involved in the negotiation of the legislation. One of technology's many benefits is that it provides those affected by this law with a greater ability to adapt quickly; however, changes to computer systems and company procedures cannot be implemented instantaneously. The immediate effective date does not provide mortgage servicers or the Courts with sufficient time to alter their systems and procedures, and will likely lead to confusion among all affected parties. MBA will continue to advocate for a delay of the law's effective date to provide at least 60 days so that the various systems affected by the new law may be adjusted to accommodate the changes.

Below are highlights of the key provision the new Maryland laws.

H.B. 363/ S. 270: Credit Regulation/Mortgage Lending (Effective 6/1/08)

- Prohibits all prepayment penalties
- For ALL mortgage loans, except reverse mortgages and loans approved “for government guaranty by FHA/VA/Community Development Administration, lender must “give due regard to the borrowers ability to repay the loan in accordance with its terms.” This includes:
  - Qualification at the fully-indexed rate
  - Property taxes and homeowner’s insurance, regardless of whether an escrow account is established.
- Due regard to ability to repay must include:
  - Consideration of the borrower’s debt to income ratio, including existing debts and other obligations;
  - Verification of gross monthly income and assets by review of third-party written documentation, which includes:
    - W-2, Tax Returns, Payroll Receipts, Financial Institution Records, other documents that provide reasonably reliable evidence of the borrower’s income/assets
- Requires brokers to disclose in the Finder’s Fee Agreement that the individual is a broker and not a lender in the transaction.
- Authorizes Maryland’s participation in the National Mortgage Licensing System.
- Prohibits granting of a license to mortgage originators and lender applicants if the applicant or principal has a felony conviction in the past ten years from fraud, theft, forgery, or a financial crime. Also allows for revocation in those cases.
- To qualify for a license, the applicant must have:
  - 3 years of experience in the mortgage lending business, complete 40 hours of classroom education, and pass a written exam. The Commissioner of Financial Institutions will develop/administer the exam
- Increases surety bond requirements for lenders based upon net worth and originations.

H.B. 360/ S. 217: Mortgage Fraud

- Creates a criminal mortgage fraud statute covering all potential actors engaged in mortgage fraud and includes:
  - Restitution
  - Forfeiture
  - Enhanced penalties for vulnerable adults
  - Private right of action under certain circumstances
  - Duty to report convictions to licensing body.

#### H.B. 361/ S. 218: Foreclosure Rescue Transactions

- Prohibits a foreclosure consultant from engaging in, arranging, promoting, promising, soliciting, participating in, assisting with, or carrying out a “foreclosure rescue transaction,”
- Foreclosure rescue transaction is defined as a transaction in which a residence in default is conveyed by a homeowner who retains legal/equitable interest in all or part of the property and is designed/intended to prevent or delay foreclosure proceedings.
- Foreclosure consultants may not receive a commission for the sale of a residence in default that exceeds 8% of the sales price. The bill prohibits such consultants from receiving any money to be held on behalf of the homeowner.
- Persons holding or servicing a mortgage loan secured by a residence in default are exempt while the person performs servicing, collection, and loss mitigation activities related to that loan, so long as the loan did not arise as a result of a foreclosure consulting contract.
- Licensed mortgage lenders are exempt while arranging for a refinancing of a mortgage loan for the residence in default.

#### H.B. 365/ S. 216: Foreclosure Process Reform

- Requires lenders to wait 90 days from the borrower’s default before filing foreclosure action.
- Uniform Notice of Intent to Foreclose must be sent to the homeowner by certified and first class mail 45 days prior to the filing of foreclosure action.
- Requires lenders to provide proof of ownership when filing the foreclosure action.
- Personal service: requires two good faith attempts at personal service on separate days. Allows service by posting with the filing of an affidavit documenting the two attempts.
- Requires 45 days from service of Order to Docket to foreclosure sale.
- Reduces the number of times notice of the foreclosure sale must be published in a newspaper from three times to one.
- Codify the right to cure during the time between filing the Order to Docket and sale. Limits the exercise of the right to one business day prior to sale.
- Any security interest, when recorded, must include the license number of the originator/lender, or an affidavit line if the document was not originated by a MD licensee.