

Memorandum

To: MBA's Regulatory Compliance
Conference
"Secondary Market Developments"
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FROM: Stephen F.J. Ornstein
Matthew S. Yoon
David A. Tallman
John P. Holahan

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RE: Save New Jersey Homes Act of 2008

We are writing to inform you that on June 23, 2008, Assembly Bill 2780, the "Save New Jersey Homes Act of 2008," (the "Act") passed the Senate and General Assembly of the New Jersey State Legislature, and has been sent to Governor Jon Corzine for signature. Governor Corzine is expected to sign the bill shortly. The Act requires creditors to freeze the introductory rates of certain residential mortgage loans for three years, and defer the payment of the additional interest accruing at the fully-indexed rate. The borrower will still be liable for the deferred interest, which must be repaid at the time the loan is paid off. The Act also provides that creditors must give borrowers specific disclosures prior to the rate reset and the initiation of foreclosure proceedings.

The Act is troublesome in that it provides for mandatory modification of existing mortgage contracts via legislative fiat, and constitutes a substantial interference with contracts, which could unwittingly increase the cost of mortgages for consumers in the future. The Act far exceeds the corresponding federal legislative efforts which have been limited to voluntary efforts to enable servicers to freeze the initial interest rates for five years, absent contractual language in the operative pooling and servicing agreements to the contrary. While the Act may help troubled borrowers in the short-run, it could very well impede the recovery of the secondary market. Indeed, we expect an Act this far-reaching and controversial to be met with fierce challenges over its legality in the courts.

The legislation will become effective immediately upon the Governor's signature and will be effective until January 1, 2011.

I. Definitions

A. Creditor

“Creditor” means a state-chartered bank, savings bank, savings and loan association or credit union, any person required to be licensed under the provisions of the “New Jersey Licensed Lenders Act,”¹ and any entity acting on behalf of the creditor named in the debt obligation including, but not limited to, servicers.

B. Introductory Rate Mortgage

The term “introductory rate mortgage” means a consumer credit transaction in which the loan is secured by a mortgage on real estate in New Jersey upon which there is located a one to four family dwelling which is occupied by the borrower as the borrower’s principal residence, and which provides for:

1. An introductory payment rate option that is set at least **3 percent** below the fully indexed rate² at the time the loan was originated and payments may adjust by more than **3 percent** at the reset date regardless of whether the variable rate index has increased; *or*
2. An interest rate that may adjust by more than **2 percent** at the end of the initial fixed rate period of the loan and which, notwithstanding the payment rate in effect, had:
 - a. An interest rate at origination more than 200 basis points over the Freddie Mac 30-year conventional interest rate; and
 - b. Which provides for an introductory rate that is set below the fully indexed rate at the time the loan was originated; and
 - c. May adjust at the reset date regardless of whether the variable rate index has increased.

An “introductory rate mortgage” *does not include*:

1. A loan that provides for a fixed rate of interest for the first five years or longer; or
2. A loan that provides for an introductory rate that is set below the fully indexed rate at the time the loan was originated only as a result of the borrower’s payment of bona fide discount points.

C. Eligible Borrower

¹ NJ Rev. Stat. 17:11C-1 *et seq.*

² “Fully indexed rate” means the sum of the current value of the index used for the adjustable rate mortgage, and the margin disclosed in the loan agreement.

“Eligible borrower” means a borrower who is obligated to repay a loan secured by an introductory rate mortgage.

D. Eligible Foreclosed Borrower

“Eligible foreclosed borrower” means a borrower who is obligated to repay a loan secured by an introductory rate mortgage and who receives a notice of intention to foreclose that mortgage pursuant to the New Jersey Fair Foreclosure Act³ (the “Foreclosure Act”). However, note that “eligible foreclosed borrower” does not include an eligible borrower who has previously exercised the right to obtain a three year period of extension pursuant to the Act.

II. Teaser Rate Reset Disclosures

The Act provides for certain disclosures to be provided to borrowers when rate resets are about to occur. Prior to the date on which the interest rate in effect during the introductory period of an introductory rate mortgage resets to a variable interest rate under the terms of the mortgage, a creditor must provide a series of written notices to an eligible borrower, separate and distinct from all other correspondence. The creditor must provide these notices at 60-day and 30-day intervals prior to the date that the introductory interest rate resets.

Each notice must include, in plain language and in at least 14-point bold type:

1. The current interest rate under the terms of the introductory rate mortgage;
2. The date on which the interest rate resets from a fixed interest rate applicable during the introductory period to a variable interest rate;
3. An explanation of how the reset interest rate and monthly payment will be determined;
4. The best estimate by the creditor of the amount of the monthly payment that will apply after the date of the reset, and the assumptions upon which the estimate is based;
5. A list of alternatives an eligible borrower may pursue before the date of the reset, including any refinancing of the loan offered by the creditor or any renegotiation of loan terms offered by the creditor;
6. An explanation of the borrower’s right to obtain a period of extension prior to the initial interest rate reset of an introductory rate mortgage pursuant to the Act and an explanation of the procedure that a borrower must follow to obtain a period of extension; and
7. A certification of extension form that can be completed by a borrower in order to obtain a period of extension authorized by the Act.

³ NJ Rev. Stat. 2A:50- 53 *et seq.*

III. Three Year Interest Deferment for Eligible Borrowers

A. General Rule

Notwithstanding any law or contract right to the contrary, prior to the initial interest rate reset of an introductory rate mortgage, ***a creditor must provide an eligible borrower a period of extension for three years***, during which the interest rate on the introductory rate mortgage will not increase above the original introductory rate, ***provided the eligible borrower completes and returns a certification of extension to the creditor in accordance with the Act***. Under the provisions of the Act, the borrower continues to pay the introductory rate for three years, which includes both principal and interest payments (as well as taxes and insurance), and then at the expiration of the three year extension the borrower pays the principal and interest payments (as well as taxes and insurance) at the fully-indexed rate. Any deferred interest that results from the extension is due in balloon payment form at the time the loan is fully repaid.

B. Borrower Certification

In order to obtain the period of extension, the eligible borrower must provide to the creditor, prior to the date that the interest rate resets under the terms of the introductory rate mortgage, a completed certification of extension form signed by the eligible borrower, which contains:

1. The name of the eligible borrower;
2. The address of the property; ***and***
3. An affirmative statement that the eligible borrower:
 - a. Does not have sufficient monthly income, after deductions for necessary living expenses, to pay the monthly payments that will apply after the date that the interest rate resets;
 - b. Requests the period of extension;
 - c. Agrees to continue, during the period of extension, monthly payments, which includes principal and interest calculated at the introductory rate on the date that the introductory rate mortgage was originated, as well as amounts for taxes, insurance, and any other amounts being paid under the terms of the mortgage prior to the interest rate reset;
 - d. Agrees to pay the creditor, ***at the time of the full repayment⁴ of the introductory rate mortgage***, any interest deferred on account of the period of extension;

⁴ “Full repayment” means the full repayment of the amounts due under the introductory rate mortgage, including, without limitation, upon the maturity date, a refinancing, or a sale of or other transfer of title to the property.

- e. Agrees to accept the creditor's placement of a modification of mortgage on the property to secure the repayment of the interest deferred on account of the period of extension; and
- f. Agrees to sign a modification of mortgage form that contains the terms of the period of extension and any documentation necessary to establish or record the modification of mortgage .

The Act provides that an eligible borrower who makes a knowing material misrepresentation in a certification of extension is guilty of a crime of the fourth degree.

The creditor, upon receiving the completed certification of extension, must grant the eligible borrower the three year period of extension, which commences on the date that the introductory rate is due to reset under the terms of the introductory rate mortgage.

C. Creditor Acknowledgement

Within a reasonable amount of time after the receipt of a completed certification of extension from an eligible borrower, a creditor must provide to the eligible borrower a written acknowledgment that the certification of extension has been received. The acknowledgment must contain the following:

1. The monthly payment amount that is due from the eligible borrower during the period of extension, which must include principal and interest, calculated at the introductory rate on the date the introductory rate mortgage was originated, as well as amounts for taxes, insurance, and any other amounts being paid under the terms of the mortgage prior to the interest rate reset;
2. A schedule of payments, indicating the date that the first monthly payment is due and the dates that each subsequent monthly payment is due during the period of extension;
3. The address to which the eligible borrower will send the monthly payment;
and
4. A statement of proposed modification of mortgage, which will include:
 - a. A notice to the eligible borrower that the creditor will place a modification of mortgage on the property that is the security for the introductory rate mortgage, to secure the eligible borrower's repayment of the amount of interest deferred by the period of extension; and
 - b. An explanation of the method the creditor will use to calculate the amount of the interest deferred by the period of extension.

D. Recording the Modification

A creditor who grants a period of extension to an eligible borrower must have the right to record a modification of mortgage on the eligible borrower's property in the public records in the county in which the property is located to secure the eligible borrower's repayment of the amount of interest deferred by the period of extension. The modification of mortgage will be effective from the date that it is executed. Notwithstanding any law to the contrary, *the modification of mortgage will have the same priority as the lien of the introductory rate mortgage.*

Upon payment by the eligible borrower of the total amount of interest deferred pursuant to the period of extension, which will only be due upon full repayment of the introductory rate mortgage, the creditor will provide the eligible borrower with a recordable satisfaction of the modification of mortgage, or otherwise cause the modification of mortgage to be discharged of record.

E. Recording the Certification of Extension

If an eligible borrower fails to return to a creditor which has a right to record a modification of mortgage pursuant to the Act a properly executed modification of mortgage or any other documentation necessary to establish or record the modification of mortgage, within 30 days from the borrower's receipt from the creditor of a modification of mortgage form, the creditor may record the eligible borrower's certification of extension in place of the modification of mortgage. Notwithstanding any other law to the contrary, *the certification of extension will have the same priority as the lien of the introductory rate mortgage.*

Upon payment by the eligible borrower of the total amount of interest deferred pursuant to the period of extension, the creditor must provide the eligible borrower with a recordable satisfaction of the certification of extension, or otherwise cause the certification of extension to be discharged of record.

F. No Waiver of Claims

The Act provides that a creditor may not require an eligible borrower to limit or waive the rights of the borrower to bring any claims, defenses, demands, proceedings, actions, or causes of action against the creditor as a condition of accepting an offer of any loss mitigation activities made available by the Act.

However, an eligible borrower who has been granted a period of extension must forfeit all rights concerning deferment of interest payments if the eligible borrower:

1. Fails to make payments under the schedule of payments set forth in the creditor's acknowledgment of the period of extension such that the modification of mortgage becomes 60 days delinquent; *or*
2. Fails to comply with the terms of any modification of mortgage entered into between the creditor and the eligible borrower relating to the period of extension such that the modification of mortgage becomes 60 days delinquent.

IV. New Foreclosure Disclosures

A creditor that issues to an eligible foreclosed borrower a notice of intention to foreclose on an introductory rate mortgage pursuant to the Foreclosure Act, must send to the eligible foreclosed borrower a series of written notices, by regular and registered mail, separate and distinct from all other correspondence. The notices must include in plain language and in at least 14 point bold type:

1. A statement that the information in the notice is being provided as required by the Act, which was enacted by the New Jersey Legislature and which provides certain rights to borrowers whose homes are the subject of a mortgage foreclosure action;
2. A list of alternatives to foreclosure that an eligible foreclosed borrower may pursue, including any refinancing of the loan offered by the creditor and any renegotiation of loan terms offered by the creditor;
3. An explanation of the eligible foreclosed borrower's right to obtain a period of extension for three years pursuant to the Act, and an explanation of the procedure that an eligible foreclosed borrower must follow to obtain a period of extension;
4. A statement that the notice should be read carefully and that the eligible foreclosed borrower may wish to consult with an attorney to understand the rights that may be available under the Act; and
5. A certification of extension form that can be completed by an eligible foreclosed borrower in order to obtain the period of extension authorized pursuant to the Act

These notices must be sent at the following intervals:

1. Within 10 days of issuing the notice of intention; and
2. At the time that the creditor applies for entry of final judgment of foreclosure pursuant to the Foreclosure Act.

The notices must be sent in envelopes that state the following information on the outside front portion of the envelope:

The New Jersey Legislature has enacted the Save New Jersey Homes Act of 2008, which may help you save your home from foreclosure. Details as to the rights you may have to obtain a period of extension of foreclosure under this new law are contained within. Please read the contents carefully. You may wish to consult with an attorney to understand your rights under this new law.

V. Three Year Interest Deferment for Eligible Foreclosed Borrowers

A. General Rule

Notwithstanding any law or contract right to the contrary, *a creditor must provide an eligible foreclosed borrower a period of extension for three years, during which foreclosure proceedings pursuant to the Foreclosure Act must be suspended and the eligible foreclosed borrower must continue to pay monthly payments*, which must include principal and interest, calculated at the introductory rate on the date that the introductory rate mortgage was originated, as well as amounts for taxes, insurance, and any other amounts being paid under the terms of the mortgage prior to the interest rate reset, provided the eligible foreclosed borrower completes and returns a certification of extension to the creditor. Under the provisions of the Act, at the expiration of the three year extension, the borrower pays the principal and interest payments (as well as taxes and insurance) at the fully-indexed rate. Any deferred interest that results from the extension, plus any fees and costs incurred by the creditor as a result of the foreclosure proceeding, plus any arrearages owed to the creditor for missed payments, property taxes, etc., are due in balloon payment form at the time the loan is fully repaid.

B. Borrower Certification

In order to obtain the period of extension, the eligible foreclosed borrower must provide to the creditor, no later than 90 days from the date that the creditor sends the notice required by the Foreclosure Act, a completed certification of extension form signed by the eligible foreclosed borrower, which contains:

1. The name of the eligible foreclosed borrower;
2. The address of the property; and
3. An affirmative statement that the eligible foreclosed borrower:
 - a. Requests the period of extension;
 - b. Agrees to continue, during the period of extension, monthly payments which must include principal and interest, calculated at the introductory rate on the date that the introductory rate mortgage was originated, as well as amounts for taxes, insurance, and any other amounts being paid under the terms of the mortgage prior to the interest rate reset;
 - c. Agrees to pay the creditor, at the time of full repayment of the introductory rate mortgage:
 - i. Any interest deferred on account of the period of extension;
 - ii. Any fees and costs incurred by the creditor in connection with the foreclosure proceeding; and
 - iii. Any arrearages owed to the creditor for monthly principal and

interest payments, homeowners insurance payments, property tax payments, and any other payments that the eligible foreclosed borrower was required to pay, but failed to pay, under the terms of the introductory rate mortgage;

- d. Agrees to accept the creditor's placement of a modification of mortgage on the property to secure the repayment of amounts owed; and
- e. Agrees to sign a modification of mortgage form that contains the terms of the period of extension and any documentation necessary to establish or record the modification of mortgage.

C. Creditor Duties to Suspend Foreclosure Proceedings

The creditor, upon receiving the completed certification of extension within the time period specified above, must:

- 1. Grant the eligible foreclosed borrower the three year period of extension, which must commence no later than 30 days from the date that the creditor receives the eligible foreclosed borrower's completed certification of extension; and
- 2. Suspend the foreclosure proceeding that the creditor initiated pursuant to the Foreclosure Act.

Note that a creditor may grant relief, upon receipt of a completed certification of extension from an eligible foreclosed borrower after the time period specified above, in the sole discretion of the creditor.

D. Creditor Acknowledgement

Within a reasonable period of time after the receipt of a completed certification of extension from an eligible foreclosed borrower within the time period specified by the Act, a creditor must provide to the eligible foreclosed borrower a written acknowledgment that the certification of extension has been received. The acknowledgment must contain the following:

- 1. A statement that the foreclosure proceeding initiated pursuant to the Foreclosure Act will be suspended during the period of extension;
- 2. The monthly payment amount that is due from the eligible foreclosed borrower during the period of extension, which must include principal and interest, calculated at the introductory rate, on the date the introductory mortgage rate was originated, as well as amounts for taxes, insurance, and any other amounts being paid under the terms of the mortgage prior to the interest rate reset;
- 3. A schedule of payments, indicating the date that the first monthly payment is due and the dates that each subsequent monthly payment is due during the

period of extension;

4. The address to which the eligible foreclosed borrower must send the monthly payment; *and*
5. A statement of proposed modification of mortgage, which must include:
 - a. A notice to the eligible foreclosed borrower that the creditor will place a modification of mortgage on the property that is the security for the introductory rate mortgage, to secure the eligible foreclosed borrower's repayment of the amounts; and
 - b. An explanation of the method the creditor will use to calculate the amount of the interest deferred by the period of extension, and the amounts for which repayment is secured by the modification of mortgage .

E. Recording the Modification

A creditor that grants a period of extension to an eligible foreclosed borrower must have the right to record a modification of mortgage on the eligible foreclosed borrower's property to secure the eligible foreclosed borrower's repayment of:

1. The amount of interest deferred by the period of extension;
2. Any fees and costs already incurred in connection with the foreclosure proceeding; and
3. Any arrearages owed to the creditor for monthly payments of principal and interest, homeowner insurance payments, property tax payments, or any other payments that the eligible foreclosed borrower was required to pay, but failed to pay, under the terms of the introductory rate mortgage.

Note that the modification of mortgage is effective from the date that it is executed. Notwithstanding any other law to the contrary, *the modification of mortgage must have the same priority as the lien of the introductory rate mortgage.*

Upon payment by the eligible foreclosed borrower of the total amount of interest deferred pursuant to the period of extension, and any other amounts representing the arrearages for which the modification of mortgage secures repayment pursuant to the Act, which must only be due upon full repayment of the introductory rate mortgage, the creditor must provide the eligible foreclosed borrower with a recordable satisfaction of the modification of mortgage , or otherwise cause the modification of mortgage to be discharged of record.

F. Recording the Certificate of Extension

If an eligible foreclosed borrower fails to return to a creditor, who has a right to record a modification of mortgage, a properly executed modification of mortgage or any other documentation necessary to establish or record the modification of mortgage within 30 days

from the borrower's receipt from the creditor of a modification of mortgage form, the creditor may record the eligible foreclosed borrower's certification of extension in place of the modification of mortgage. Notwithstanding any other law to the contrary, *the certification of extension must have the same priority as the lien of the introductory rate mortgage.*

Upon payment by the eligible foreclosed borrower of the total amount of interest deferred pursuant to the period of extension, and any other amounts representing the arrearages for which the certification of extension secures repayment, the creditor must provide the eligible foreclosed borrower with a recordable satisfaction of the certification of extension, or otherwise cause the certification of extension to be discharged of record.

G. No Waiver of Claims

A creditor may not require an eligible foreclosed borrower to limit or waive the rights of the borrower to bring any claims, defenses, demands, proceedings, actions, or causes of action against the creditor as a condition of accepting an offer of any loss mitigation activities made available by the Act.

However, an eligible foreclosed borrower who has been granted a period of extension must forfeit all rights concerning deferment of interest payments, suspension of foreclosure, and deferment of payment of amounts secured by a modification of mortgage if the eligible foreclosed borrower fails to make payments under the schedule of payments as set forth in the creditor's acknowledgment of the period of extension or fails to comply with the terms of the modification of mortgage entered into between the creditor and the eligible foreclosed borrower relating to the period of extension, such that the modification of mortgage becomes 60 days delinquent.

H. Final Judgment of Foreclosure

A court may not approve an entry of final judgment in a foreclosure proceeding commenced pursuant to the Foreclosure Act as to an introductory rate mortgage unless the court is satisfied from the pleadings and certifications on file with the court that notice of the availability of the period of extension was provided to the eligible foreclosed borrower in accordance with the provisions of the Act.

VI. Penalty Provisions

The Act provides that any person who willfully violates any provision of the Act is liable to a penalty of not more than \$10,000 for the first offense, and not more than \$20,000 for the second and subsequent offense. This penalty may be collected in a summary proceeding pursuant to the New Jersey Penalty Enforcement Law of 1999.⁵ *Importantly, the Act provides that immaterial errors in a notice required to be provided by a creditor pursuant to the Act will not constitute a violation of the Act.*

⁵ NJ Rev. Stat. § 2A:58-10 *et seq*

If a creditor violates any provision of the Act, an eligible borrower, an eligible foreclosed borrower, or the Attorney General may bring an action to enforce compliance by a summary proceeding pursuant to the New Jersey Penalty Enforcement Law of 1999.

The Attorney General, in consultation with the Department of Banking and Insurance must promulgate regulations under the Act. We will provide an updated memorandum when the regulations are promulgated.

Please call Stephen F.J. Ornstein, Matthew S. Yoon, David A. Tallman, or John P. Holahan at (202) 347-8400 with any questions.