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August 15, 2007

Acting Secretary Victoria Reider  
Office of Chief Counsel  
Department of Banking  
17 N. Second Street, Suite 1300  
Harrisburg, PA 17101-2290

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DEPARTMENT OF BANKING  
LEGAL SECTION

**RE: Public Comment on Regulation 3-43.**

Dear Acting Secretary Reider:

The Mortgage Bankers Association<sup>1</sup> (MBA) and the Mortgage Bankers Association of Pennsylvania<sup>2</sup> (MBA of PA) appreciate the opportunity to provide comments in response to the Pennsylvania Department of Banking's Proposed Regulations regarding "Proper Conduct of Lending and Brokering in the Mortgage Loan Business." MBA and MBA of PA remain wholly committed to the eradication of abusive lending practices and applaud the Department's efforts to address abuses among residents of Pennsylvania. These topics are extremely important to our organizations and our member companies and we look forward to working with the Department going forward.

However, MBA and MBA of PA are concerned that several sections of the proposed regulations, as currently written, do not provide the certainty or clarity that the primary and secondary mortgage markets require and cause compliance and litigation concerns for many lenders. Before the regulations are adopted,

<sup>1</sup> The Mortgage Bankers Association (MBA) is the national association representing the real estate finance industry, an industry that employs more than 500,000 people in virtually every community in the country. Headquartered in Washington, D.C., the association works to ensure the continued strength of the nation's residential and commercial real estate markets; to expand homeownership and extend access to affordable housing to all Americans. MBA promotes fair and ethical lending practices and fosters professional excellence among real estate finance employees through a wide range of educational programs and a variety of publications. Its membership of over 3,000 companies includes all elements of real estate finance: mortgage companies, mortgage brokers, commercial banks, thrifts, Wall Street conduits, life insurance companies and others in the mortgage lending field. For additional information, visit MBA's Web Site: [www.mortgagebankers.org](http://www.mortgagebankers.org).

<sup>2</sup> The Mortgage Bankers Association of Pennsylvania (MBA of PA) is a statewide Association made up of five local chapters representing mortgage bankers, brokers and related business entities throughout the Commonwealth. The MBA of PA works closely with state legislators and regulators on issues and proposals impacting the industry to ensure that the industry's point of view is understood and incorporated in laws and regulations.

MBA and MBA of PA urge the Department to clarify these sections in order to maintain the flow of affordable mortgage capital into the Commonwealth of Pennsylvania.

Today, consumers enjoy the benefits of a national mortgage market. Capital is obtained largely from the securitization and sale of mortgage-backed assets to secondary market investors, driving down the cost of homeownership. The capital that lenders use to fund mortgages is derived from the secondary mortgage market with national and international capital sources including Fannie Mae, Freddie Mac, Ginnie Mae, the Federal Home Loan Banks and a wide array of private investors.

This secondary mortgage market is, however, greatly dependent on legal certainty and predictability. Secondary market investors must be able to purchase and trade mortgage-backed assets without undue complications and without excessive legal risk. In this sense, only well defined, standardized, objective and uniform lending rules will provide the capital markets with the foundation of necessary legal certainty that ensures enforceability of particular transactions while facilitating securitization and the flow of capital.

The following enumerates provisions that are of concern to MBA and the MBA of PA and their member companies:

**§ 46.2. Proper conduct of lending and brokering in the mortgage loan business:**

§46.2(b) requires that a licensee who "has contact with the applicant" shall disclose several items to the applicant "no later than three business days after the application is received or prepared by the licensee." As written, it is unclear what constitutes "contact with the applicant," and whether the applicant would need to sign and date the disclosure within the three-day period. Requiring the applicant to sign and date the disclosure within three days would be administratively difficult. With regard to loans originated by mortgage brokers, it could be impractical for the broker to disclose the required information within three days, as it is information that only the lender may have at that time. It is also unclear whether a consumer applying for a loan through a broker would receive the disclosure twice, once from the broker and then again from the lender. MBA and MBA of PA ask that the Department clarify this section before adopting final rules.

§46.2(c) requires licensees who issued a disclosure form to issue an updated disclosure form at the time the licensee knows, or reasonably should know, that the initial disclosure form is inaccurate. MBA and MBA of PA would suggest that the Department clarify whether the borrower must sign and acknowledge receipt of the form within a predetermined period of time and, if the borrower must

acknowledge receipt of the form, MBA and MBA of PA ask that the Department indicate the time frame in which the borrower must do so.

§46.2(d) states that a licensee shall retain the disclosure form required by §46.2(b) and § 46.2(c) in the applicant's loan file, yet it does not specify a retention period. MBA and MBA of PA would encourage the Department to clarify how long a lender must retain the form.

§46.2(e) Evaluation of applicant ability to repay:

MBA and MBA of PA agree that it is a duty of lenders to make a loan only when they believe that the borrowers have the ability to repay their loans. The determination of the borrower's ability to repay should permit lenders to utilize the lawful and prudent systems and procedures that have been developed in the industry over the years, particularly automated underwriting systems.

§46.2(e)(2) instructs licensees to "consider, verify, and document" the applicant's income and fixed expenses. This section could eliminate or severely restrict stated-income or low-documentation mortgage products, and would eliminate any such products selected for a borrower by an automated underwriting system. Additionally, since these regulations will only apply to state licensed lenders, they will put licensees at a disadvantage to national banks who could continue to offer their full array of these products. MBA and MBA of PA encourage the Department to develop language that addresses the desire to verify and document a borrower's income and fixed expenses while maintaining the use of automated systems and the availability of such products.

§46.2(e)(5) requires that all records, worksheets, and supporting documentation used in the licensee's ability to repay analysis be maintained in the applicant's loan file yet it does not specify a retention period. MBA and MBA of PA are also concerned that this requirement could eliminate automated underwriting systems. Again, MBA and MBA of PA would encourage the Department to clarify how long a lender must retain the supporting documentation.

§46.2(f) Loan Transaction Prohibitions

§46.2(f)(3) prohibits lenders from advising or inducing an applicant to refinance an existing loan or otherwise enter into a new financial obligation without performing the ability to repay analysis required by subsection (e). As written, this section could potentially eliminate several products from the marketplace in Pennsylvania, including Veterans Administration "streamline" loans, low-documentation FHA loans and various Fannie Mae and Freddie Mac programs aimed at low-income or first-time homebuyers. Additionally, this section could impact loan modifications or workout agreements for troubled borrowers where a new "financial obligation" may be created. MBA and MBA of PA request that the Department consider these circumstances before issuing a final rule.

§46.2(f)(4) should add the following underlined phrase to correct what appears to be an inadvertent omission: "...if an applicant qualifies for a loan offered by the licensee other than a covered loan, offer to the applicant a covered loan without advising the applicant that the applicant qualifies for a loan other than a covered loan."

§46.2(f)(12) prohibits licensees from providing legal advice to an applicant. This section is extremely broad and could pose a number of issues. As a mortgage is a legal document, it is unclear whether responding to questions or advising a borrower where to sign constitutes "rendering legal advice." In addition, it does not address situations where a licensee is also admitted to practice law in the Commonwealth. MBA and MBA of PA ask that the Department consider these two scenarios, as well as the breadth of this section prior to issuing a final rule.

### Conclusion

As stated previously, lenders and investors need certainty in order to comply with the legal and regulatory obligations set forth by the states in which they do business. Several sections of the Proposed Regulation, as currently written, do not provide the clarity that the primary and secondary mortgage markets require and cause compliance and litigation concerns for many lenders.

We appreciate the opportunity to comment on the Proposed Regulation and look forward to working with the Department of Banking on these issues in the future.

Sincerely,



John M. Robbins, CMB  
MBA Chairman



E. Robert Levy  
Executive Director, MBA of PA