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INDEPENDENT REGULATORY
REVIEW COMMISSION



PENNSYLVANIA
BANKERS ASSOCIATION

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AUG 16 2007

DEPARTMENT OF BANKING
LEGAL SECTION

COMMENTS
SUBMITTED TO THE
PENNSYLVANIA DEPARTMENT OF BANKING
RE

**Proposed Rulemaking; Proposed Regulation on the Proper Conduct of Lending
and Brokering in the Mortgage Loan Business**

[10 PA. CODE CH. 46] [37 Pa.B. 3416] [Saturday, July 21, 2007]

BACKGROUND

PBA members are approximately 205 banking, trust and savings institutions of all sizes representing both state and national charters operating in the Commonwealth and their subsidiaries and affiliates.

PBA supports home ownership. Our members spend countless hours each year working with potential borrowers. We sponsor home ownership and financial literacy programs around the state. We help folks one-on-one to understand what it takes to obtain a legitimate mortgage loan.

We realize that some are financially incapable of owning a home due to income limitations or credit histories. In those cases, we simply have to withhold credit until they improve their finances.

We also realize that there are a few mortgage lenders and brokers who do not share our values and dedication to doing the right thing all of the time. These unscrupulous businesses prey on borrowers who lack basic financial literacy skills and do not know how to comparison shop or seek legal advice when they do not understand a document.

PBA appreciates the time and effort the Department of Banking devotes to the cause of preventing predatory mortgage lending practices in Pennsylvania. Be assured, we share your concern and deplore this abuse.

We also appreciate the time the Acting and Former Secretaries of Banking and your legal and executive staffs took to meet with PBA's Credit Access Task Force and Legal Affairs Advisory Committee to explain your proposed regulation and policy statement on this subject throughout their development. We look forward to continuing that dialogue.

We think that the proposal has been refined in helpful ways, but we continue to have concerns about the proposed regulation's potential for duplicative and unnecessary regulation of financial

institutions and their subsidiaries and affiliates, especially in light of the recent United States Supreme Court decision in *Watters v. Wachovia*. That decision, by settling the question of who has jurisdiction over operational subsidiaries of national banks, enables regulators and the banking industry to move beyond the question of who supervises to the question of how best to supervise. *Watters v. Wachovia*, ___ U.S. ___, 127 S.Ct. 1559, 167 L.Ed.2d 389, 75 USLW 4176 (2007) (available at <http://www.supremecourt.us/opinions/06pdf/05-1542.pdf>).

The *Watters* decision was the latest in a long line of decisions including Supreme Court decisions that upheld the preemption authority of the OCC under the National Bank Act. By clarifying the law applicable to bank operating subsidiaries, *Watters* helps to assure a fair and predictable legal and regulatory environment. It also helps to maintain the flexibility that state and federal regulators need in order to adapt to the constant changes that are inevitable in a dynamic and growing banking industry responding to changing customer demands and needs. In the aftermath of the *Watters* decision, the resources of state and federal regulators now may be devoted fully and more efficiently to assuring a safe and sound industry that preserves and enhances public trust. This is a very positive development for all concerned.

Our overall goal is to prevent Pennsylvania from becoming an island of mortgage lending requirements that makes our state's lenders uncompetitive. As you well know, the consumer mortgage lending market is national in scope. It doesn't stop at the state borders.

Many PBA members and their affiliated mortgage companies sell mortgage loans in the secondary market in order to sustain the demand for new loans and manage their liquidity and credit risk. Government-sponsored entities ("GSEs") such as Fannie Mae and Freddie Mac require mortgage loans to conform to their proprietary specifications. Lenders do not have the ability to change the GSEs' and other investors' documentation requirements. Regulations and policy statements promulgated by the Department need to reflect that reality.

In addition, there is only so much subjectivity that our mortgage lenders can apply to a borrower's mortgage loan application. Our lenders are trained to work with income data and credit scores, but we don't possess crystal balls. Anyone who has ever made a loan knows that a borrower's financial situation can deteriorate over time rather than improve as we hope it will.

Mortgage underwriting standards fluctuate. We understand this also makes it difficult for the Department to prescribe regulatory standards.

With that background in mind, we would like to point out several of our concerns with the pending proposal:

COMMENTS

§46.1 Definitions

- *Licensee* – A licensee under the MBBCEPA, SMLA, CDCA or a partially exempt entity under the MBBCEPA.

As currently drafted, the term "licensee" subject to the proposed regulation includes "partially exempt entities" under the Mortgage Bankers and Brokers and Consumer Equity Protection Act (the "MBBCEPA"). Under section 303(b) of the MBBCEPA, partially exempt entities include attorneys, real estate brokers, owner occupants of properties, persons originating or negotiating fewer than three loans annually, consumer discount companies, builders, insurance companies, non-

profit organizations and subsidiaries and affiliates of state and federally chartered banks and savings associations. By using the term "partially exempt entities," the Department would apply the proposed regulation to subsidiaries and affiliates of state and federally chartered banks and savings associations. Given the fact that PBA's members - financial institutions and their subsidiaries and affiliates - are not the perpetrators of consumer residential mortgage abuse that the Department seeks to end, PBA respectfully requests that the proposal be revised to exclude them.

As noted above, the U.S. Supreme Court's recent decision in *Wachovia* precludes state licensure and regulation of national bank operating subsidiaries. Likewise, bank/financial services holding company affiliates and state bank operating subsidiaries already face high levels of regulation and thus need not be covered by this regulation. In that manner, scarce regulatory resources can be targeted where they are needed most - toward less-regulated entities.

Thus, we respectfully request that the definition of "licensee" be revised to read:

Licensee--A licensee under the MBBCEPA, SMLA, CDCA ~~or a partially exempt entity under the MBBCEPA.~~
"Licensee" shall not include a State-chartered bank, bank and trust company, savings bank, private bank or national bank, a State or federally chartered savings and loan association, a federally chartered savings bank or a State or federally chartered credit union or their subsidiaries, affiliates or employees.

§ 46.2 Proper conduct of lending or brokering in the mortgage loan business.

- (b) *Disclosures to applicant.* On a form prescribed by the Department and signed and dated by the applicant and the licensee, a licensee who has contact with the applicant shall disclose the following to the applicant no later than three business days after the application is received or prepared by the licensee:
- (1) If the lender providing the loan will escrow the applicable taxes and insurance.
 - (2) If the licensee is a lender with the ability to directly lock-in a loan interest rate.
 - (3) Whether the loan contains a variable interest rate or balloon payment feature.
 - (4) Whether the loan includes a prepayment penalty.
 - (5) Whether the loan has a negative amortization feature.
- (c) *Required redisclosures.* A licensee who has issued the disclosure form required by subsection (b) shall issue an updated disclosure form at the time the licensee knows or reasonably should know that the initial disclosure form is inaccurate.

Given the time constraints imposed by the rapid pace of the mortgage lending market, licensees may not be able to produce these separate, additional PA disclosures in three days. In addition, PBA notes that residential mortgage disclosure requirements unique to Pennsylvania will be operationally difficult and expensive to install.

- (c) *Evaluation of applicant ability to repay.*
- (1) A licensee shall not offer a loan without having reasonably determined, based on the documents and information provided under this subsection, that the applicant will have the ability to repay the loan in accordance with the loan terms and conditions by final maturity at the fully indexed rate, assuming a fully amortized repayment schedule.
 - (2) In performing an analysis to determine whether an applicant will have the ability to repay a loan, a licensee shall consider, verify and document the:
 - (i) income of the applicant.
 - (ii) fixed expenses of the applicant.

(3) A licensee may consider and document information in addition to verified income and fixed expenses as required in subsection (e)(2) in determining an applicant's ability to repay an offered loan, provided that the additional factors are reasonably related to an applicant's ability to repay.

(4) A licensee shall not primarily rely upon the sale or refinancing of an applicant's collateral in determining an applicant's ability to repay an offered loan.

(5) All records, worksheets, and supporting documentation used in the licensee's ability to repay analysis shall be maintained in the applicant's loan file.

(6) In determining an applicant's ability to repay a loan offered under this subsection, a licensee shall not ignore facts or circumstances that it knows or reasonably should know which would indicate that an applicant does not have the ability to repay the offered loan.

(7) In addition to the analysis required by this subsection, great weight and due consideration shall be given to the *Guidance on Nontraditional Mortgage Product Risks*, as amended, issued by the Department in establishing a licensee's internal procedures and guidelines when implementing the ability to repay analysis required by this subsection.

PBA notes that the broad application of the requirements excerpted above could bar the ability to generate "stated income" or "stated asset" residential mortgage loans. These products have appropriate uses despite their heightened underwriting risks which can be mitigated by appropriate restrictions applicable to a given lender's risk tolerance assessments.

PBA appreciates the opportunity to comment on the Department's proposal and would appreciate the opportunity to discuss its concerns in further detail.

Sincerely,

Jan R. Burg

cc: Senate Banking & Insurance Committee
House Commerce and Economic Development Committee
Independent Regulatory Review Commission