Before the Massachusetts Division of Banks regarding

209 CMR §§ 32.32, 34, 40: Predatory Home Loan Practices

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On behalf of our low-income clients, the National Consumer Law Center[1] thanks the Massachusetts Division of Banks for its continued leadership in proposing a comprehensive set of regulations to protect Massachusetts consumers from predatory lending. We are pleased to offer comments on the proposed regulations. As with regulations implemented by the Division in the past, the proposed regulations on high-cost lending go a long way towards addressing some of the most egregious lending practices.

I. CERTAIN PROVISIONS IN THE PROPOSED REGULATIONS ARE NOT SUBSTANTIALLY SIMILAR TO THE FEDERAL TILA AND MUST BE AMENDED

A. Scope of the Exemption from the Federal Truth In Lending Act

The federal Truth In Lending Act (TILA) permits the Federal Reserve Board to grant exemptions to a class of transactions within any state if it makes certain determinations.[2] First, the state law governing the class of transactions must be "substantially similar" to the federal Act. The Board interpreted this language to mean that the state law must be *generally the same* as or more expansive than the federal Act

[1] The National Consumer Law Center, Inc. (NCLC) is a non-profit Massachusetts Corporation, founded in 1969, specializing in low-income consumer issues, with an emphasis on consumer credit. On a daily basis, NCLC provides legal and technical consulting and assistance on consumer law issues to legal services, government, and private attorneys representing low-income consumers across the country. NCLC publishes a series of sixteen practice treatises and annual supplements on consumer credit laws, including *Truth In Lending* (5th ed. 2003) and *Cost of Credit* (2nd ed. 2000) and *Repossessions and Foreclosures* (5th ed. 2002). The publications, as well as our bimonthly newsletters, which include *NCLC Reports Consumer Credit & Usury Ed.*, describe the law currently applicable to all types of consumer loan transactions.
[2] 15 U.S.C. § 1633.

and Regulation Z.[3] Second, the state must show that it can adequately enforce the state law.

The Commonwealth applied for and received an exemption for credit transactions governed by the Consumer Credit Cost Disclosure Act, Mass. Gen. Laws ch. 140D, § 1. This exemption was renewed by the Federal Reserve Board in 1982.[4] The Massachusetts Commissioner of Banks files an annual report with the Federal Reserve Board answering certain questions posed by the Board that allows it to determine if the Commonwealth is in compliance with the conditions of the exemption.[5]

In 1994, Congress amended the TILA when it passed the Home Ownership and Equity Protection Act (HOEPA).[6] Congress designed this law to prevent some predatory lending practices targeted at vulnerable consumers who were sold high cost mortgage loans. To comply with its exemption from TILA, the Commonwealth promulgated regulations dealing with high cost loans.[7] However, the General Assembly did not enact a HOEPA-like statute until 2004. At that time, it passed the "Predatory Home Loan Practices Act."[8] This statute is similar to its federal counterpart, though it generally covers more high cost loans or provides greater substantive protections than does its federal counterpart.

However, the statute and the regulations proposed by the Commissioner of Banks depart from HOEPA in a few significant ways. These departures, unfortunately, make the statute and regulations *less* protective than HOEPA. The Commissioner of Banks has an obligation under the exemption granted to the Commonwealth to address these issues by regulation. The areas of concern are addressed below.

B. The Definition of Creditor

The definition of creditor in 209 CMR § 32.32(2)(h) is unduly restrictive and should be revised to be consistent with the thresholds established under HOEPA. Recognizing the devastating effect of high-cost home loans, Congress broadly defined creditor under HOEPA to include any person who originates two or more covered mortgages in any 12-month period or any person who originates one or more such mortgages through a mortgage broker.[9] The low threshold prevents fringe lenders from evading HOEPA by creating sham entities for the express purpose of making loans just

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[3] Official Staff Commentary § 226.29(a)-2.
[4] Official Staff Commentary § 226.29(a)-4.
[5] The reports cover such issues as the number of creditors subject to the jurisdiction of the Commonwealth, the number of TILA examinations conducted, the number and nature of violations, the personnel conducting the examinations, the enforcement procedures and complaint process maintained by the Commonwealth, and the proposal and adoption of any parallel amendments to made by Congress to the federal statute or the Federal Reserve Board to Regulation Z or the Commentary.
[6] Pub. L. No. 103-325 (Sept. 23, 1994). This Act primarily amended 15 U.S.C. §§ 1602 and 1639.
[7] 209 CMR § 32.32. The first record of these amendments that NCLC could uncover shows that they were effective on June 12, 1998. These regulations have been amended several times since then.
[8] This Act appears Mass. Gen. Laws ch. 183C.
[9] 15 U.S.C. § 1602(f); Reg. Z § 226.2, n.3.

below a numerical limit. Nor can "investors" escape the reach of the statute by making a small number of abusive loans per year.

The broad definition of creditor under HOEPA also recognizes the central role brokers have played in marketing these high-cost loans to consumers. The abusive tactics of brokers working on behalf of predatory mortgage lenders have been well documented.[10] Brokers aggressively push high cost loans on unsuspecting consumers without revealing the true cost of these loans, or the fact that they earn kickbacks from lenders.

The Division should be commended for including brokers in the definition of creditor. However, it is essential that the definition of creditor establish a threshold low enough to capture all brokered loans covered by the statute and regulations. As proposed, a broker is not defined as a creditor unless he or she has brokered 5 or more loans within the past 12 months. This threshold is too high. Some brokers may make only three or four covered loans per year. However, the homeowners who obtain these loans would benefit greatly from the protection of the regulation, and should not be excluded merely because their loan was consummated before the numerical cut off. A lower threshold would make it clear to brokers that there are no "free" loans; a broker must comply with the regulation with the first covered loan, and every covered loan thereafter. Moreover, a lower threshold lessens the burden on the consumer who, in litigating these issues, must prove that a broker has made 5 or more covered loans.

Recommendation: NCLC suggests that the definition of creditor in 209 CMR § 32.32(2)(h) be revised to lower the numerical thresholds:

> (h) <u>Creditor</u> means any person who meets the definition under 209 CMR § 32.32(1): <u>Creditor</u>, *as well as any entity that originated 2 or more mortgages within the past 12 month period or acted as an intermediary between originators and borrowers on one or more home mortgage loan within the past 12 month period*, provided that creditor shall not include a person who is an attorney providing legal services in association with the closing of a home loan who is not also funding the home loan and is not an affiliate of the creditor. For the purpose of 209 CMR § 32.32, creditor shall include broker.

[10] See, e.g., Departments of the Treasury and Housing and Urban Development, *Curbing Predatory Home Mortgage Lending*, at 73 (June 20, 2000), available at http://www.huduser.org/publications/pdf/treasrpt.pdf; Senate Special Committee on Aging, "Equity Predators: Stripping, Flipping and Packing Their Way to Profits," March 16, 1998, at http: //www.senate.gov/~aging/hr14.htm. See also, Stripping the Wealth: An Analysis of Predatory Lending in Boston, ACORN (2000).

C. The Points and Fees Definition

The HOEPA definition includes, among other things, any item listed in Regulation Z § 226.4(c)(7), except tax escrows, which are unreasonable, or where the creditor receives some compensation from the fee, directly or indirectly, or where the fee is paid to an affiliate of the creditor.[11] The "section 226.4(c)(7) charges" are those fees imposed only in real estate secured transactions that are not *finance charge*s if they are bona fide and reasonable. For purposes of the HOEPA *points and fees* definition, Congress intended that the section 226.4(c)(7) charges could be points and fees, even if they were not finance charges, in these circumstances.

The current regulation tracks its federal counterpart in this respect, but the proposed regulation does not.[12] The proposed regulation simply refers to the Massachusetts equivalent of the section 226.4(c)(7) charges[13] and then states that these charges are points and fees only if the creditor receives direct or indirect compensation in connection with the loan. The result is that some loans will not be covered by the Commonwealth's law that would be covered by HOEPA. For example, if an affiliate of the creditor performed an appraisal on the property, that fee would count as a point and fee under HOEPA but would not under the proposed regulations. Similarly, if a credit report fee was unreasonable, it would count toward the HOEPA trigger but not toward the Massachusetts trigger. Consequently, the proposed regulations are not substantially similar to the federal law and place the Massachusetts exemption in jeopardy.

Recommendation: NCLC urges the Commissioner to amend the proposal as follows:

> 32.32(2)(a)(1)(b): charges for all items listed in 209 CMR 32.04(3)(g) (*other than amounts held for future payment of taxes) unless the charge is reasonable, the creditor receives no direct or indirect compensation in connection with the charge, and the charge is not paid to an affiliate of the creditor;*

D. The Definition of the Total Loan Amount

The Federal Reserve Board defined the total loan amount as the amount financed minus any section 226.4(c)(7) charges and any credit insurance premiums or debt cancellation charges that count toward the points and fees trigger.[14] The result is *not* the principal amount and is often lower than the amount financed as well. This definition is important because more loans are covered under HOEPA the lower the total loan amount and the higher the total points and fees.

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[11] Reg. Z § 226.32(b)(1)(iii).
[12] *Compare* 209 C.M.R. § 32.32(2)(a)(3)(current regulation) *with* 209 C.M.R. § 32.32(2)(a)(1)(b)(proposed regulation).
[13] *See* 209 C.M.R. § 32.04(3)(g).
[14] Official Staff Commentary § 226.32(a)(1)(ii)-1.

The proposed regulations, on the other hand, define the total loan amount as the principal amount.[15] The result is that the proposed regulations are not substantially similar to the federal law and place the Massachusetts exemption in jeopardy.

Recommendation: NCLC urges the Commissioner to amend the proposal as follows:

> 209 C.M.R. § 32.32(2)(l): Total Loan Amount, *means the amount financed as determined according to § 32.18(2) and deducting any points and fees as defined in § 32.32(2)(a) and financed by the creditor.*

II. THE DEFINITION OF POINTS AND FEES SHOULD BE CONSISTENT THROUGHOUT THE REGULATIONS

The statute prohibits the financing of points and fees greater that 5% of the total loan amount or $800, which ever is greater.[16] However, the proposed regulation unnecessarily muddies the water on what constitutes points and fees for purposes of this prohibition when it adds a parenthetical listing certain fees that are *not* points and fees.

This list does not square with the definition of points and fees earlier in the proposed regulation. Specifically, the definition *includes* appraisal fees and credit report fees under section 32.32(2)(a)(1)(g)(2) in certain circumstances, namely when the creditor, directly or indirectly, retains compensation from the fee. Similarly, if the definition of points and fees is amended to comply with HOEPA, then the section 32.34(2)(a), in its present form, is unacceptable.

Recommendation: NCLC urges the Commissioner to amend the proposal as follows:

> 209 C.M.R. § 32.34(2)(a): Financing of Points, Fees or Charges. *Directly or indirectly financing* any portion of the points and/or fees in an amount that exceeds 5% of the total loan amount or $800, whichever is greater.

III. THE DEFINITION "SCHEDULED MONTHLY PAYMENTS" IN 209 CMR § 32.32(2)(k) SHOULD BE REVISED TO INCLUDE INFORMATION FROM LOAN APPLICATIONS COMPLETED BY THE BORROWER

The Division should revise the definition "Scheduled Monthly Payments" in 209 CMR § 32.32(2)(k) and add a requirement that creditors review borrowers' loan applications for reported debts. In assessing a borrower's ability to repay a high-cost

[15] 209 C.M.R. § 32.32(2)(l).
[16] *Compare* Mass. Gen. Laws ch. 183C, § 6 *with* 209 C.M.R. § 32.34(2)(a).

loan, a creditor must consider the borrower's income and debts, including those reported by a nationally recognized consumer credit bureau report.[17] Requiring a creditor to consult a nationally recognized credit report for a listing of debts is a good start. However, reliance solely on a credit report would not truly capture the borrower's debt burden, as not all debts are listed on a credit report. Many creditors do not furnish information to consumer reporting agencies. Federal agencies, for example, are restricted in the information they may furnish. Moreover, creditors that do furnish information may provide incomplete, inaccurate or disputed information. Without supplemental information on the borrower's debts, the creditor is likely to overestimate the ability of the borrower to repay the high-cost loan.

Creditors should be required to consult the credit application completed by the borrower in addition to the credit report. If completed by the borrower, that document will contain a comprehensive list of the borrower's debts.[18] The debts may include items not likely to show up on a credit report, such as obligations to family members. By reviewing the credit report and the loan application, the creditor reconcile any inconsistent information, including errors contained in the credit report.

Recommendation: We suggest that the definition of "Scheduled Monthly Payments" in 209 CMR § 32.32(2)(k) be revised to state the following:

> (k) <u>Scheduled Monthly Payments</u> means minimum sums required to be paid with respect to all of the borrower's debts that are reported *on any loan application completed by the borrower and* a nationally recognized consumer credit bureau report and the monthly mortgage payment due under the high cost home loan (ignoring any reduction arising from a lower introductory rate) plus 1/12 of the annualized cost of real estate tax and insurance premium payments during the immediately preceding twelve months. Scheduled monthly payments shall not include any debts that are consolidated with or paid off by the high cost home loan.

IV. THE REQUIRED DISCLOSURES SHOULD BE PROVIDED TO CONSUMERS NOT LESS THAN THREE BUSINESS DAYS IN ADVANCE OF CLOSING

The proposed regulations, in 209 CMR § 32.32(3), retains the requirement that written notice be provided to homeowners. We commend the Division for retaining these important disclosures, even though they are not required by G.L. c. 183C, § 1 <u>et seq</u>. Predatory lenders use deception and other tactics to obscure the true nature of high-cost

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[17] Proposed regulation 209 CMR § 32.34(1)(c).

[18] The application should be completed by the borrower to avoid creditor and broker fraud. For example, some brokers have inflated the income of unsuspecting borrowers on loan applications.

loans. A simple written notice that highlights the essential terms of the loan, and warns consumers that they are not required to close the loan, will go a long way toward steering some consumers away from these loans. The regulations, however, fail to state when a creditor must provide the disclosures to the consumer. The timing is critical, as most subprime lenders provide very few disclosures in advance of closing.

The notice in 209 CMR § 32.32(3) is similar to the advance notice required under HOEPA; the HOEPA notice must be provided not less than three business days prior to consummation.[19] The notice must be *received* by the borrower at least three business days prior to consummation to enable the borrower to absorb the information and reflect on the decision. The three-day advance look period also allows consumers to review the important terms of the loan before they are pressured into signing documents at the loan's closing. Moreover, it protects unsophisticated consumers by letting them know that they are not required to complete the loan agreement merely because they have received the notice or any other disclosure.

The Division should revise the regulations to require that the written disclosures be provided at least three business days prior to consummation.

V. THE NOTICE TO ASSIGNEES SHOULD BE RETAINED

We commend the Division for prohibiting the sale or assignment of a covered mortgage without the inclusion of the notice to assignees contained in 209 CMR § 32.34(1)(b). HOEPA requires a similar notice in loans that are sold or assigned.[20] In most cases, whether a loan is covered by the statute and regulations will be apparent from a review of the APR and points and fees charged on the loan. The inclusion of the proposed notice, however, puts assignees on actual notice about the status of the loan. Assignees cannot easily escape liability for the borrowers' claims and defenses by asserting, for example, that a due diligence review of loan documents revealed no covered loans when the status of the loans were evident on the face of the documents.[21]

Preserving the ability of homeowners to pursue the assignee is critical. Most mortgage loans are sold on the secondary market, leaving the homeowner stranded and unable to assert defenses to a foreclosure action initiated by the loan holder. Moreover the originator avoids liability for their bad acts by selling the loan and the assignee of the loan profit from the wrongdoing of the originator.

VI. THE DIVISION SHOULD ELIMINATE THE REGULATION ON PACKING

The Division is right to be concerned about loan packing. Its effects on the overall costs of the loan are significant. The premiums for various insurance or gap products are added to the principal, upon which points are calculated. Further, interest is

[19] 15 U.S.C. § 1639(b)(1); Reg. Z § 226.31(c)(1).
[20] 15 U.S.C. § 1641(d)(4); Reg. Z § 226.34(a)(2).
[21] See proposed regulation 209 CMR § 32.34(1)(b)(2).

charged on the premium, if financed, over the life of the loan. The most effective way to eliminate the practice is to forbid the financing of such products or to forbid the sale of them entirely.

However, merely giving notice to the borrower and obtaining “informed” consent will do little to address the issue. Consumers now routinely “consent” to the purchase of credit insurance products. It is clear that few consumers understand that the loan includes insurance or they are told (despite the written disclosures) that they cannot obtain a loan without it.

NCLC, therefore, recommends the elimination of 209 CMR § 32.34(2)(b). This section is particularly confusing since the sale of single premium credit insurance products is banned in 209 CMR § 32.34(2)(i).

VII. THE DIVISION SHOULD ADD LANGUAGE TO CLARIFY THAT AN ATTEMPT TO EVADE THE STATUTE BY DIVIDING THE LOAN TRANSACTION IS A PROHIBITED ACT OR PRACTICE

The Division should make clear that any attempt to evade the reach of the statute by dividing the loan transaction is a prohibited act or practice under 209 CMR § 32.34(1). Specifically, the Division should add language consistent with G.L. c. 183C, § 17(a). Creditors will seek to avoid coverage under the statute and regulations by structuring a transaction as two distinct loans. In addition to denying coverage under the act, such duplicity results in unnecessary fees and costs.

Recommendation: We therefore recommend that 209 CMR § 32.34(1) be revised to add a new subsection (e):

(e) <u>Attempt to Evade Statute</u>. Attempt to avoid coverage under 209 CMR § 32.32 by dividing a loan transaction into separate parts, or providing two or more loans to a consumer, the combination of which would meet the requirements of 209 CMR § 32.32(1).

VIII. SAMPLING REQUIREMENTS THAT MEET DUE DILIGENCE SHOULD TRACK THE RATING AGENCY PROCEDURES

The proposed regulation essentially defines due diligence in the context of assignee liability as requiring the purchaser or assignee to conduct a subsequent compliance review to determine whether there are other high cost loans in the group of home loans purchased *if* sampling disclosed high cost loans.

NCLC supports the Commissioner in any effort to define due diligence beyond what is in the statute. However, this standard is vague and does not define the sampling methodology. The private agencies[22] involved in rating mortgage loan pools for purposes

[22] The rating agencies include: Fitch Investment Services, C.P., Duff & Phelps Credit Rating Co., Standard and Poor’s Rating Service, and Moody’s Investment Services, Inc.

of securitizations and Wall Street investments have defined what they think due diligence is in this circumstance. NCLC strongly urges the Commissioner to adopt that standard.

For example, Fitch Investors Service applied the following standard when it issued a response to the New Jersey Predatory Lending Legislation which contains an assignee provision similar to the one found in the Commonwealth's new law.

> Under the due diligence process, after a pool of loans has been identified to Fitch, the third party [one who is unaffiliated with the loan originator] should calculate APRs based on information gathered directly from the loan documents, including relevant interest rate, points and fees. If there are ten or fewer New Jersey loans in a transaction, all such loans must be subject to the due diligence. If there are more than ten New Jersey loans in a transaction, a random sample may be taken. The minimum sample size should be in the range of 10%-25% of the New Jersey loans in the pool. If, however, due diligence performed on such sample uncovers any loan which has been determined to be a high cost home loan under the Act, the above calculations must be performed on every New Jersey loan in the pool.[23]

Essentially, Fitch defines due diligence to involve an independent entity, unaffiliated with the creditor that conducts the sampling and review of loans. In addition, Fitch creates sample sizes depending on the number of loans from the targeted state in the pool. Finally, if due diligence uncovers just one loan that is a high cost loan, then all loans from that state must be individually reviewed to determine if they are high cost loans.

The assignee liability provisions are essential to the vitality and effectiveness of the Act. The same motivation that drove Congress to attach strict assignee liability provisions to HOEPA apply here. Assignees will not police who they do business with unless they are liable under certain circumstances for the wrongdoing of the creditor. Homeowners cannot protect themselves from foreclosure if they cannot raise claims and defenses against the holder because of the holder in due course shield.

Recommendation: NCLC urges the Commissioner to amend the proposal as follows:

> 209 C.M.R. § 32.34(b)(2)(c): [replace the last sentence] *The entity that reviews any loans or sample of loans to determine if the loans are high cost loans must be independent from and not affiliated with the creditor. If there are ten or fewer Massachusetts loans in a pool to be sold, purchased, or securitized, all such loans must be*

[23] *Fitch Ratings Responds to New Jersey Predatory Lending Legislation,* June 5, 2003. Copy attached.

subject to the due diligence. If there are more than ten Massachusetts loans in a in a pool to be sold, purchased, or securitized, a random sample must be taken. The minimum sample size should be in the range of 10%-25% of the Massachusetts loans in the pool. If due diligence performed on such sample uncovers any loan which has been determined to be a high cost home loan under these regulations, an assessment as to whether the loans are high cost loans must be performed on every Massachusetts loan in the pool.

Fitch Ratings Responds to New Jersey Predatory Lending Legislation

05 Jun 2003 10:01 AM

Fitch Ratings-New York-June 5, 2003: On May 1, 2003, Governor McGreevey signed into law the 'New Jersey Home Ownership Act of 2002' (the Act), which will be effective Nov. 27, 2003. Fitch has previously indicated and confirms that it will not rate residential mortgage backed securities (RMBS) transactions which contain loans that are originated in jurisdictions which contain legislation that may result in unlimited purchaser or assignee liability for predatory lending practices of an originator, broker or servicer (see press release dated May 1, 2003, 'Fitch Revises its Rating Criteria in the Wake of Predatory Lending Legislation', available on the Fitch Ratings web site at 'www.fitchratings.com'). Based on its review of the Act, as well as discussions with officials from New Jersey, Fitch believes that it can rate residential mortgage-backed securities (RMBS) transactions which contain certain loans that are originated in New Jersey after Nov. 26, 2003, subject to additional credit enhancement. Fitch will not rate RMBS transactions which contain high cost home loans originated in New Jersey after Nov. 26, 2003 since the unlimited liability provisions may result in unquantifiable losses to transactions.

The Act categorizes as 'home loans', all loans, other than reverse mortgages, which are secured by either 1) a mortgage or deed of trust on a one to six family dwelling in New Jersey occupied by a borrower as the borrower's principal dwelling or, 2) a security interest in a manufactured home in New Jersey occupied by the borrower as the borrower's principal dwelling. The Act further designates certain specific types of home loans: 1) a home loan made, arranged or assigned by a person selling either a manufactured home or home improvements to a borrower, 2) a 'high cost home loan' or 3) a 'covered home loan' - which also includes a high cost home loan.

Under the Act, the exposure of an assignee or purchaser of 1) a covered loan, 2) a manufactured home loan, 3) a home improvement loan or 4) a home loan which is not a covered loan, a manufactured home loan or a home improvement loan which violates the act, so long as any such loan is not also a high cost home loan, appears to be limited (although the exposure with regard to manufactured home loans and home improvement loans is higher than the exposure to covered loans and home loans). Therefore, Fitch will rate RMBS transactions containing any of the following loans which are subject to the Act and are also not high-cost home loans: 1) home loans, 2) covered loans, 3) home improvement loans, or 4) manufactured home loans.

There are two ways in which a transaction may contain a high cost home loan. The first instance is when an issuer knows that a loan is a high cost home loan, and in such a case the issuer would remove the loan from the transaction. The second instance is when a loan is thought to not be a high cost home loan, but due to an error in the origination process the loan is, in fact, a high cost home loan. As indicated in its May 1, 2003 press release, Fitch is concerned that loans which are originally coded as other than high cost home loans, based on such specifications as the principal balance, interest rates and/or points, may actually be high cost home loans. This may subject purchasers and assignees of loans originally coded not as high cost home loans to unlimited liability.

The Act limits the exposure of an assignee or purchaser of any high cost home loan if, as proven by a preponderance of the evidence: (1) there are in place at the time of the purchase or assignment of the loan, policies that expressly prohibit its purchase or acceptance of assignment of any high-cost home loan; and (2) there is a requirement by contract that a seller or assignor of home loans to the purchaser or assignee represents and warrants to the purchaser or assignee that either (a) it will not sell or assign any high-cost home loan to the purchaser or assignee or (b) that the seller or assignor is a beneficiary of a representation and warranty from a previous seller or assignor to that effect; and (3) the assignee or purchaser exercises reasonable due diligence at the time of purchase or assignment of home loans or within a reasonable period of time thereafter intended by the purchaser or assignee to prevent the purchaser or assignee from purchasing or taking assignment of any high-cost home loan. The Act is unclear as to what will be considered reasonable due diligence in New Jersey under the limited damages provision of the Act. Fitch will not rate any transactions containing loans originated in New Jersey after the effective date of the Act where the seller or purchaser cannot provide adequate evidence that the particular transaction will have the benefits of the aforementioned safe harbor because of its concern that a lender may originate a high cost loan in error, thereby subjecting the transaction to unlimited liability.

In order to rate RMBS transactions which contain any loans originated in New Jersey after the Act's effective date, Fitch must receive an acceptable certification from a third party unaffiliated with the originator of the loans that such third party has conducted due diligence on the New Jersey loans and indicating the results of such due diligence. Under the due diligence process, after a pool of loans has been identified to Fitch, the third party should recalculate the APRs based on information gathered directly from the loan documents, including relevant interest rate, points and fees. The APR, points and fees should then be compared to the high cost home loan thresholds in the Act. If there are ten or fewer New Jersey loans in a transaction, all such loans must be subject to the due diligence. If there are more then ten New Jersey loans in a transaction, a random sample may be taken. The minimum sample size should be in the range of 10%-25% of the New Jersey loans in the pool. If, however, the diligence performed on such sample uncovers any loan which has been determined to be a high cost home loan under the Act, the above calculations must be performed on every New Jersey loan in the pool. Due to the unlimited liability that can be assessed against an RMBS transaction that contains high cost home loans originated in New Jersey, Fitch takes comfort that 'reasonable due diligence' has occurred only if the aforementioned certificate has been produced.

Fitch will continue to monitor anti-predatory lending legislation and provide the market with timely commentary on its rating approach.

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