

# New Jersey's Department of Banking and Insurance Adopts New Mortgage Processing Requirements

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New Jersey's Department of Banking and Insurance recently adopted two changes regarding residential mortgages that will affect all residential lenders. First, it published a new mandatory disclosure form on its website that lenders are required to use in connection with residential mortgage applications as of Jan. 1, 2018. Second, the department amended its regulations regarding



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the permissible fees that lenders can charge borrowers for appraisals in connection with residential loan applications. Lenders should be aware of both changes in order to ensure compliance with the same.

## MANDATORY DISCLOSURE FORM

Before accepting loan fees from loan applicants, all lenders and brokers doing business in New Jersey are required to, among other things, give loan applicants

a written disclosure setting forth certain information. See N.J.A.C. 3:1-16.3(a). Prior to 2018, lenders and brokers were free to use their own form to make the required disclosures, so long as the disclosures were made.<sup>1</sup> However, the department recently published a new mandatory disclosure form that lenders are required to use in connection with residential mortgage applications as of Jan. 1, 2018.<sup>2</sup> A copy of the new disclosure form is posted on the department's website at [http://www.nj.gov/dobi/division\\_banking/ocf/index.htm](http://www.nj.gov/dobi/division_banking/ocf/index.htm).<sup>3</sup> Lenders were not provided with any prior notice of this disclosure and, as such, confusion has ensued.

While the department has indicated that its new form is a vehicle to ensure compliance with residential mortgage loan application disclosures and uses terminology more in harmony with the TRID regulations, there appear to be inconsistencies between the new form and what is actually required by New Jersey regulations. For that matter, the new form seems to create some new regulatory requirements beyond those set forth in the regulations.

First, the new form provides that the loan applicant "must be given a NJ Application Disclosure form when you receive your Loan Estimate." (Emphasis in original). Pursuant to N.J.A.C. 3:1-16.3, however, a lender or broker is only required to give the disclosure before accepting "any application fee in whole or in part, any credit report fee, appraisal fee or any fee charges as reimbursement for third party fees[.]" N.J.A.C. 3:1-16.3(a). The new form, therefore,

creates an ambiguity regarding when the lender or broker must give a loan applicant the disclosure form. However, lenders should err on the side of caution and provide the form as early in the mortgage lending process as possible.

Second, the new form contains a list of "permissible fees" that a lender or broker may charge the loan applicant, including an application fee, origination fee, lock-in fee, commitment fee, and discount points. Brokers may only charge an application fee and broker fee. However, the form does not specify that this list is non-exhaustive, and there are additional fees that are permitted under the regulations but not specified on the form, such as a credit report fee, appraisal fee, warehouse fee and other third party fees. See N.J.A.C. 3:1-16.2. Therefore, if a lender charges a loan applicant an appraisal fee, for example, a loan applicant may question whether this fee is permitted because such a fee is not specified on the form. However, there is no doubt the charges listed above are permitted. Nonetheless, the form will add to consumer confusion as to what can be charged. It would be prudent for lenders to create and use an addendum to Section 4 of the new form in order to set forth these additional permissible fees.

Third, the form requires every lender to respond to the following: "A 'Correspondent Mortgage Lender' may hold a loan for only 90 days before selling it to a third party. Your lender is a 'Correspondent': Yes: \_\_\_\_\_; No: \_\_\_\_\_." However, the regulations only require that correspondent mortgage lenders include such a statement and do not require that other lenders do so. See N.J.A.C. 3:1-16.3(a)(6). Thus, the new disclosure form effectively creates a new requirement for all lenders to disclose whether they are correspondent mortgage lenders, although this is not required by the regulations.

Fourth, the regulations require lenders and brokers to disclose whether all or any part of the permissible fees are refundable, as well as the terms and conditions for the refund, which "may be disclosed by making reference to these rules with proper citation." See N.J.A.C. 3:1-16.3(a)(3). The new form, however, provides only that application fees, lock-in and commitment fees are refundable in certain circumstances. The form further provides that "[f]ees paid for Credit Reports and Appraisals are generally non-refundable." (Emphases in original). However, the regulations expressly provide that the lender may charge up-front fees for credit reports and appraisals based on a reasonable estimate "provided that any amount in excess . . . is refunded to the borrower at or prior to closing."

See N.J.A.C. 3:1-16.2. Accordingly, lenders may want to advise borrowers that, when the actual cost is less than the estimate, the excess amount will be refunded.

In sum, while the department has commented that its new mandatory disclosure form is designed to ensure that lenders and brokers comply with the disclosure requirements under the regulations, the form appears to create new regulatory requirements, contains several inconsistencies when compared with the regulations, and arguably could confuse consumers. Nonetheless, lenders must be aware that the department now considers the form mandatory and comply with the same.

## APPRAISAL FEES

On Dec. 18, 2017, the Department also adopted changes to a long-standing rule governing fees incident to the origination, processing and closing of first mortgage loans, N.J.A.C. 3:1-16.2 (the Regulation) which specifies the fees lenders can charge residential borrowers. Under the prior version of the regulation, the permissible appraisal fee differed based on who performed the appraisal:

If the appraisal is performed and delivered by a third-party appraiser, the fee shall not exceed the amount paid, or to be paid, directly to the party performing and delivering the appraisal. If the appraisal is performed and delivered in-house, the fee shall approximate the usual, customary and reasonable fee for comparable appraisals by third party appraisers based on a survey of such fees charged by lenders to be conducted annually by the department and published in the New Jersey Register. If the appraisal is performed by a third-party appraiser and delivered by an appraisal management company, the fee charged by the lender shall not exceed the amount charged by the appraisal management company and shall approximate the usual, customary and reasonable fee for comparable appraisals by third party appraisers based on a survey of such fees charged by lenders to be conducted annually by the Department and published in the New Jersey Register.

Under the amended regulation, the permissible appraisal fee is “the direct cost of the fee charged by a duly credentialed real estate appraiser for an appraisal in connection with a mortgage loan application.” Id.

The plain language of this amendment suggests that any fees charged by an appraisal management company (AMC) for its services above and beyond the fees charged by the appraiser itself cannot be charged to the borrower. Indeed, when the Department proposed this amendment, at least one commenter suggested that the Department should clarify the regulation and “explicitly codify permission for lenders to pass through reasonable AMC fees to New Jersey borrowers.” See 49 N.J.R. 3817(a). Nonetheless, the Department declined to do so, stating:

The Department declines to make the change suggested by the commenter. The Department has issued a letter dated Sept. 23, 2016, pursuant to N.J.A.C. 3:1-16.2(a)7xv authorizing an AMC fee pass through. Others in the industry may rely on this third-party fee approval letter, and it will be made available by the Department upon request. Therefore, the Department sees

no delay to lenders seeking AMC fee approval. The Department also anticipates posting this Sept. 23, 2016, letter online in the near future.

Id. The referenced letter has not yet been posted online, but is available from Department upon request and confirms that “this letter constitutes a generic approval of AMC fees as a permissible type of third party fee, pursuant to N.J.A.C. 3:1-16.2(a)7xv[.]” Accordingly, although not expressly stated in the amended regulation, lenders may continue to pass through reasonable AMC fees to borrowers.

Finally, the amended Regulation makes two more changes regarding appraisal fees. First, it states that an appraisal fee may be charged by a lender or broker, but not by both in connection with the same application. Second, it allows the cost for a subsequent appraisal to be charged to a borrower for the same property and same application “for good cause shown.” “Good cause” may include: (i) a changed circumstance that materially affects the property value; (ii) a delay from the time a prior appraisal was performed, provided no material delay was caused by the lender and (iii) compliance with federal regulations. ■

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## FOOTNOTES

1. A disclosure has been required since 1981 as part of the adoption of the original Mortgage Bankers and Brokers Act, N.J.S.A. 17:11B-1 et seq., replaced by the Licensed Lenders Act, N.J.S.A. 17:11C-1 et seq. and then the Residential Mortgage Lending Act, N.J.S.A. 17:11C-51 et seq.
2. The new form is based on a previous form originally produced by the Mortgage Bankers Association of New Jersey to implement provisions of the Department's Mortgage Processing Rules and to comply with the Real Estate Settlement Procedures Act (RESPA) changes that took effect in 2010. The new form uses terminology that is consistent with the federal Loan Estimate and Closing Disclosure forms required under the TILA-RESPA Integrated Disclosure (TRID). The Consumer Financial Protection Bureau (CFPB) published an updated guide to the TRID disclosure forms on Dec. 6, 2017 to incorporate amendments and clarifications set forth in the CFPB's final rule issued on July 7, 2017. See [https://s3.amazonaws.com/files.consumerfinance.gov/f/documents/cfpb\\_kbyo\\_guide-to-loan-estimate-and-closing-disclosure-forms\\_v2.0.pdf](https://s3.amazonaws.com/files.consumerfinance.gov/f/documents/cfpb_kbyo_guide-to-loan-estimate-and-closing-disclosure-forms_v2.0.pdf) and <https://www.consumerfinance.gov/policy-compliance/rulemaking/final-rules/2013-integrated-mortgage-disclosure-rule-under-real-estate-settlement-procedures-act-regulation-x-and-truth-lending-act-regulation-z/>
3. The Department directs that “Beginning on Jan. 1, 2018, the ‘NJ Application Disclosure Form’ must be used for such disclosures, preferably in a two-sided single sheet format. A copy of the completed form must be provided to the applicant(s) and maintained in the loan file.”