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To: All Clients and Friends

From: Cliff Bernstein

Re: New Act Relating to Mortgage Foreclosures and Subprime Loans

TITLE INSURANCE BULLETIN – NEW YORK

Gov. Patterson recently signed into law Chapter 472/200. (Hereinafter referred to as "The Act"). The Act is comprehensive legislation targeted at the subprime lending crises and is an attempt to provide assistance to home owners currently at risk of losing their homes. The Act establishes protections to mitigate the possibility that a similar crises may occur in the future.

The Act focuses on homeowners facing immediate foreclosure.

Pre Foreclosure Notice: Effective 9/1/2008 The act requires the lender to send to a borrower of a high cost home loan, subprime home loan and non-traditional home loan a notice of the lenders intention to foreclose their mortgage. The notice must be sent to the borrower at least 90 days from the date the lender intends to commence its foreclosure. The Notice must advise the borrowers that they are in danger of being foreclosed and must provide the borrower with a list of five (5) HUD approved credit counseling services. The Notice is codified in new section 1304 of the RPAPL. A copy of the notice is attached. This notice must be in bold, 14 point type. The Notice is only required once every 12 months and must be sent by certified mail and also regular mail. It is to be sent to the last known address of the borrower, and if not the property address, to the property address also. The notice is not required if the borrower has filed an application for adjustment of debts or an order for relief from the payment of debts, or IF THE PREMISES IS NO LONGER THE BORROWER'S PRINCIPAL DWELLING.

Mandatory Settlement Conference: Effective 8/5/2008 Applies to foreclosure proceedings that were commenced before September 1, 2008 where no final order has been issued. The Act requires a court to schedule an early settlement conference within sixty (60) days from the date the plaintiff files proof of service of the complaint. The plaintiff and/or its counsel must appear and have the authority to settle the case. If the homeowner Appears unrepresented, he/she will be deemed to have made a motion to proceed as a "poor person" (CPLR 1101), and the court can appoint counsel for the homeowner (CPLR 1102 (a)).

Affirmative Allegations of Ownership: Effective 9/1/2008 The Act requires the plaintiff in an action to foreclose a high cost home loan, subprime home loan or non-traditional home loan to make an affirmative allegation in their foreclosure complaint that they are the holder of the note and mortgage at the time the action was commenced or have been delegated the authority to institute the current action by the holder of the note and mortgage and that the mortgage complies with section 6-M of the Banking Law and Real Property Law 265-B as well as the requirements in Section 1303 of the RPAPL.

Additional Notice Requirements: Effective 9/1/2008 RPAPL 1303 is amended to create another notice to be given to the mortgagor of a 1-4 family, owner occupied, dwelling. The notice must be delivered with the summons and complaint in a foreclosure, be on a separate page in bold, 14 point type, on colored paper in a color other than the color of the summons and complaint. This notice is the same notice required under the Home Equity Theft Protection Act.

There are definitions in the new section:

Annual percentage rate - is based on the provisions in the Federal Truth in-Lending Act.

Home Loan - is any loan, including Home Equity Loan, OTHER THAN A REVERSE MORTGAGE, provided the loan is a conforming loan; the borrower is a natural person; the mortgage is primarily for personal, family or household purposes; is on a 1-4 family principal dwelling of the borrower.

Subprime Home Loan - is a mortgage in which the terms exceed the "Threshold" (defined next), made between January 1, 2003 and September 1, 2008. It excludes building and bridge loans.

Threshold - is 3 percentage points over the treasury yield for securities that are the same length as the mortgage, and if for a subordinate loan, 5 percentage points. The interest rate to be used to determine the Threshold shall not include an introductory rate.

Non Traditional Home Loan - is a payment option adjustable or interest only mortgage, made between January 1, 2003 and September 1, 2008.

Lender - is a mortgage banker or exempt organization as defined in the banking law.

Distressed property. The Act creates 265-b of the Real Property Law: effective 9/1/2008. (Distressed property consulting contracts). A distressed property is defined as a loan that has gone in to one or more default periods.

The distressed property consultant may not:

1. Perform services without a written contract.
2. Receive payment before completion of the services.
3. Take a power of attorney from the homeowner
4. Keep any original documents

The distressed property service contract must:

1. Be in writing.
2. Given to the homeowner for review prior to signing.
3. Be in 12 point type.
4. Disclose the type of services and amount of payment.
5. Give name, address and phone of consultant.
6. Be signed by both parties, witnessed and acknowledged before a notary public.
7. Contain a notice in 14 point bold type allowing cancellation within 5 days and stating the duties of the consultant and when payment is due.

High cost loans. The Act amends Banking Law Section 6-1 (2) to prohibit High Cost loans containing the following:

1. Negative amortization.

2. Financing of other insurance or products in the mortgage payments.
3. An offer of a special mortgage (government or not for profit lender, with below market rate, or payments that vary with income or are waived). This can be ameliorated by offering the borrower counseling.
4. A Pre payment penalty.
5. Use of the yield spread to offset up front costs by choosing a higher rate mortgage, unless the compensation from the lender to the broker which exceeds the amount owed to the broker shall be credited back to the borrower.
Other requirements of a High Cost Loan:
6. After July 1, 2010, the loan must escrow taxes and hazard insurance.
7. The borrower must be informed there will be an escrow as above when they are first given the anticipated monthly payments.
8. No have a teaser rate that lasts for less than 6 months.
9. The borrower must be given a notice as specified in the law within 3 days of determining the loan is high cost, but not less than 10 days before closing.

Subprime Loans The Act creates new banking law section 6-M which regulates and defines sub prime loans. A subprime loan is defined as:

1. A loan in which the fully indexed APR is more than 1 $\frac{3}{4}$ percentage points (1st lien) or 3 $\frac{3}{4}$ percentage points (subordinate lien) over the average rate for Freddie Mac loans in the northeast as of a week prior to the lender receiving the application.
2. The property is 1-4 family, owner occupied.
3. The borrower is a natural person.

A subprime loan has the following limitations, which, if not followed, renders the loan void:

1. No call provisions allowing the lender in its sole discretion to accelerate a loan.
2. No negative amortization
3. No increased interest rate after default.
4. No more than 2 payments may be paid in advance.
5. No modification or deferral fees if the loan remains sub prime after modification, or the APR is not at least 2 percentage points lower after modification.
6. No oppressive mandatory arbitration clause.
7. No financing of insurance or other products in the loan.
8. No "loan flipping" (where the refinance does not result in a tangible net benefit to borrower).
9. No refinancing of special mortgages which are made by a government entity or not for profit which contain below market rates or other benefits to the borrower.
10. No lending without counseling disclosure and a list of counselors.
11. No encouragement of default in order to make a sub prime loan.

12. No fees, kickback, thing of value other than for actual work shall be paid by the lender to the mortgage broker.
13. No prepayment penalties.
14. Where the borrower uses the yield spread to offset up front costs by choosing a higher rate mortgage, the compensation from the lender to the broker which exceeds the amount owed to the broker shall be credited back to the borrower.
15. Taxes and hazard insurance must be escrowed.
16. The borrower must be informed there will be an escrow as above when they are first informed of the anticipated monthly payments.
17. No teaser rate that lasts less than 6 months.

When originating a sub prime loan, the lender must reasonably and in good faith believe the borrower has the ability to repay the loan. There also must be a legend on the top of a subprime loan in 12 point type stating the loan is sub prime.

Section 6-M gives the borrower the right to receive damages, legal fees or other relief, if the lender violates any of the above provisions and further allows the attorney general or superintendent of insurance to enforce the borrowers rights.

The Act creates new Banking Law 590-b which establishes responsibilities for lenders and mortgage brokers to comply with the Act. They now have a duty of care in making loans and standards for dealings with Appraisers and Borrowers. The act provides remedies for the violation of these responsibilities.

Mortgage loan servicers are now required to register with the Superintendent of Insurance and open their books for inspections. Additionally, the Banking Board can promulgate new regulations for mortgage loan servicers.

The Act also adds new section 187 to the Penal Law, Section 187 creates the crime of residential mortgage fraud. Residential Mortgage Fraud is committed by a person who knowingly and with intent to defraud, uses materially false information concerning a material fact or conceals a material fact related to the making of a home loan.

This bulletin is sent courtesy of CB Title Agency of NY, LLC and Stewart Title Insurance Company. This bulletin is a summary of the pertinent provisions of the Act. Please refer directly to the Act for any legal analysis.