

940 CMR 8.00: MORTGAGE BROKERS AND MORTGAGE LENDERS

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8.01: Purpose

940 CMR 8.00 relates to mortgage lenders and mortgage brokers pursuant to the Attorney General's authority in M.G.L. c. 93A, § 2(c). 940 CMR 8.00 is designed to protect Massachusetts consumers seeking residential mortgage loans and to ensure that the mortgage industry is operating fairly and honestly by means of legitimate and responsible business acts and practices that are neither unfair nor deceptive.

940 CMR 8.00 addresses problems experienced by consumers when they seek or obtain mortgage loans for the purchase or initial construction of residential homes, or when consumers refinance an existing loan.

8.02: Scope

940 CMR 8.00 defines unfair or deceptive acts or practices. They are not intended to be all inclusive as to the types of activities prohibited by M.G.L. c. 93A, § 2(a). Acts or practices not specifically prohibited by 940 CMR 8.00 are not necessarily consistent with M.G.L. c. 93A or otherwise deemed legitimate by the absence of regulation here.

940 CMR 8.00 shall cover any mortgage lender or broker advertising or doing business within Massachusetts, regardless of whether or not the lender or broker maintains an office in Massachusetts.

940 CMR 8.00 applies to all residential mortgage loan transactions in the Commonwealth of Massachusetts, as more particularly defined in 940 CMR 8.00, except that it does not apply to either:

- (a) reverse mortgages governed by M.G.L. c. 167E, § 7; or
- (b) open-end home equity lines of credit. 940 CMR 8.00 also excludes reduced interest rate mortgages originated under the auspices of affordable housing programs which are administered by state, quasi-public, or local government entities.

8.03: Definitions

Advertisement (including the terms "advertise" and "advertising") shall be defined in a manner which is consistent with the definition in 940 CMR 6.00: Retail Advertising, and means any oral, written, graphic, or pictorial statement made by a mortgage broker or lender in any manner in the course of the solicitation of business. Advertisement includes any representation made in a newspaper, magazine, or other publication or on the internet, radio or television or contained in any notice, handbill, sign, billboard, banner, poster, display, circular, pamphlet, catalog, or letter. Advertisement includes any representation disseminated or accessible within Massachusetts if the advertisement is directed to consumers in Massachusetts.

8.03: continued

Bait Advertising means an offer to procure, arrange, or otherwise assist a borrower in obtaining a mortgage on terms which the broker or lender cannot, does not intend, or want to provide, or which the broker or lender knows cannot be reasonably provided. Its purpose is to switch borrowers from buying the advertised mortgage loan product to buying a different mortgage loan product, usually at a higher rate or on a basis more advantageous to the broker or lender.

Borrower means any natural person seeking, using, or paying for directly or indirectly, the services of a mortgage lender or broker in connection with a mortgage loan.

Broker Fee means any money, compensation, commission, fee, charge or other valuable consideration directly or indirectly imposed by a mortgage broker for the brokers services in negotiating, placing, finding, or otherwise assisting a borrower in obtaining a mortgage loan. The term broker fee does not include a fee charged by the lender (such as a commitment fee or a lock-in fee), wages or commissions paid to an employee of the mortgage broker or mortgage lender by his or her employer, nor does such term include bona fide and reasonable payments to be remitted to third party service providers, such as appraisal fees or fees for credit reports or payments or remittances to the mortgage lender.

Clear and Conspicuous (including the terms "clearly and conspicuously") shall be defined in a manner which is consistent with the definition in 940 CMR 6.00: Retail Advertising. 940 CMR 6.01: Clear and Conspicuous provides that clear and conspicuous (including the terms "clearly and conspicuously") shall mean that:

the material representation being disclosed is of such size, color, contrast, or audibility and is so presented as to be readily noticed and understood by a reasonable person to whom it is being disclosed.

Further, without limiting the requirements of the preceding sentence, 940 CMR 6.01: Clear and Conspicuous (e) states that a representation in an advertisement is not clear and conspicuous unless:

1. for a printed, written, typed or graphic advertisement, such material representation appears in type which is at least one-third the size of the largest type of information which it modifies and is a minimum of eight point type;
2. for the video portion of a television advertisement, such material representation:
 - a. is displayed in type not less than 14 scan lines in height;
 - b. contains letters of a color or shade that noticeably contrast with the background, and the background does not consist of colors and/or images which obscure or detract attention from the representation or are disparaging to its meaning or importance; and
 - c. appears on the screen for a duration equal to at least one second for every three words of the material representation but not less than a total of five seconds.
3. for a radio advertisement or the audio portion of a television advertisement, such material representation complies with the requirements of 940 CMR 6.01: Clear and Conspicuous(c).

Commissioner means the Commissioner of Banks.

Commitment for Mortgage Loans (or the word "commitment") means an oral or written agreement to loan or to advance funds for a mortgage loan. A commitment can specify a loan amount, repayment terms, interest rate or conditions necessary to close the loan.

Contractor or Home Improvement Contractor means any person who owns or operates a residential contracting business or who undertakes, offers to undertake, purports to have the capacity to undertake, or submits a bid for, by him or herself or through others, residential contracting work as defined in M.G.L. c. 142A.

8.03: continued

Mortgage Broker or Broker means any person, who for compensation or gain, or in the expectation of compensation or gain, directly or indirectly negotiates, places, assists in placement, finds, or offers to negotiate, place, assist in placement or find mortgage loans on residential property for others, or as otherwise defined by M.G.L. c. 255E, § 2 or by the Commissioner. Notwithstanding anything to the contrary in 940 CMR 8.00, the following persons shall not be deemed to be a mortgage broker:

- (a) any person who is exempt from the licensing requirements of M.G.L. c. 255E, § 2, provided, however, that individuals who work for or on behalf of brokers that are licensed pursuant to M.G.L. c. 255E, § 2, shall not be exempt from 940 CMR 8.00; and
- (b) any financial institution which is regulated by a federal and/or state bank regulatory agency and which, directly or indirectly, negotiates, places, assists in placement, finds, or offers to negotiate, place, assist in placement or find mortgage loans on residential property for a direct or indirect affiliate or subsidiary of such financial institution.

Mortgage Lender or Lender means any person engaged in the business of making mortgage loans or issuing commitments for mortgage loans, including, but not limited to, mortgage lenders licensed or regulated by M.G.L. c. 255E, § 2 or by the Commissioner, and shall include all individuals who work on behalf of such lenders.

Mortgage Loan or Loan means a loan to a natural person primarily for personal, family or household use secured wholly or partially by a mortgage on residential property, or as otherwise defined by M.G.L. c. 255E or by the Commissioner, and shall include loans to refinance a mortgage. "Mortgage loan" or "loan" shall not include either:

- (a) reverse mortgages governed by M.G.L. c. 167E, § 7; or
- (b) open-end home equity lines of credit.

Person means a natural person or organization including a corporation, partnership, association, cooperative or trust or any other legal entity.

No Income Loan Product means a mortgage loan where:

- (a) in making its decision whether to underwrite the loan or extend credit, the mortgage lender does not account for or consider, in any manner whatsoever, the prospective borrower's income or employment status; and
- (b) that fact is set forth in the lender's written underwriting or loan origination policies governing its No Income Loan Product.

Point means an origination fee, finder's fee, or other fee, premium, service charge, or any other charge calculated as a percentage of the principal amount of the loan or a percentage of the amount financed, however such point may be called, which is charged by a mortgage lender at or before the time the mortgage loan is made as additional compensation for the mortgage loan, or as otherwise defined by M.G.L. c. 183, § 63 or by the Commissioner. A point does not include:

- (a) *bona fide* and reasonable fees for actual services performed including, but not limited to, attorney's fees, appraisal fees, credit reporting fees, private mortgage insurance premiums, and title insurance premiums or mortgage broker fees; or
- (b) a charge which is credited to closing costs or other costs relating to such loan.

Residential Property means real property located in Massachusetts having thereon a dwelling house with accommodations for four or fewer separate households and occupied, or to be occupied, in whole or in part by the obligor of the mortgage debt, or as otherwise defined in M.G.L. c. 255E.

8.04: Advertising Practices

(1) It is an unfair or deceptive act or practice for a mortgage broker or lender to make any representation or statement of fact in an advertisement if the representation or statement is false or misleading or has the tendency or capacity to be misleading, or if the mortgage broker or lender does not have sufficient information upon which a reasonable belief in the truth of the representation or statement could be based.

8.04: continued

(2) It is an unfair or deceptive act or practice for a mortgage broker or lender to advertise without clearly and conspicuously disclosing its business name, and if required to be licensed pursuant to M.G.L. c. 255E, the words "broker" or "lender", as applicable, and the license number.

(3) It is an unfair or deceptive act or practice for a mortgage broker to represent in any advertisement that the mortgage broker will fund a mortgage loan.

(4) It is an unfair or deceptive act or practice for a mortgage broker or lender to engage in bait advertising or to misrepresent (directly or by failure to adequately disclose) the terms, conditions or charges incident to the mortgage loan being advertised in any advertisement. Violations of 940 CMR 8.04(4) shall include, but shall not be limited to:

- (a) the advertisement of "immediate approval" of a loan application or "immediate closing" of a loan or words of similar import, such as "instant closing";
- (b) the advertisement of a "no point" mortgage loan when points are required or accepted by the lender as a condition for commitment or closing;
- (c) the advertisement of an incorrect specific number of points required for commitment or closing;
- (d) the advertisement through terms such as "bad credit no problem" or words of similar import or that an applicant will have unqualified access to credit without clearly and conspicuously disclosing the material limitations on the availability of credit that may exist, such as:

- 1. requirements for the availability of credit (such as income);
- 2. that a higher rate or more points may be required for a consumer with bad credit; and
- 3. that restrictions as to the maximum principal amount of the loan offered may apply.

(e) the use of "avoid foreclosure" or words of similar import in an advertisement unless the advertisement also clearly and conspicuously discloses, that:

- 1. the borrower must refinance the mortgage in default and/or take a new mortgage loan;
- 2. the borrower may be required to pay interest rates significantly higher than what other borrowers not facing foreclosures might pay; and
- 3. the warning that "you may lose your home if you cannot make all the payments or if you miss any of the payments on this loan."

(5) It is an unfair or deceptive act or practice for a mortgage broker or lender who advertises any finance terms to fail to comply with the applicable state and federal advertising Truth-in-lending laws, M.G.L. c. 140D, § 1, et seq. Consumer Credit Cost Disclosure, and 15 U.S.C. § 1601, et seq. Fair Debt Collection Practices Act.

8.05: Mortgage Disclosures

(1) It is an unfair or deceptive act or practice for a mortgage broker or mortgage lender to fail to make any disclosure, or fail to provide any document, to a consumer required by and at the time specified by any applicable state or federal law, regulation or directive.

(2) It is an unfair or deceptive act or practice for a mortgage broker or lender to conceal or to fail to disclose to a borrower any fact relating to the loan transaction, disclosure of which may have influenced the borrower not to enter into the transaction with the broker or lender.

(3) It is an unfair and deceptive act or practice for the mortgage broker or lender to fail to take reasonable steps to communicate the material facts of the transactions in a language that is understood by the borrower. Reasonable steps which shall comply with 940 CMR .8.00 may include but shall not be limited to:

- (a) using adult interpreters; and
- (b) providing the borrower with a translated copy of the disclosure forms required by any applicable state or federal law, regulation or directive, in a language understood by the borrower.

8.05: continued

(4) It is an unfair or deceptive act or practice for a mortgage lender to fail to give to the borrower legible copies of the mortgage deed, promissory note, and the settlement statement when completed or at the time of closing.

8.06: Prohibited Practices

(1) It is an unfair or deceptive act or practice for a mortgage broker or lender to make any representation or statement of fact if the representation or statement is false or misleading or has the tendency or capacity to be misleading, or if the mortgage broker or lender does not have sufficient information upon which a reasonable belief in the truth of the representation or statement could be based. Such claims or representations include, but are not limited to the availability, terms, conditions, or charges, incident to the mortgage transaction and the possibility of refinancing. In addition, other such claims and representations by the broker may include the amount of the brokerage fee, the services which will be provided or performed for the brokerage fee, the borrower's right to cancel any agreement with the mortgage broker, the borrower's right to a refund of the brokerage fee, and the identity of the mortgage lender that will provide the mortgage loan or commitment.

(2) It is an unfair or deceptive act or practice for a broker or lender to charge an application and/or broker fee which significantly deviates from industry-wide standards or is otherwise unconscionable.

(3) It is an unfair or deceptive act or practice for a mortgage broker or lender to accept any broker fee, application fee or other fee, prior to the borrowers receipt of any disclosure forms mandated by 940 CMR 8.05(1). Where the applicable state or federal law specifies that the disclosure form must be provided to a consumer prior to the consummation of the mortgage loan. Notwithstanding the foregoing, an appraisal fee may be accepted if the lender or brokers provides oral or written notice, prior to the receipt of such fee, as to whether the fee is refundable.

(4) It is an unfair or deceptive act or practice for a mortgage broker or lender to engage the services of (another) mortgage broker that will charge the borrower an additional fee without obtaining in advance the written permission of the borrower to charge that fee, the amount of which shall be specified in writing.

(5) It is an unfair or deceptive act or practice for a mortgage broker or lender to directly or indirectly, regardless of the receipt or the expectation of receipt of compensation from the contractor, to:

- (a) provide loan application documents to home improvement contractors for use by such contractor in connection with the financing by mortgage loans of home improvement contracts;
- (b) use a home improvement contractor as an agent for its business; or
- (c) accept mortgage applications from contractors.

940 CMR 8.06(5) shall not prohibit contractors from referring consumers to mortgage brokers or lenders, or lenders from purchasing executed home improvement contracts.

(6) It is an unfair or deceptive act or practice for a mortgage broker or lender to procure or negotiate for a borrower a mortgage loan with rates or other terms which significantly deviate from industry-wide standards or which are otherwise unconscionable. To determine whether the Annual Percentage Rate (APR), for example, is unconscionable, factors to consider include whether the APR at the time the loan was made is more than, the greater of:

- (a) ten percent above the highest domestic "Prime Rate" listed in the Money Rates section of The Wall Street Journal; or
 - (b) 20% percent; and
- whether the APR is consistent with comparable rates for borrowers in similar financial circumstances.

(7) It is an unfair or deceptive act or practice for a mortgage lender to act also as a mortgage broker directly or indirectly in the same mortgage loan transaction, or to violate 209 CMR 42.04(4) or 42.07(4).

8.06: continued

(8) It is an unfair or deceptive act or practice for a lender to fail to disburse funds in accordance with any commitment or agreement with the borrower.

(9) It is an unfair or deceptive act or practice for a mortgage broker or lender to conduct business with a person which should be licensed under M.G.L. c. 255E, and which it knows or should know is an unlicensed mortgage broker or lender.

(10) It is an unfair or deceptive act or practice for any mortgage lender to charge a prepayment fee which:

- (a) violates M.G.L. c. 183, § 56;
- (b) significantly deviates from industry-wide standards; or
- (c) is otherwise unconscionable.

(11) It is an unfair or deceptive act or practice for a mortgage broker or lender to fail to give to the borrower or his or her attorney the time and reasonable opportunity to review every document signed by the borrower and every document which is required pursuant to 940 CMR 8.00, prior to the disbursement of the mortgage funds.

(12) It is an unfair or deceptive act or practice for a mortgage broker or lender to accept any fees which were not disclosed in accordance with 940 CMR 8.00 or applicable law.

(13) It is an unfair or deceptive act or practice for a mortgage broker or lender to accept any attorneys fees in excess of the fees that have been or will be remitted to its attorneys.

(14) It is an unfair or deceptive act or practice for a mortgage broker or lender to refuse to permit the borrower to be represented by the attorney of his or her choice. Nothing contained herein shall limit the lenders right to choose its own attorney, which may be paid for by the borrower.

(15) It is an unfair or deceptive act or practice for a mortgage broker to arrange or mortgage lender to make a mortgage loan unless the mortgage broker or lender, based on information known at the time the loan is made, reasonably believes at the time the loan is expected to be made that the borrower will be able to repay the loan based upon a consideration of the borrower's income, assets, obligations, employment status, credit history, and financial resources, not limited to the borrower's equity in the dwelling which secures repayment of the loan (subject, however, to the treatment of No Income Loan Products in 940 CMR 8.06(16)). The determination under 940 CMR 8.06(15) of a borrower's ability to repay a loan shall take into account, without limitation:

- (a) the borrower's ability to repay at the fully indexed rate, assuming a fully amortizing repayment schedule, and the resulting scheduled payments that may be charged under the loan accounting for interest rates, financial terms or scheduled payments that may adjust upward; and
- (b) the property taxes that are required on the subject property at the time the loan is expected to be made and the reasonably anticipated insurance costs if the loan requires that insurance be maintained on the property, regardless whether the broker or lender will collect an escrow for such taxes or insurance in connection with loan payments.

For purposes of 940 CMR 8.06(15)(a), the "fully indexed rate," with respect to loan rates that may adjust upward, shall mean the index rate prevailing at the date of loan origination plus the margin to be added to it after the expiration of an introductory interest rate. For purposes of illustration, assume that a loan with an initial fixed rate of 7% will reset to the six-month London Interbank Offered Rate (LIBOR) plus a margin of 6%. If the six-month LIBOR rate equals 5.5% at the date of origination, the determination of ability to pay under 940 CMR 8.06(15)(a) shall take into account the borrowers ability to repay at 11.5% (5.5% plus 6%), regardless of any interest rate caps that limit how quickly the fully indexed rate may be reached.

8.06: continued

(16) It is an unfair or deceptive act or practice for a mortgage broker or lender to process or make a mortgage loan without documentation to verify the borrower's income (a so-called "no documentation," "no doc," "stated income" or "limited documentation" loan) unless the broker or lender, as applicable, first provides a written document to the borrower, which must be signed by the borrower in advance of the closing, and which:

- (a) identifies the borrower's income and the source of the income; and
- (b) provides detailed information, if true, that by applying for a mortgage loan on a no- or limited documentation basis, the consumer will pay a higher interest rate or increased charges, or have less favorable terms for the mortgage loan (including information concerning the precise increase in interest rate, charges, or the nature of the less favorable terms).

Provided, however, that if a mortgage broker or lender arranges or makes a mortgage loan using a No Income Loan Product, which loans shall remain subject to 940 CMR 8.06(15), the requirement in 940 CMR 8.06(16)(a) shall not apply. It is an unfair or deceptive act or practice for a mortgage lender or broker to process or make a mortgage loan on a no- or limited documentation basis if the stated income provided by the borrower with respect to the no- or limited documentation loan contradicts information previously obtained by the broker or lender with respect to that borrower in connection with the same proposed loan, absent a documented change in circumstances or other documented explanation for the discrepancy between the prior information and latter income representation. Notwithstanding the foregoing, it shall be an unfair or deceptive act or practice for a mortgage lender to underwrite or close a loan without first verifying the employment or income of the borrower when the amount of the income stated is not reasonable for the actual employment status or experience of the borrower known to the lender, or when the borrower's stated employment or stated income is not reasonable in light of the borrower's circumstances known to the lender.

(17) It is an unfair or deceptive act or practice for a mortgage broker to process, make or arrange a loan that is not in the borrower's interest. Where the financial interest of a mortgage broker conflicts with the interests of the borrower (for example, where the broker's compensation will increase directly or indirectly if the borrower obtains a loan with higher interest rates, increased charges or less favorable terms than those for which a borrower would otherwise qualify), the broker shall disclose the conflict and shall not proceed to process, make or arrange the loan so long as such a conflict exists. It is an unfair or deceptive act or practice for a mortgage broker to disclaim the duty established by 940 CMR 8.06(17) in a written contract or to assert in oral representations that a broker does not have such a duty in communications with the borrower.

(18) It is an unfair or deceptive act or practice for a mortgage lender:

- (a) to use a pricing model for its mortgage loans which treats borrowers with similar credit criteria and bona fide qualification criteria differently; or .
- (b) to make a mortgage loan when any or all of the cost features of the mortgage loan are based on criteria other than the borrower's credit and other bona fide qualification criteria.

For purposes of 940 CMR 8.06(18), "bona fide qualification criteria" shall mean those account in determining whether to extend a mortgage loan, including by way of example, income, assets, credit history, credit score, income-to-debt ratios or loan-to-value ratios. For purposes of 940 CMR 8.06(18)(b), the term "cost features" shall include, but not be limited to, the interest rate; the index; margin; and other adjustment features if the interest rate is adjustable; points; and prepayment penalties.

8.07: Severability

If any provision of 940 CMR 8.00 or the application of such provision to any person or circumstances is held to be invalid, the validity of the remainder of 940 CMR 8.00 and the applicability of such provision to other persons or circumstances shall not be affected.

8.08: Effective Date

940 CMR 8.00 is effective on April 4, 2008.

REGULATORY AUTHORITY

940 CMR 8.00: M.G.L. c. 93A, § 2(c).

(PAGES 79 AND 80 ARE RESERVED FOR FUTURE USE.)