

Mortgage Lenders Beware!

Kentucky's General Assembly adopted House Bill 552, which, among other things, amended Kentucky's Mortgage Loan Companies and Mortgage Loan Brokers Act (the "Mortgage Loan Act"), KRS 286.8-010 *et. seq.*, and Kentucky's high-cost home loan statute, KRS 360.100. Because the General Assembly declared the bill to be an emergency enactment, the amendments became effective on April 24, 2008, the date the Governor signed the bill into law.

No doubt most licensees under the Mortgage Loan Act regularly monitor legislation being considered by the General Assembly. However, if you have relied upon an exemption from the provisions of the Mortgage Loan Act, you may not realize that a number of the amendments will materially impact how you conduct your mortgage loan business in Kentucky!

The purpose of this article is to highlight some of the important provisions of House Bill 552, in particular those that affect exempt entities under the Mortgage Loan Act and that may cause a larger number of home loans to be subject to KRS 360.100.

Amendments to the Mortgage Loan Act:

Exemption Matters:

First, if you and your affiliates have been exempt because you are a bank or other regulated entity, your affiliates can no longer share your exemption unless they are wholly owned subsidiaries.

Second, persons who do not hold a self-executing exemption under the Mortgage Loan Act, but instead are required to file a claim of exemption with the KDFI, must now comply with *all* provisions of the Mortgage Loan Act except the licensing and examination provisions (unless the Executive Director determines that an examination is necessary).

Third, if you hold a claim of exemption because you are a mortgage loan company or broker approved and regulated by HUD, your exemption will not be approved unless you have held a mortgage loan company or mortgage loan broker license or registration or have been approved and regulated by HUD to conduct a mortgage lending business for five consecutive years prior to the filing of your application for exemption. In addition, the Mortgage Loan Act now requires any person (other than those holding a self-executing exemption) to qualify as a foreign entity in order to conduct any business in the residential real estate mortgage lending process in Kentucky.

Limit on Mortgage Loan Income:

If you are a licensee or hold a claim of exemption (which the KDFI interprets to mean those persons who must file a claim of exemption) under the Mortgage Loan Act, you are now prohibited from making mortgage loans that exceed a “total net income” limit. Section 26 of House Bill 552 (which has not yet been codified), makes it unlawful for licensees or persons holding a claim of exemption to originate loans secured by a mortgage on residential real property in Kentucky if the total net income generated exceeds \$2,000 or 4% of the total loan amount, whichever is greater.

“Total net income” means all fees, income or compensation of any kind collected, received or charged by a licensee, a person holding a claim of exemption, *or by an affiliate of such person*, including, but not limited to, origination, broker and lender fees, discount points if retained by such person as income, processing, administrative and document preparation fees, yield spread premiums, servicing release premiums, and financial counseling fees. “Total net income” does not include interest or fees paid to compensate unaffiliated third parties. “Total loan amount” means the amount financed less the total net income generated by the originating licensee, person holding a claim of exemption, or the affiliate of such person.

Prescreened Trigger Lead Information:

The Mortgage Loan Act now makes it unlawful for any person to use prescreened trigger lead information derived from a consumer report to solicit a consumer who has applied for a mortgage loan with another mortgage loan company or mortgage loan broker, when the person

- fails to state in the initial solicitation that such person is not affiliated with the company or broker with which the consumer initially applied,
- fails in the initial solicitation to conform to state and federal laws relating to prescreened solicitations, including the requirement to make a firm offer,
- uses information about consumers who have opted out of prescreened credit offers or have placed their information on the state or federal do-not-call registry, *or*
- solicits a consumer with rates, terms and costs knowing that the rates terms or costs will be subsequently changed to the consumer’s detriment.

Amendments to the High-Cost Home Loan Statute:

House Bill 552 also amended Kentucky’s high-cost home loan statute, KRS 360.100, in a manner that may result in additional mortgage loans being subject to that statute.

KRS 360.100 does not apply to open-end credit plans or reverse mortgage transactions. It does apply to a consumer loan obtained by a natural person and secured by a mortgage on residential real property used as the borrower’s principal dwelling if the principal amount of the loan is greater than \$15,000 and does not exceed \$200,000 *and* the terms of the loan exceed either or both of the following thresholds:

- the loan at the time of consummation is considered a “mortgage” under the Home Ownership and Equity Protection Act of 1994, as amended, and the regulations adopted thereunder, *or*
- the total points and fees payable by the borrower at or before the loan closing exceed the greater of \$3,000 or 6% of the total loan amount as shown as the “amount financed” on the final Truth-in-Lending Statement.

It is the second bullet point that has been added under House Bill 552. “Total points and fees payable by the consumer at or before the loan closing” has been defined by the amendment as being all amounts payable by a borrower at or before the closing of a home loan, excluding any interest or time-price differential due at closing. The term includes the following:

- mortgage broker fees,
- amounts payable under an add-on or discount system of charges,
- service, transaction, activity and carrying charges that exceed similar charges on noncredit items,
- points, loan fees, assumption fees, finder’s fees and similar charges,
- appraisal, investigation and credit report fees when service is provided by the lender or its affiliate,
- charges imposed on a creditor by another person for purchasing or accepting the obligation if the borrower is required to pay the charges in cash,
- premiums and charges for credit life, accident, health or loss-of-income insurance, or debt cancellation coverage, *or*
- closing agent fees charged by a third party if the lender requires the services, requires the imposition of the charge, or retains a portion of the charge.

“Total points and fees payable by the consumer at or before the loan closing” does not include real estate related fees paid to third parties if the charge is reasonable, the creditor receives no direct or indirect compensation, and the charge is not paid to an affiliate of the creditor. “Real estate related fees” include:

- fees for title work, title insurance, property survey and similar purposes,
- fees for preparing loan related documents such as deeds, mortgages, and reconveyance or settlement documents,
- notary and credit report fees,
- property appraisal and inspection fees if the service is performed prior to closing, including pest infestation and flood hazard determinations, and
- amounts required to be paid into escrow if the amounts would not otherwise be included in the finance charge.

Obviously, mortgage lenders will have a lot of questions about how to interpret this new provision of KRS 360.100. For example, are the listed fees intended to be exclusive, or are there other fees that may be included in or excluded from the definition of “total points and fees payable by the consumer at or before the loan closing?”

Other amendments to KRS 360.100 address the ability to charge prepayment penalties, and the ability of borrowers to make the scheduled payments under a high-cost home loan.

More Information:

It is not possible to analyze in detail all of the amendments made by House Bill 552. The entire text of the bill can be found at <http://www.lrc.ky.gov/record/08RS/HB552/bill.doc>, and the KDFI has provided a helpful summary of the amendments on its website at www.kfi.ky.gov/industryinformation/hb552.htm. The KDFI has also indicated it will propose new administrative regulations and will issue guidance on interpreting some of the amendments effected by House Bill 552. You should monitor the KDFI's website for more information about these proposals.

If you would like more information about House Bill 552 and its effect on the Mortgage Loan Act or Kentucky's high-cost home loan statute, please contact Jane Foushee at (502) 562-7217.