

CHAPTER 38

MORTGAGE BANKERS AND
MORTGAGE BROKERS

Authority

N.J.S.A. 17:1-8 and 8.1; 17:11B-5 and 13.

Source and Effective Date

R.1992 d.387, effective September 11, 1992.
See: 24 N.J.R. 2653(a), 24 N.J.R. 3514(a).

Executive Order No. 66(1978) Expiration Date

Chapter 38, Mortgage Bankers and Mortgage Brokers, expires on September 11, 1997.

Chapter Historical Note

Chapter 38, Mortgage Bankers and Mortgage Brokers, became effective July 9, 1981 with Subchapter 1, License Fees, adopted as R.1981 d.260. See: 13 N.J.R. 256(c), 13 N.J.R. 384(b). Subsequently, Subchapter 1 was revised and redesignated "General Provisions" by Emergency Rule R.1982 d.165, effective May 10, 1982, to expire July 9, 1982. See: 14 N.J.R. 571(a). The provisions of R.1982 d.165 were readopted with changes, by R.1982 d.302, effective September 7, 1982. See: 14 N.J.R. 977(a). Subchapter 2, Books and Records; Subchapter 3, Examinations; Subchapter 4, Fees and Charges; Subchapter 5, Obligation of Licensees; and Subchapter 6, Appeal Procedure, were adopted as R.1982 d.303, effective September 7, 1982. See: 14 N.J.R. 493(a), 14 N.J.R. 977(b). Pursuant to Executive Order No. 66(1978), Chapter 38 expired on September 7, 1987 and was adopted as new rules by R.1987 d.396, effective October 5, 1987. See: 19 N.J.R. 1261(a), 19 N.J.R. 1791(a). Subchapter 5 was repealed by R.1989 d.191, effective April 17, 1989, but operative July 16, 1989. See: 20 N.J.R. 1021(b), 21 N.J.R. 981(c). Pursuant to the findings in *Mortgage Bankers Ass'n of New Jersey v. New Jersey Real Estate Comm'n, et al.*, 102 N.J. 176 (1986) (on remand—OAL Docket No. BRE-228-87), a new Subchapter 5, Persons Licensed, was adopted as R.1992 d.226, effective June 1, 1992, but with N.J.A.C. 3:38-5.3 operative January 1, 1993. See: 23 N.J.R. 3406(b), 23 N.J.R. 3686(c), 24 N.J.R. 2048(b). Pursuant to Executive Order No. 66(1978), Chapter 38 was readopted as R.1992 d.387. See: Source and Effective Date. Petition for Rulemaking: Reasonable access to real estate offices. See: 28 N.J.R. 1076(a).

See section annotations for specific rulemaking activity.

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SUBCHAPTER 1. GENERAL PROVISIONS

3:38-1.1 Definitions

The following words and terms, when used in this chapter, shall have the following meanings unless the context clearly indicates otherwise.

"Act" means the Mortgage Bankers and Brokers Act, N.J.S.A. 17:11B-1 et seq.

"Branch office" means any location where, in the regular course of business, mortgage loan applications are distributed to or received from consumers, mortgage records are maintained, underwriting decisions are made, mortgage commitments or lock-in agreements are issued, or any fees or charges relating to the mortgage loan are received from consumers. A home or place of business of a consumer shall not be considered a branch office. A location shall not be considered a branch office merely because any or all of the following activities are conducted at the location:

1. Consumers receive information concerning available loan products from a computer terminal;
2. Consumers are prequalified for a mortgage loan, so long as no additional fee is charged for this service; and
3. Advertising materials are distributed to consumers so long as the materials do not in any way resemble an application for a mortgage loan.

"Broker" means to place for others a mortgage loan in the primary market. "Financial services industry" means the businesses that are engaged in the granting of credit or the making of investments.

"Lender" means a bank, savings bank, savings and loan association, credit union, mortgage banker or any other person who originates mortgage loans in this State.

"Licensee" means a mortgage banker or mortgage broker licensed with the Department of Banking.

"Mortgage banker" means any person other than those exempted, who for compensation or gain, or in the expectation of compensation or gain, either directly or indirectly originates, acquires or negotiates mortgage loans in the primary market.

"Mortgage banker non-servicing" means a mortgage banker which:

1. Does not hold mortgage loans in its portfolio for more than 90 days in the regular course of business or service mortgage loans for more than 90 days in the regular course of business; and
2. Has shown to the Department's satisfaction an ability to fund loans through warehouse agreements, table funding agreements or otherwise.

"Mortgage broker" means any person, other than those exempted, who for compensation or gain, or in the expectation of compensation or gain, either directly or indirectly negotiates, places or sells for others, or offers to negotiate, place or sell for others, a mortgage loan in the primary market.

"Mortgage loan" means any loan secured by a first mortgage on real property on a one- to six-family dwelling, a portion of which may be used for nonresidential purposes.

"Originate" means to commit to make a mortgage loan, or to close a mortgage loan in the name of the licensee.

"Prequalification" is the process whereby a licensee prior to application advises a person whether he or she qualifies for a mortgage loan product, subject to satisfactory appraisal and other contingencies.

"Primary market" means the market wherein mortgage loans are originated between a lender and a borrower, whether or not through a mortgage broker or other conduit, and shall not include the sale or acquisition of a mortgage loan after closing of the mortgage loan.

"Settlement service" means any service provided in connection with a real estate settlement including, but not limited to, the following: title searches, title examinations, the provision of title certificates, title insurance, services rendered by an attorney, the preparation of documents, property surveys, the rendering of credit reports or appraisals, pest and fungus inspections, services rendered by a real estate agent or broker, and the handling of the processing, and closing or settlement.

"Solicitor" means any person not licensed as a mortgage banker or mortgage broker who is employed as a solicitor by one, and not more than one, licensee, who is subject to the direct supervision and control of that licensee, and who solicits, provides or accepts mortgage loan applications, or assists borrowers in completing mortgage loan applications, and whose compensation is in any way based on the dollar amount or volume of mortgage loan applications, mortgage loan closings or other mortgage loan activity.

"Table fund agreement" means an agreement between an investor and a licensee whereby the investor agrees to purchase specified mortgage loans from a licensee immediately after the closing of the mortgage loans, and which permits the licensee to close loans with funds of the investor.

"Warehouse agreement" means an agreement to provide credit to a licensee to enable the licensee to have funds to close mortgage loans and hold those mortgage loans pending sale to permanent investors.

New Rule, R.1992 d.226, effective June 1, 1992.

See: 23 N.J.R. 3406(b), 23 N.J.R. 3686(c), 24 N.J.R. 2048(b).

Old section 3:38-1.1, "License requirements" recodified to 3:38-1.2. Amended by R.1993 d.295, effective June 21, 1993 (operative August 1, 1993).

See: 25 N.J.R. 1035(a), 25 N.J.R. 2687(a).

Amended by R.1994 d.629, effective December 19, 1994.

See: 26 N.J.R. 4124(b), 26 N.J.R. 4999(a).

3:38-1.2 License requirements

(a) The "license period" shall run from July 1 in all odd numbered years to the second June 30 thereafter or any part of that two-year period.

(b) Regardless of the date of issuance, all licenses shall expire on June 30 in the odd numbered year following the date of issuance, the first expiration date for all licenses being June 30, 1983.

(c) The license fee is \$1,000 for each mortgage banker or mortgage broker for each biennial license period, or any part thereof provided, however, that if an initial license is issued in the second year of any biennial licensing period, the license fee shall be \$500.00.

Emergency amendment, R.1989 d.409, effective July 3, 1989 (expires September 1, 1989).

See: 21 N.J.R. 2401(a).

License fee raised in (c); licensing period changed to biennial.

Adopted concurrent proposal, R.1989 d.509, effective August 31, 1989.

See: 21 N.J.R. 2401(a), 21 N.J.R. 3083(a).

Provisions of emergency amendment R.1989 d.409 readopted without change.

Amended by R.1991 d.195, effective April 15, 1991.

See: 23 N.J.R. 254(a), 23 N.J.R. 1125(a).

Fees increased in (c).

Recodified from 3:38-1.1 by R.1992 d.226, effective June 1, 1992.

See: 23 N.J.R. 3406(b), 23 N.J.R. 3686(c), 24 N.J.R. 2048(b).

Section was "Applications".

3:38-1.3 Applications

(a) Each applicant for a mortgage banker or mortgage broker license must submit to the Department of Banking a completed application in a form prescribed by the Commissioner together with the required license fee and a non-refundable application fee of \$200.00.

(b) In addition to the application form, the applicant shall file a certified consent certificate with the Department permitting the Department to make inquiries from the Department of Law and Public Safety, Division of Criminal Justice, as to any information they may have on file with respect to the applicant.

(c) Each individual applicant must qualify by passing an examination administered under the direction of the Department of Banking unless the examination required is waived pursuant to N.J.A.C. 3:38-1.4.

(d) All applications must be accompanied by a letter of inquiry from the applicant to a surety company authorized to do business in the State of New Jersey regarding the issuance of a bond in the amounts required by N.J.A.C. 3:38-1.5(c) upon completion of all requirements for the issuance of a license.

(e) All applications on behalf of a corporation, partnership, association or other entity and all applications on behalf of an individual sole proprietor shall include an unqualified certified financial statement of the applicant as of the close of its most recent fiscal year, financial statements for the previous two years and such additional information as shall be required by the Commissioner for a newly organized corporation. All other applications shall not be required to include a financial statement.

(f) A licensee may apply for renewal of his license, without application fee, by filing with the Department of Banking a completed application for that purpose in a form to be prescribed by the Commissioner along with the required license fees.

1. The Department shall notify all licensees at least 90 days prior to the expiration date of the license.

2. The completed renewal form must be received by the Department of Banking no fewer than 60 days prior to the expiration of the license.

(g) A licensee shall submit the following to convert from a mortgage banker to a mortgage banker non-servicing or from a mortgage banker non-servicing to a mortgage banker;

1. The original license, and the licenses of all branch offices, and the licenses of all licensed individuals;

2. A completed conversion form, which shall include the name and address of the licensee, the requested date of conversion and a copy of the licensee's most recent semi-annual report of tangible net worth filed pursuant to N.J.A.C. 3:38-1.10;

3. For a conversion to a mortgage banker non-servicing, a signed affidavit from the president, a general partner or the sole proprietor stating that the licensee will not hold or service mortgage loans for more than 90 days in the regular course of business; and

4. A conversion fee of \$200.00 plus \$25.00 for each additional branch office.

(h) A licensee shall submit the following to convert from a mortgage banker or a mortgage banker non-servicing to a mortgage broker, or from a mortgage broker to a mortgage banker or a mortgage banker non-servicing:

1. The original license, the licenses of all branch offices and the licenses of all licensed individuals;

2. A completed conversion form, which shall include the name and address of the licensee, the requested date of conversion and a copy of the licensee's most recent semi-annual report of tangible net worth filed pursuant to N.J.A.C. 3:38-1.10;

3. For a conversion to a mortgage broker, a signed affidavit from the president, a general partner or the sole proprietor stating that the licensee will not issue commitments or lock-ins in its name, will not close mortgage loans in its name, and will only charge borrowers application fees and discount points; and

4. A conversion fee of \$200.00, plus \$25.00 for each additional branch office and for each licensed individual.

(i) The Department shall approve a conversion of a license pursuant to (g) or (h) above so long as the licensee satisfies the tangible net worth requirement for the license sought, or the license sought has the same or a lesser tangible net worth requirement as the tangible net worth requirement of the license held by the licensee.

Emergency amendment, R.1989 d.409, effective July 3, 1989 (expires September 1, 1989).

See: 21 N.J.R. 2401(a).

Application fee raised from \$125 to \$200 at (a).

Adopted concurrent proposal, R.1989 d.509, effective August 31, 1989. See: 21 N.J.R. 2401(a), 21 N.J.R. 3083(a).

Provisions of emergency amendment R.1989 d.409 readopted without change.

Amended by R.1991 d.588, effective December 16, 1991.

See: 23 N.J.R. 2450(a), 23 N.J.R. 3743(a).

Revised (e).

Recodified from 3:38-1.2 by R.1992 d.226, effective June 1, 1992.

See: 23 N.J.R. 3406(b), 23 N.J.R. 3686(c), 24 N.J.R. 2048(b).

Section was "Examinations".

Amended by R.1993 d.423, effective September 7, 1993.

See: 25 N.J.R. 2625(b), 25 N.J.R. 4063(b).

Amended by R.1994 d.559, effective November 7, 1994.

See: 26 N.J.R. 3234(a), 26 N.J.R. 4347(b).

Case Notes

Failure to disclose consent order limiting ability to work in savings and loan business; misstatement justifying denial of application. N.J.S.A. 17:1 1A-34 et seq. Tracey v. New Jersey Dept. of Banking, 91 N.J.A.R.2d (BKG) 1.

3:38-1.4 Examinations

(a) Upon acceptance of an application for an individual, the Department will notify the applicant of the date of the next scheduled examination, which shall not be more than 90 days from the date of acceptance of the application. The

failure of an applicant to take or pass the examination within one year of the acceptance of the application shall void the application. Any applicant who passes the exam but does not perfect his license by the posting of a bond within one year from the date of passage of the exam must resubmit to an examination. An applicant who fails the examination twice shall be prohibited from taking the examination for six months from the date of the second examination. An applicant who fails the examination a third or subsequent time shall be prohibited from taking the examination for one year from the date of the third or subsequent examination.

(b) The examination shall be prepared by the Department of Banking and may cover, but is not limited to, the following topics:

1. The contents of Federal and State legislation and regulations on mortgage banking and brokering;
2. New Jersey real estate laws;
3. Basic knowledge of mortgage documents; and
4. Related State and Federal legislation such as the Real Estate Settlement Procedures Act, the Equal Credit Opportunity Act, and Regulation Z.

Amended by R.1991 d.524, effective October 21, 1991.
See: 23 N.J.R. 2210(a), 23 N.J.R. 3134(a).

Added provision that applicants who fail to pass the licensing exam successive times shall be prohibited from the exam for specified periods of time.

Recodified from 3:38-1.3 by R.1992 d.226, effective June 1, 1992.

See: 23 N.J.R. 3406(b), 23 N.J.R. 3686(c), 24 N.J.R. 2048(b).

Section was "No waiver of examination".

3:38-1.5 No waiver of examination

The Department shall not grant a waiver of the examination for licensure pursuant to N.J.S.A. 17:11B-4(e).

Repeal and New Rule, R.1991 d.588, effective December 16, 1991.
See: 23 N.J.R. 2450(a), 23 N.J.R. 3743(a).

Section was "Waiver of examination".

Recodified from 3:38-1.4 by R.1992 d.226, effective June 1, 1992.

See: 23 N.J.R. 3406(b), 23 N.J.R. 3686(c), 24 N.J.R. 2048(b).

Section was "Bonds".

3:38-1.6 Bonds

(a) No license will be issued unless and until the applicant has posted with the Department of Banking a bond in the amount required by this subchapter in a form prescribed by the Commissioner by a surety company authorized to do business in the State of New Jersey.

(b) Any licensee may procure a blanket bond to cover all licensees in his employ.

(c) The minimum amount of the bond posted shall be:

1. For an individual mortgage banker or broker: \$25,000.

2. For a corporate or non-corporate entity plus one individual licensee: \$35,000.

3. For a corporate or non-corporate entity plus two to five individual licensees: \$60,000.

4. For a corporate or non-corporate entity plus six to 10 individual licensees: \$75,000.

5. For a corporate or non-corporate entity plus 11 to 15 individual licensees: \$100,000.

6. For a corporate or non-corporate entity plus 16 or more individual licensees: \$125,000.

(d) The bond shall run to the State, pro rata, for the benefit of the Department and for the benefit of all consumers injured by the wrongful act, omission, default, fraud or misrepresentation of the mortgage banker, mortgage broker or solicitor in the course of activity as a licensee or solicitor. The bond shall not be payable for claims made by business creditors.

(e) A licensee shall provide the Department with the original copy of a surety bond. If the licensee changes its surety company or the bond is otherwise amended, the licensee shall immediately provide the Department with the amended original copy of the surety bond. A surety company shall not cancel a bond for any cause unless written notice of its intention to cancel is filed with the Department at least 30 days before the day upon which cancellation shall take effect, and cancellation without such notice shall not be effective.

(f) When a person submits a claim with a surety company against the bond of a licensee, the surety company shall immediately notify the Department and shall not pay any claim unless and until it receives notice to do so from the Department.

(g) When the Department receives notice from a surety company of a claim against a licensee which appears valid, a consumer is unable to obtain payment of a court judgment which was obtained against the licensee for activities undertaken as a licensee, or the Department in its sole discretion otherwise determines it is necessary and proper to do so, the Department shall cause a notice to be published once a week for three successive weeks in a newspaper having general circulation in the area where the licensee conducts or conducted business advising consumers of their right to file claims against the bond. The Department is not required to publish notice when it has a claim against the bond for an examination charge or any other fee, charge or penalty if there are no consumer claims or complaints which appear valid and which may require payment from the bond. If the Department determines a notice is necessary the notice shall be in the following form:

NOTICE TO CONSUMERS

TO ANY CONSUMER HAVING CLAIMS AGAINST
(Name of Licensee), A LICENSED MORTGAGE BANK-
ER OR BROKER

TAKE NOTICE that in order to provide a procedure for the orderly resolution of claims against the bond obtained by (Name of Licensee) for the benefit of any consumer injured by the wrongful act, default, fraud or misrepresentation of (Name of Licensee), you are hereby required to present your claims against (Name of Licensee) at the following address:

N.J. Department of Banking
20 West State Street
CN 040
Trenton, NJ 08625
Attn: Regulatory Affairs Division

Each claim shall be presented in writing, specifying the amount claimed and the particulars of the claim, and shall be duly verified under oath or affirmation.

TAKE FURTHER NOTICE that each person having claims against (Name of Licensee) should file a claim no later than (one month after last notice) or risk losing the opportunity to file a claim.

Commissioner of Banking

(h) The Department shall review all timely claims made against the bond of a licensee and shall decide which claims are valid. All consumers with timely valid claims shall share pro rata in their claims against the bond. The Department shall then submit claims it has against the licensee for unpaid examination charges or for other penalties, charges or fees to the surety company for payment. Consumers submitting claims after the filing date set forth in the published notice but before the expiration of the applicable statute of limitations period shall recover next against the bond in the order that the claims are submitted.

(i) The surety company shall pay consumers' claims based on the damages directly incurred by the wrongful act, default, fraud or misrepresentation of the licensee. Attorney's fees, pre- or post-judgment interest, court costs and similar charges are not recoverable through the bond, unless such charges are included in a final judgment against the licensee and the surety company was given prior notice of the court action and an opportunity to respond. A consumer may not recover third party charges for services which are necessary and transferable for future mortgage loan applications.

Amended by R.1990 d.603, effective December 3, 1990.
See: 22 N.J.R. 2868(a), 22 N.J.R. 3619(b).

Added new (d), defining that bonds pertain to consumer claims, not to business claims.
Amended by R.1991 d.272, effective May 20, 1991.
See: 23 N.J.R. 802(a), 23 N.J.R. 1661(a).

New (e)-(i) added regarding surety bonds; filing original copy, notification of claims, determining validity of claims and payment of claims.

Recodified from 3:38-1.5 by R.1992 d.226, effective June 1, 1992.
See: 23 N.J.R. 3406(b), 23 N.J.R. 3686(c), 24 N.J.R. 2048(b).

Section was "Interim license".
Administrative Correction to (c).
See: 24 N.J.R. 3514(b).

Amended by R.1995 d.208, effective April 17, 1995.
See: 27 N.J.R. 20(b), 27 N.J.R. 1576(a).

3:38-1.7 Interim license

In the event that an applicant in business for any period of time prior to the effective date of this subchapter shall make an initial application to the Commissioner for a license on or before May 21, 1982, or if a renewal application is filed in a timely fashion and the Commissioner does not approve the application on or before the expiration date of the license, the applicant or licensee may continue to transact business without interruption until such time as he is notified that his application for a license has been disapproved or his application for renewal denied.

Recodified from 3:38-1.6 by R.1992 d.226, effective June 1, 1992.
See: 23 N.J.R. 3406(b), 23 N.J.R. 3686(c), 24 N.J.R. 2048(b).
Section was "Replacement of license".

3:38-1.8 Replacement of license

If a natural person upon whom a corporation, partnership, association, or other entity relies for its license pursuant to N.J.S.A. 17:11B-3(b) discontinues his affiliation or employment with such entity for any reason whatsoever, the entity may continue to operate under its license for a period of three months or for such other extended period as the Commissioner determines necessary for the entity to replace that natural person with another licensed natural person; provided, that the entity so notifies the Department of Banking within 10 days of the date upon which that natural person disassociates or leaves the employ of the entity.

Recodified from 3:38-1.7 by R.1992 d.226, effective June 1, 1992.
See: 23 N.J.R. 3406(b), 23 N.J.R. 3686(c), 24 N.J.R. 2048(b).
Section was "Office requirements".

3:38-1.9 Office requirements

(a) Each licensee which maintains more than one office must designate one office as the principal office. The designation of the principal office must be filed with the Commissioner of Banking. Any change in the designation must be filed within 10 days of the effective date of the change. The Commissioner shall endorse the change of address on the license.

(b) A licensee shall obtain a branch office license from the Commissioner for each branch office located in this State.

(c) A licensee shall also obtain a branch office license for each branch office located outside this State where, on a regular basis:

1. Mortgage loan applications are distributed to and/or received from New Jersey consumers in person;
2. Lock-in or commitment agreements are signed in person by New Jersey consumers;
3. The licensee or its solicitors communicates with New Jersey consumers in person regarding available loan products; and/or
4. The licensee collects fees in person from New Jersey consumers.

(d) Application for branch offices shall include the following:

1. A license fee of \$1,000, provided, however, that if an initial branch office license is issued in the second year of any biennial licensing period, the fee is \$500.00;
2. A general description of the area to be served by the office; and
3. The name and license number of the mortgage banker or broker to be in charge of the office.

(e) Each licensee must submit any change of address to any branch office or any change in the licensed supervisory individual within 10 days of the change. The Commissioner shall endorse the change of address on the license.

(f) Unless the Commissioner determines within 30 days of receipt of a completed branch application that the office is located within an establishment which is exclusively devoted to social or recreational activities or is inconsistent with the ability of the public to gain access to the mortgage banker or broker, a license shall be issued upon the posting thereafter with the Department of Banking of a bond or the receipt of a certification by the surety that the bond already posted with the Department has been appropriately increased and extended to include the branch and its individual licenses.

(g) Each licensee shall display his license so that it is easily observable by the general public. The address on the license must be the same as the address of the place of business where the license is on display.

(h) A licensee changing its name or the address of one or more of its offices shall file the appropriate form with the Department in accordance with the requirements set forth in N.J.A.C. 3:1-7.

(i) A licensee shall notify the Department of every location, other than a principal or branch office, where the licensee distributes advertising materials regarding available mortgage loan products in person to consumers on a regular basis.

(j) A branch office of a licensee under the Act does not also constitute a branch office of another licensee merely because the first licensee distributes or receives applications of that other licensee at the branch office.

(k) A principal or branch office of a bank, savings bank, savings and loan association or credit union shall not also constitute a branch office of a licensee merely because the bank, savings bank, savings and loan association or credit union distributes or receives applications of the licensee at the principal or branch office.

(l) A licensed real estate office of a person licensed as a real estate broker or salesman pursuant to Chapter 15 of Title 45 of the Revised Statutes does not constitute a branch of an unaffiliated licensee under the Act merely because the real estate broker or salesman distributes or receives an application of the licensee at that office, or because an unaffiliated licensee under the Act or a solicitor of that licensee who does not hold himself out to the public as performing mortgage banking or brokering there and does not maintain an office or desk there meets at the office of the real estate broker as a convenience to the borrower and distributes or receives applications or fees there. For purposes of this section, the term "unaffiliated" shall mean a licensee under the Act not affiliated with a real estate licensee, as defined in N.J.A.C. 11:5-1.41.

Emergency amendment, R.1989 d.407, effective July 3, 1989 (expired September 1, 1989).

See: 21 N.J.R. 2398(a).

Name or address change reporting requirements added at (e).

Adopted concurrent proposal, R.1989 d.510, effective August 31, 1989. See: 21 N.J.R. 2398(a), 21 N.J.R. 3082(a).

Provisions of emergency amendment R.1989 d.407 readopted without change.

Recodified from 3:38-1.7 by R.1992 d.226, effective June 1, 1992.

See: 23 N.J.R. 3406(b), 23 N.J.R. 3686(c), 24 N.J.R. 2048(b).

Recodified from 3:38-1.8. Added (f). Prior text at section "Net Worth/Insolvency", recodified to 3:38-1.10.

Amended by R.1992 d.387, effective October 5, 1992.

See: 24 N.J.R. 2653(a), 24 N.J.R. 3514(a).

Added new (b) and (c); recodified existing text as (d) through (j).

Amended by R.1992 d.431, effective November 2, 1992 (operative January 1, 1993).

See: 24 N.J.R. 1937(a), 24 N.J.R. 4032(a).

Added new (k)-(m).

Amended by R.1994 d.559, effective November 7, 1994.

See: 26 N.J.R. 3234(a), 26 N.J.R. 4347(b).

Amended by R.1995 d.317, effective June 19, 1995.

See: 27 N.J.R. 1507(a), 27 N.J.R. 2384(a).

In (d)1 substituted "1,000, provided, however, that if an initial branch office license is issued in the second year of any biennial licensing period, the fee is \$500.00" for "250".

3:38-1.10 Net Worth/Insolvency

(a) Tangible net worth means net worth less the following assets:

1. That portion of any assets pledged to secure obligations of any person or entity other than that of the applicant;

2. Any asset (except construction loans receivables secured by first mortgages from related companies) due from officers or stockholders of the applicant or related companies in which the applicant's officers and/or stockholders have an interest;
 3. That portion of the value of any marketable security (listed or unlisted) not shown at lower of cost or market, except for any shares of FNMA stock required to be held under a servicing agreement, which should be carried at cost;
 4. Any amount in excess of the lower of the cost or market value of mortgages in foreclosures, construction loans, or foreclosed property acquired by the applicant through foreclosure;
 5. Any investment shown on the balance sheet in the applicant's joint ventures, subsidiaries, affiliates and/or related companies which is greater than the value of said assets at equity;
 6. Goodwill;
 7. The value placed on insurance renewals or property management contract renewals or other similar intangibles of the applicant;
 8. Organization costs of the applicant;
 9. The value of any servicing contracts held by the applicant not determined in accordance with AICPA Statement of Position 76-2, dated August 25, 1976, or subsequent revision thereto;
 10. Any real estate held for investment where development will not start within two years from the date of its initial acquisition;
 11. Any leasehold improvements not being amortized over the lesser of the expected life of the asset or the remaining term of the lease; and
 12. Any commitment fees paid/collected which are not recoverable through the closing or selling of loans.
- (b) Tangible net worth shall be computed on the accrual basis of accounting.
1. "Accrual basis of accounting" means the accounting method in which expenses are recorded when incurred, whether paid or unpaid, and income is recorded when earned, whether received or not received.
- (c) "Insolvent" means negative tangible net worth, or the inability to pay debts when due.
- (d) Each applicant for a license as a mortgage banker must demonstrate that it has tangible net worth of \$250,000, except that an applicant for a mortgage banker non-servicing license must demonstrate that it has tangible net worth of at least \$150,000. Each applicant for a license as a mortgage broker must demonstrate that it has tangible net worth of at least \$50,000.
- (e) Each licensed mortgage banker shall maintain at all times tangible net worth of at least \$250,000, except that a mortgage banker non-servicing shall maintain at all times tangible net worth of at least \$150,000. Each licensed mortgage broker shall maintain at all times tangible net worth of at least \$50,000.
- (f) Each mortgage banker and mortgage broker shall file a report semi-annually on forms provided by the Department indicating the tangible net worth of the licensee, the warehousing lines available and outstanding, and any other relevant information the Department may require. The reports are due within 60 days following the end of the period. The licensee shall remit with each such report a \$100.00 filing fee. The Department shall assess a \$50.00 penalty against any licensee for each semi-annual report the licensee files late.
- (g) The requirements of this section shall apply to each applicant or licensee which is a corporation, partnership, association or other entity and each individual applicant or licensee seeking to operate or operating as a sole proprietor. The requirements shall not apply to other applicants or licensees.
- (h) If the net worth of a mortgage banker or broker falls below the required amount or the mortgage banker or broker is insolvent, the Department may take such action as it deems appropriate and necessary to protect the public including, but not limited to, requiring the licensee to operate pursuant to a Memorandum of Understanding, directing the licensee to submit and comply with a capital plan, or suspending the licensee from transacting new business until the net worth level is attained.
- (i) Mortgage bankers licensed on December 16, 1991 shall be exempt from the net worth requirements in (e) above until December 31, 1995. Prior to that date, each licensed mortgage banker shall maintain a tangible net worth equal to or greater than \$50,000 on or after December 31, 1992, \$100,000 on or after December 31, 1993, and \$175,000 on or after December 31, 1994. The following are exceptions:
1. Mortgage bankers non-servicing licensed as mortgage bankers on December 16, 1991 shall be exempt from the net worth requirement in (e) above until December 31, 1997; and
 2. Each such licensed mortgage banker non-servicing shall maintain a tangible net worth equal to or greater than \$50,000 on or after December 31, 1992, \$75,000 on or after December 31, 1994, \$100,000 on or after December 31, 1995, \$125,000 on or after December 31, 1996, and \$150,000 on or after December 31, 1997.
- (j) When considering whether to suspend the license of a licensee unable to attain the net worth standards set forth in this section, the Commissioner shall consider the following factors:

1. Whether a mortgage banker is less than \$35,000 below the net worth requirement for that year, and whether a mortgage broker has \$25,000 tangible net worth;

2. The size of any warehouse line or table funding agreement, the institution(s) providing this credit, and any correspondent relationship that a licensee may have with another financial institution;

3. The number and amount of loans typically made by the licensee;

4. The history of consumer complaints received by the Department concerning the licensee;

5. Whether the licensee has committed to make loans which it has been unable to fund; and

6. Any other factors reflecting on the licensee's ability and fitness to transact business as a mortgage banker or broker.

New Rule, R.1991 d.588, effective December 16, 1991.

See: 23 N.J.R. 2450(a), 23 N.J.R. 3743(a).

Recodified from 3:38-1.9 by R.1992 d.226, effective June 1, 1992.

See: 23 N.J.R. 3406(b), 23 N.J.R. 3686(c), 24 N.J.R. 2048(b).

Amended by R.1993 d.295, effective June 21, 1993 (operative August 1, 1993).

See: 25 N.J.R. 1035(a), 25 N.J.R. 2687(a).

Amended by R.1995 d.655, effective December 18, 1995.

See: 27 N.J.R. 3655(a), 27 N.J.R. 5011(a).

Case Notes

Mortgage was subject to Mortgage Bankers and Brokers Act (MBBA). *Trico Mortg. Co., Inc. v. Forero*, 275 N.J.Super. 91, 645 A.2d 793 (A.D.1994), certification denied 139 N.J. 186, 652 A.2d 174.

SUBCHAPTER 2. BOOKS AND RECORDS

3:38-2.1 Methods and accounting

(a) All licensees shall maintain books and records in accordance with recognized accounting principles. If a licensee maintains books and records on a basis other than the accrual method of accounting, the licensee shall also maintain books and records on the accrual basis of accounting which states the net worth of the licensee.

(b) All licensees must maintain a record-keeping system which shall demonstrate the following fees if charged to the mortgage applicant by the licensee:

1. Appraisal fees;
2. Credit report fees;
3. Application fees;
4. Commitment fees;
5. Warehouse fees; and

6. Third party charges.

(c) Each licensee shall maintain a trustee account ledger detailing receipts and disbursement of all funds deposited by the borrower or seller with the licensee in connection with the origination or closing of any mortgage loan. The funds shall be held in accordance with the terms of a written agreement between the licensee and such borrower or seller, which provides that upon the occurrence of a specific condition or event, the funds or a portion thereof shall be disbursed to the borrower or seller. All such trust accounts shall be reconciled on a quarterly basis. Nothing in (c) of this section is meant to include escrows collected or held by the licensee for taxes or insurance.

(d) Each licensee must notify the Department of the office in which the books and records are kept.

(e) A licensee may keep its mortgage banker or broker records at either:

1. A licensed branch office in this State; or

2. An unlicensed site in or out of this State, or a licensed branch office outside of this State, provided that, in either instance, the licensee secures the prior approval of the Department of Banking. The approval of the Department will be given only if the licensee enters into an agreement with the Department governing the maintenance and production of records at the site. The provisions of the agreement shall include, but shall not be limited to, the designation of the site where the records will be maintained, the fees and expenses chargeable by the Department for conducting examinations, and the right of the Department to rescind the agreement.

Amended by R.1991 d.362, effective July 15, 1991.

See: 23 N.J.R. 803(a), 23 N.J.R. 2122(a).

Added (e), allowing licensees to keep records at licensed sites outside of this State or unlicensed sites inside the State if they have entered into an agreement with the Department.

Amended by R.1991 d.588, effective December 16, 1991.

See: 23 N.J.R. 2450(a), 23 N.J.R. 3743(a).

Revised (a).

Amended by R.1992 d.387, effective October 5, 1992.

See: 24 N.J.R. 2653(a), 24 N.J.R. 3514(a).

Revised (e).

Case Notes

Mortgage was subject to Mortgage Bankers and Brokers Act (MBBA). *Trico Mortg. Co., Inc. v. Forero*, 275 N.J.Super. 91, 645 A.2d 793 (A.D.1994), certification denied 139 N.J. 186, 652 A.2d 174.

Rule permits mortgage bankers to charge the borrower for reimbursement of third party charges without defining such charges; broker who receives commission from seller for negotiating real property sale is barred from earning consideration for assisting buyer and obtaining necessary financing. *Mortgage Bankers Ass'n of New Jersey v. New Jersey Real Estate Commission*, 200 N.J.Super. 584, 491 A.2d 1317 (App.Div.1985), reversed and remanded 102 N.J. 176, 491 A.2d 1317 (1986).

3:38-2.2 Loan application information

(a) Each licensee shall maintain a loan application system containing the following information for each application:

1. Case number;
2. Application date;
3. Name;
4. Property address;
5. Disposition;
6. Type of loan.

3:38-2.3 Loan documentation file

(a) Each licensee shall maintain for each mortgage loan application the following data, if utilized by the licensee in connection with the mortgage loan application:

1. Loan application;
2. Loan commitment;
3. Truth-in-Lending disclosure statement;
4. Loan closing statement;
5. Copy of mortgage note or bond;
6. Adverse action or rejection of application letter;
7. Appraisal report;
8. Credit report.

3:38-2.4 Documentation

(a) Every loan application must be signed by the borrower or his agent. If more than one borrower applies, all borrowers or their agents must sign the application.

(b) Each credit report for which an applicant is charged a separate fee shall consist of at least a written memorandum. The memorandum shall provide that the credit history of the applicant was investigated and by whom.

(c) Every appraisal report for which an applicant is charged a separate fee shall consist of at least a written memorandum indicating that the value of the property was evaluated and by whom.

3:38-2.5 Reproduction of documents and records

A licensee may reproduce documents and records relating to the operation of its business for the purpose of complying with this subchapter and may substitute the copy for the original.

SUBCHAPTER 3. EXAMINATIONS**3:38-3.1 Examination of books and records**

(a) The Department of Banking shall examine the books and records of licensees at such times as are determined by the Commissioner in accordance with the statute.

(b) The cost of examination shall be borne by the licensee.

(c) The official report of examination shall be submitted to such individual representative of the licensee as shall be designated by the licensee for such purpose.

SUBCHAPTER 4. FEES AND CHARGES**3:38-4.1 Fees permitted**

(a) No licensee shall charge a borrower any fees incident to the origination, processing or closing of a mortgage loan other than the following, except as otherwise authorized by State or Federal law, either explicitly or as interpreted by the appropriate regulator in official staff commentary, regulatory bulletins, or memoranda.

1. Application fee;
2. Credit report fee;
3. Appraisal fee;
4. Commitment fee;
5. Warehouse fee;
6. Reimbursement for third party fees paid or actually incurred by a lender on behalf of a borrower;
7. Discount points or fractions thereof;
8. Lock-in fees; and
9. A service fee not to exceed \$25.00 to cancel the mortgage, providing that the borrower has received prior written notice of the fee required by the licensee, and providing further that if the licensee collects the service fee at the time of the mortgage transaction and transfers the servicing rights prior to cancellation, the licensee shall refund the service fee to the borrower.

(b) No licensee shall give or accept any fee, kickback, or thing of value pursuant to any agreement or understanding, oral or otherwise, that business incident to or a part of a real estate settlement service involving a mortgage loan shall be referred to any person, except as otherwise permitted by State or Federal law. Without limiting the above, a fee shall be deemed to be permitted if it falls within an exception to the anti-kickback provisions of the Federal Real Estate Settlement Procedures Act ("RESPA") contained in 12 U.S.C. § 2607, the implementing regulations of RESPA

or any opinion regarding RESPA set forth by the Federal Department of Housing and Urban Development.

(c) No broker shall charge or collect from a borrower on its own behalf any fees other than an application fee and discount points or fractions thereof.

(d) The terms application fee, credit report fee, appraisal fee, commitment fee, warehouse fee, third party charge, discount point and lock-in fee are defined by reference according to N.J.A.C. 3:1-16.2. In addition, the restrictions and limitations on the ability of a licensee to collect these fees set forth in N.J.A.C. 3:1-16.2 are also incorporated by reference.

Amended by R.1992 d.226, effective June 1, 1992.
See: 23 N.J.R. 3406(b), 23 N.J.R. 3686(c), 24 N.J.R. 2048(b).
Section was "Application". Added (b).
Amended by R.1992 d.387, effective October 5, 1992.
See: 24 N.J.R. 2653(a), 24 N.J.R. 3514(a).
Revised (a); added (c)-(d).
Amended by R.1993 d.423, effective September 7, 1993.
See: 25 N.J.R. 2625(b), 25 N.J.R. 4063(b).

Case Notes

Mortgage was subject to Mortgage Bankers and Brokers Act (MBBA). *Trico Mortg. Co., Inc. v. Forero*, 275 N.J.Super. 91, 645 A.2d 793 (A.D.1994), certification denied 139 N.J. 186, 652 A.2d 174.

Rules on reasonableness of permissible mortgage fees omit specific monetary guidelines; broker who receives commission from seller for negotiating real property sale is barred from earning consideration for assisting buyer and obtaining necessary financing. *Mortgage Bankers Ass'n of New Jersey v. New Jersey Real Estate Commission*, 200 N.J.Super. 584, 491 A.2d 1317 (App.Div.1985), reversed and remanded 102 N.J. 176, 491 A.2d 1317 (1986).

SUBCHAPTER 5. PERSONS LICENSED

3:38-5.1 Necessity for license

(a) No person shall act as a mortgage banker or a mortgage broker without first obtaining a license therefor, but a person licensed as a mortgage banker may act as a mortgage broker. A person who originates or brokers mortgage loans secured by New Jersey real estate from outside New Jersey must obtain a license under the Act. A mortgage banker non-servicing shall not service mortgage loans for more than 90 days in the regular course of business.

(b) No corporation, partnership, association or any other entity shall be issued or hold a license unless one officer of the corporation, or one principal of the partnership, association or other entity, has a license of the same type sought or held.

(c) Each branch office and principal office shall be operated under the full control and supervision of an individual licensee employed at the office on a regular and full-time basis to supervise and perform mortgage banking and mortgage brokerage services. No such individual may supervise more than one office. An individual supervising an office on a regular and full-time basis must normally be present at the office at least 50 percent of the time that the office is open for business. Nothing in this rule shall be deemed to require an office to be open for a specified period of time.

Amended by R.1993 d.295, effective June 21, 1993.
See: 25 N.J.R. 1035(a), 25 N.J.R. 2687(a).
Amended by R.1994 d.559, effective November 7, 1994.
See: 26 N.J.R. 3234(a), 26 N.J.R. 4347(b).

3:38-5.2 Exemptions

(a) The following persons are exempt from the licensing requirements of the Act:

1. Savings and loan associations, commercial banks, savings banks, insurance companies and credit unions. Subsidiaries of these institutions are not exempt from the licensing requirements;

2. A person making mortgage loans for private investment or gain and not in the regular course of business. Only a person not engaged in the financial services industry who makes one or two mortgage loans in a calendar year, or a person employed in the financial services industry who makes one or two private mortgage loans in a calendar year outside of his or her employment, shall qualify for this exemption;

3. An attorney at law of this State, not actively and principally engaged in the business of a mortgage banker or mortgage broker, when the attorney renders services in the course of his or her practice. An attorney who receives compensation specifically for originating or brokering a mortgage loan shall not qualify for this exemption and must be licensed;

4. A person licensed as a real estate broker or salesman pursuant to Chapter 15 of Title 45 of the Revised Statutes, and not engaged in the business of a mortgage banker or broker. A real estate broker or salesman receiving separate or additional compensation in any amount for originating or brokering a mortgage loan, in addition to the real estate sales commission, shall be deemed to be engaged in the business of a mortgage banker or broker and must be licensed or employed and registered as a solicitor for a licensed mortgage banker or broker; except that a person licensed as a real estate broker or salesman who, in addition to the real estate commission, only receives up to \$250.00 at the closing of the mortgage loan for reimbursement of expenses incurred in providing mortgage related services in conjunction with a particular real estate sales or real estate brokerage service shall not be deemed to be engaged in the business of a mortgage broker. Expenses are deemed to be incurred in providing mortgage related services only if the expenses are specifically allocated to those services and are not a percentage of the general overhead or costs of the real estate office.

5. A builder acting as a mortgage broker incident to the builder's own construction or for the sale of the builder's construction; and

6. A registered solicitor employed by a licensed mortgage banker who acts on behalf of the mortgage banker, and a registered solicitor employed by a licensed mortgage broker who acts as a broker on behalf of the mortgage broker. A person who is simultaneously employed as a solicitor by more than one licensee shall not qualify for this exemption and must be licensed.

Amended by R.1992 d.431, effective November 2, 1992 (operative January 1, 1993).

See: 24 N.J.R. 1937(a), 24 N.J.R. 4032(a).

Added text to (a)4.

Case Notes

Defining phrase "the business of a mortgage banker or broker" by amount charged for mortgage services, and including real estate brokers charging more than \$250 for helping buyer obtain mortgage, was reasonable. *Mortgage Bankers Ass'n of New Jersey v. New Jersey Real Estate Com'n*, 283 N.J.Super. 233, 661 A.2d 832 (A.D. 1995).

3:38-5.3 Registration of solicitors

(a) Before acting as a solicitor for a licensee, an individual must be registered with the Department for that licensee.

(b) To register a solicitor, the prospective employing licensee shall send the following to the Department of Banking:

1. A completed registration form, which shall include the solicitor's name, birth date and residence address and the name of the employing licensee; and

2. A \$50.00 registration fee which is payable every two years upon renewal. A solicitor who changes employing mortgage banker or broker within the two-year registration period must be re-registered by the new employing licensee by filing a new registration form with the \$50.00 fee. The employing licensee may obtain a duplicate certificate for \$10.00 in the event the original certificate is lost or destroyed.

(c) The Department shall provide all licensees employing mortgage solicitors with solicitor registration certificates, which shall be renewable every two years. The initial registration shall run from January 1, 1993 to December 31, 1994. The subsequent registration period runs from January 1, 1995 to June 30, 1997.

1. Solicitor registration certificates valid as of December 31, 1996 shall not expire on that date but shall be continued in full force and effect until June 30, 1997. Registration periods shall run from July 1, 1997 until June 30, 1999, and for two-year intervals thereafter.

(d) The registration certificate shall contain the name of the solicitor, the name of the employing licensee, and the address of the principal office of the employing licensee. The employing licensee shall display the registration certificate at the office or work station of the solicitor.

(e) Within 30 calendar days after a solicitor ceases his or her affiliation with a licensee, the licensee shall return the registration certificate to the Department. It is not necessary for a licensee to return the registration certificate of a solicitor who changes from one branch location of the licensee to another branch office of that licensee.

(f) The Commissioner shall refuse to register any person who changes affiliation two or more times in the calendar year if the Commissioner determines that the change is for the purpose of evading the licensing requirements of the Act.

New Rule, R.1992 d.226, effective June 1, 1992 (operative January 1, 1993).

See: 23 N.J.R. 3406(b), 23 N.J.R. 3686(c), 24 N.J.R. 2048(b).

Amended by R.1992 d.431, effective November 2, 1992 (operative January 1, 1993).

See: 24 N.J.R. 1937(a).

Revised (b)2 and (c).

Amended by R.1994 d.629, effective December 19, 1994.

See: 26 N.J.R. 4124(b), 26 N.J.R. 4999(a).

Amended by R.1997 d.2, effective January 6, 1997.

See: 28 N.J.R. 4295(a), 29 N.J.R. 123(a).

Substantially amended (c).

SUBCHAPTER 6. APPEAL PROCEDURE

3:38-6.1 Appeal procedure

(a) Before any license is denied, suspended or revoked, or before any penalties are assessed against a licensee, the Commissioner shall afford the aggrieved party a hearing, if requested in writing and received by the Department within 20 days of receipt by the aggrieved party of an order to show cause asking why the denial, suspension, revocation or penalty should not be taken or assessed. The order to show cause shall clearly set forth the ground or grounds upon which the contemplated action is based.

(b) For a period not to exceed 30 days following receipt of the request for a hearing, the Department shall attempt to settle the dispute by conducting such proceedings, meetings and conferences as it deems appropriate.

(c) If these efforts at settlement fail, the Department shall proceed according to the applicable provisions of the Administrative Procedure Act, N.J.S.A. 52:14B-1 et seq. and N.J.S.A. 52:14F-1 et seq., as implemented by N.J.A.C. 1:1, the Uniform Administrative Procedures Rules of Practice.