



State of North Carolina

OFFICE OF THE COMMISSIONER OF BANKS

MICHAEL F. EASLEY
GOVERNOR

JOSEPH A. SMITH, JR.
COMMISSIONER OF BANKS

November 5, 2008

Philip R. Mahoney
President
Mortgage Bankers Association of the Carolinas, Inc.
5821 Fairview Road Suite 217
Charlotte, North Carolina 28209

Re: Declaratory Ruling 2008-01 concerning House Bill 2188 and Seller Paid Points

Dear Mr. Mahoney:

You have inquired about the treatment of seller-paid points, fees, and insurance premiums in North Carolina's High-Cost Home Loan statute¹ in light of the recent amendment to N. C. Gen. Stat. § 24-1.1E(a)(6).² You have requested that the North Carolina Commissioner of Banks ("Commissioner") issue a declaratory ruling addressing whether seller-paid points and fees are to be included when determining the points and fees threshold under N. C. Gen. Stat. § 24-1.1E(a)(6)b. As discussed in further detail below, we conclude that seller-paid points and fees are generally excluded from the calculation of points and fees under the high-cost loan threshold; however, there are specific instances where seller-paid charges would be included in the points and fees calculation.

This declaratory ruling is being issued in response to your inquiry pursuant to N. C. Gen. Stat. § 150B-4 and 4 NCAC 3B.0105. It is an interpretation of the effect of the latest amendments to Chapter 24 of the North Carolina General Statutes solely as it relates to seller-paid points and fees as administered and enforced by the Office of the Commissioner of Banks (OCOB). For the benefit of the public, a copy of this declaratory ruling will be posted on the OCOB website. In addition, a copy of this ruling will be mailed to each holder of an active mortgage broker, lender, or servicer license issued by the OCOB.

¹ N. C. Gen. Stat. § 24-1.1E

² Session Law 2008-227 (House Bill 2188), *available at*:

<http://www.ncga.state.nc.us/Sessions/2007/Bills/House/PDF/H2188v5.pdf>.



I. Legislative Intent

The express purpose of the House Bill 2188 amendment to N.C. Gen. Stat. § 24-1.1E (a)(6)b was to conform the points and fees threshold to the amended definition of “points and fees” as enacted by House Bill 1817 in 2007. Section 1 of House Bill 1817 amended the definition of “points and fees” in N.C. Gen. Stat. § 24-1.1E (a)(5)3 to include *all* compensation paid to a mortgage broker (i.e. to include yield spread premium compensation paid by the lender as well as direct broker fees paid by the borrower). The intent of House Bill 1817 was to include yield spread premiums in the calculation of the points and fees threshold in N.C. Gen. Stat. § 24-1.1E (a)(6)b.

However, the language of N.C. Gen. Stat. § 24-1.1E(a)(6)b stated that only such points and fees as were “payable by the borrower at or before loan closing” were to be included in calculating the points and fees threshold for high cost loans. This language was interpreted by some to exclude yield spread premiums. Section 2 of House Bill 2188 was drafted to clarify this issue.

Section 2 of House Bill 2188 deleted the “payable by the borrower at or before loan closing” phrase to ensure that broker yield spread premium compensation would be included in the points and fees threshold. The title of the bill indicates that its intent was “to make conforming changes in the definition of high cost home loans” (i.e., to conform N.C. Gen. Stat. § 24-1.1E (a)(6)b to the intent of House Bill 1817). The staff summary of House Bill 2188 also reflects the limited legislative purpose of the amended language:

Section 2 of the bill makes a conforming change to the definition of the term "thresholds" in the anti-predatory lending law. Last year the law was amended so that the definition of the term "points and fees" included all compensation paid to a mortgage broker from any source. This section makes a corresponding change to the definition of the term "thresholds."

As such, there is no indication that the General Assembly intended for House Bill 2188 to include all seller-paid points and fees when calculating the High-Cost Home Loan points and fees threshold under N.C. Gen. Stat. § 24-1.1E (a)(6)b.

II. Plain Language Analysis

A review of the plain language of N.C. Gen. Stat. § 24-1.1E (a)(5) reveals that seller-paid points and fees (with the exception of seller paid broker fees) are not included within the definition of “points and fees” as that phrase is used in the High-Cost Home Loan Statute.

To be included in the points and fees calculation, the fee in question must come within the statutory definition provided under N.C. Gen. Stat. § 24-1.1E(a)(5)a which defines “points and fees” as:

1. All items required to be disclosed under sections 226.4(a) and 226.4(b) of Title 12 of the Code of Federal Regulations, as amended from time to time, except interest or the time-price differential.
2. All charges for items listed under section 226.4(c)(7) of Title 12 of the Code of Federal Regulations, as amended from time to time, but only if the lender receives direct or indirect compensation in connection with the charge or the charge is paid to an affiliate of the lender; otherwise, the charges are not included within the meaning of the phrase “points and fees”.
3. To the extent not otherwise included in sub-subdivision a.1. or a.2. of this subdivision, all compensation paid from any source to a mortgage broker, including compensation paid to a mortgage broker in a table-funded transaction. A bona fide sale of a loan in the secondary mortgage market shall not be considered a table-funded transaction, and a table-funded transaction shall not be considered a secondary market transaction.
4. The maximum prepayment fees and penalties which may be charged or collected under the terms of the loan documents.

Mortgage related points and fees payable to the lender by the seller would not generally fall within one of the four designated types of charges included in the points and fees threshold under N. C. Gen. Stat. § 24-1.1E(a)(6)b.

First, such seller-paid fees would not be “required to be disclosed under sections 226.4(a) and 226.4(b) of Title 12 of the Code of Federal Regulation [...]” Title 12 of the Code of Federal Regulations § 226.4 defines and identifies “finance charges” that must be disclosed under the federal Truth in Lending Act. Generally, “any charge payable directly or indirectly by the consumer and imposed directly or indirectly by the creditor as an incident to or a condition of the extension of credit” would be deemed a finance charge; however, Section 226.4(c) exempts certain enumerated fees from disclosure as finance charges.³ Among these specific exemptions, Section 226.4(c)(5) provides that “seller’s points” do not need to be disclosed as finance charges.

The Federal Reserve Board Official Staff Commentary has interpreted “seller’s points” to mean any charges imposed by the creditor upon the non-creditor seller of property for providing credit to the buyer or for providing credit on certain terms. As such, charges payable to the lender by the seller would not fall within the statutory definition of items “required to be disclosed under Sections 226.4(a) and 226.4(b) of the Code of Federal Regulations,” and

³ The exclusion of certain fees from the federal definition of “finance charge” will not exclude those fees from the North Carolina definition of “points and fees,” when our State statute specifically provides otherwise, as detailed elsewhere in this ruling. For example, although “real-estate related fees” may be excluded from disclosure under Section 226.4(c)(7), such fees may still be considered “points and fees” for North Carolina’s High Cost Home Loan statute if they meet the conditions set forth under N.C. Gen. Stat. § 24-1.1E(a)(5)a.2 and are not excluded under N.C. Gen. Stat. § 24-1.1E(a)(5)b.

therefore would not fall within the definition of points or fees under N.C. Stat. § 24-1.1E(a)(5)a.1.

Second, seller-paid items listed in Section 226.4(c)(7) may be excluded from the calculation of points and fees under North Carolina law, so long as the lender receives no direct or indirect benefit from the imposition of the charge and the charge is not paid to the lender or an affiliate of the lender. Additionally, certain real-estate related charges may be excluded from the calculation of points and fees under N.C. Gen Stat. § 24-1.1E(a)(5)b, regardless of the identity of the paying party. However, if a seller pays for a Section 226.4(c)(7) charge which (i) is not specifically excluded under N.C. Gen Stat. § 24-1.1E(a)(5)b and (ii) for which the lender receives a direct or indirect benefit or which is paid to the lender or a party affiliated with the lender, then these seller-paid fees would be included in the calculation of points and fees.

Third, seller-paid mortgage broker fees would be included in the points and fees calculation. The statute states that “all compensation paid from any source to a mortgage broker” falls within the definition of “points and fees” under the High-Cost Home Loan Statute. This language is clear on its face and includes seller-paid broker fees. As such, although seller-paid points and fees are normally excluded from the High-Cost Home Loan points and fees calculation, seller-paid broker fees must be included in the calculation pursuant to N.C. Gen. Stat. § 24-1.1E(a)(5)a.3.

Fourth, it is our belief that sellers rarely agree to pay for prospective prepayment penalty charges, and so the fourth element of the points and fees determination would rarely (if ever) apply to a seller. However, if a seller committed to pay a prepayment penalty incurred at a future date, then such a fee would be included in the points and fees calculation.

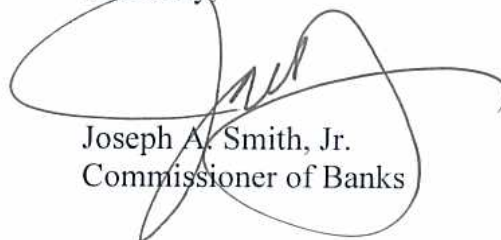
III. Conclusion

In conclusion, based on the apparent legislative intent, the plain language of the statute, and as a matter of supervisory enforcement policy, the OCOB does not interpret the points and fees threshold as amended by House Bill 2188 generally to include those points and fees payable to the lender which are excluded as “seller’s points” by the staff interpretation of 12 CFR § 226.4(c). If under Section 226.4 points and fees payable by the seller to the lender may be excluded from the definition of “finance charges,” then the OCOB would also exclude those points in its High-Cost Home Loan points and fees calculation under the provisions of N.C. Gen. Stat. § 24-1.1E(a)(6), except for the specific inclusions of charges as identified in N.C. Gen. Stat. § 24-1.1E(a)(5)a2-4.

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I trust this is responsive to your inquiry. If you have additional questions regarding the OCOB's interpretation in this matter, please do not hesitate to contact me.

Sincerely,

A handwritten signature in black ink, appearing to read "JAS", is written over the typed name and title. The signature is stylized with large loops and a long horizontal stroke extending to the right.

Joseph A. Smith, Jr.
Commissioner of Banks