

BEFORE THE DEPARTMENT OF ADMINISTRATION
OF THE STATE OF MONTANA

In the matter of the adoption of New)	NOTICE OF PROPOSED ADOPTION
Rules I through IV pertaining to)	
government sponsored enterprises,)	
designated manager supervisory)	
requirements, false, deceptive, or)	
misleading advertising, and internet or)	NO PUBLIC HEARING
electronic advertising)	CONTEMPLATED

TO: All Concerned Persons

1. On December 28, 2019, the Department of Administration proposes to adopt the above-stated rules.

2. The Department of Administration will make reasonable accommodations for persons with disabilities who wish to participate in this rulemaking process or need an alternative accessible format of this notice. If you require an accommodation, contact the Department of Administration no later than 5:00 p.m. on November 22, 2019, to advise us of the nature of the accommodation that you need. Please contact Heather Hardman, Division of Banking and Financial Institutions, P.O. Box 200546, Helena, Montana 59620-0546; telephone (406) 841-2922; TDD (406) 841-2974; facsimile (406) 841-2930; or e-mail to banking@mt.gov.

3. GENERAL STATEMENT OF REASONABLE NECESSITY: The department is proposing to adopt NEW RULES I through IV to implement House Bill 107 (HB 107), which amended the Montana Mortgage Act (Act). HB 107 was passed by the 2019 Legislature, and was signed by the Governor on March 19, 2019.

4. The rules proposed to be adopted provide as follows:

NEW RULE I GOVERNMENT SPONSORED ENTERPRISES (1) The government-sponsored enterprises for the mortgage servicer capital requirements in the Montana Mortgage Act are:

- (a) Federal Home Loan Mortgage Corporation (Freddie Mac);
- (b) Federal National Mortgage Association (Fannie Mae); or
- (c) Federal Home Loan Banks (FHLBs).

AUTH: 32-9-171, MCA

IMP: 32-9-171, MCA

STATEMENT OF REASONABLE NECESSITY: HB 107 provides that the department may define by rule the list of government sponsored enterprises (GSEs). The GSEs are quasi-governmental entities established to enhance the flow of credit to specific sectors of the American economy. The identified GSEs were selected

because they focus on the housing and mortgage sectors and provide liquidity, operating reserve, and net worth standards for mortgage servicers.

NEW RULE II DESIGNATED MANAGER SUPERVISORY REQUIREMENTS

(1) If a designated manager supervises more than one location, a mortgage broker or mortgage lender must have a written policy which addresses supervision of multiple licensed locations.

(2) The policy must include the frequency of:

(a) communication between the designated manager and employees in remote locations;

(b) onsite visits by the designated manager to other licensed locations; and

(c) review of employee performance and of work performed.

(3) The policy must include the use of training, technology, and risk assessments by a mortgage broker or mortgage lender in respect to origination activities at licensed locations. A designated manager's role in training, if applicable, must be identified in the policy.

(4) A mortgage broker or mortgage lender must submit a copy of the policy to the department at the time a designated manager is assigned to supervise multiple locations. A mortgage broker or mortgage lender should resubmit a copy of the policy to the department within 30 days of amendments.

(5) The designated manager must attest that he or she has read the policy. This attestation must be signed by the designated manager and included whenever the policy is submitted to the department. The designated manager and all mortgage loan originators and employees of the mortgage broker or mortgage lender at each licensed location subject to the policy shall comply with the policy.

AUTH: 32-9-122, 32-9-130, MCA

IMP: 32-9-130, MCA

STATEMENT OF REASONABLE NECESSITY: HB 107 amended 32-9-122(2), MCA, to allow a designated manager to be responsible for more than one location. It further clarified that the designated manager is responsible for mortgage origination activity conducted at each office to which this person is assigned in the Nationwide Mortgage Licensing System. Under 32-9-130(3)(b), MCA, the department is authorized to promulgate rules to define supervisory requirements for designated managers. New Rule II provides direction to mortgage brokers, mortgage lenders, and designated managers when a designated manager is responsible for supervising multiple locations. This new rule will aid the department's enforcement of the supervision requirements under the Act.

The department recognizes that technological advances have made it easier for managers to monitor and interact with employees. The mortgage industry has encouraged regulators to align regulations with common business practices, including remote supervision of employees. New Rule II(1) allows designated managers to supervise multiple licensed branch locations pursuant to a written policy. The department will review the operations of mortgage lenders and mortgage brokers to ensure the policy is implemented and effective to ensure adequate supervision of remote offices and staff.

New Rule II(2) and (3) set forth expectations for subjects the department expects to be included within the policy. It emphasizes the importance of communication, in-person contact, and supervision between the designated manager and employees at the licensed locations. These are core competencies that a designated manager performs which can contribute to better regulatory compliance during the origination of residential mortgage loans. A mortgage broker or mortgage lender may use training, technology, and risk assessments to enhance supervision of origination activities at licensed locations. Such training, technology, and risk assessments may be independent of the supervision provided by a designated manager, but these tools should be addressed in the remote supervision policy to provide a better overview of the overall supervision of origination activity at remote locations.

New Rule II(4) is necessary to establish that a mortgage broker or mortgage lender must submit the policy to the department initially when a designated manager is assigned to supervise multiple locations and again whenever the policy is amended. The department needs to see the policy to understand how the designated manager and mortgage broker or mortgage lender will ensure adequate supervision of its licensed locations.

New Rule II(5) provides that the designated manager must read and understand the policy. The purpose of (5) is to ensure all parties are complying with the policy and the remote supervision requirements under the Act.

NEW RULE III FALSE, DECEPTIVE, OR MISLEADING ADVERTISING

(1) False, deceptive, or misleading advertising includes but is not limited to advertising or marketing that:

(a) is defined by this rule as false, deceptive, or misleading;

(b) violates 32-9-149, MCA, or this rule;

(c) violates any applicable state or federal unfair, deceptive, or abusive acts or practices laws or other laws applicable to advertising services authorized by or conducted under the Montana Mortgage Act.

(2) An advertisement is false, deceptive, or misleading, if it:

(a) describes rates or fees as "lowest," "best," or other similar words unless the statement is objectively true;

(b) uses the term "free," or any other similar term or phrase that implies there is no cost to the applicant;

(c) offers to procure, arrange, or otherwise assist a borrower to obtain a mortgage loan on terms which the person cannot, does not intend, or does not want to provide, or which the person knows or should know cannot be reasonably provided;

(d) suggests or represents that all or most borrowers may or will qualify for a loan or that persons with bad credit histories or no credit histories may or will qualify for this loan unless the person can demonstrate that borrowers with bad credit or no credit have been routinely and successfully qualified for loans by that licensee; or

(e) fails to disclose that a loan has the potential for negative amortization. If a loan has the potential for negative amortization, the advertisement shall clearly identify that potential and shall prominently disclose the:

(i) market or fully indexed rate;

- (ii) term of the reduced payments;
- (iii) term of the entire loan; and
- (iv) annual percentage rate (APR).

(3) A licensee shall not use advertising materials for the purpose of conveying, or in a manner reasonably calculated to convey, a false impression of sponsorship or approval by a federal, state, or local government agency or in a manner that suggests any affiliation that does not exist. Such advertising is considered false, deceptive, or misleading. Prohibited advertising materials include but are not limited to advertisements that include:

- (a) an official-looking emblem, logo, crest, or seal that resembles one used by any state or federal government agency. Such emblems may include an eagle, flag, the Statue of Liberty, or a crest or seal used by any state or the United States or used by any government agency or political subdivision;
- (b) images, including those in electronic format, designed to resemble official government communications, such as communications from the Internal Revenue Service or U.S. Treasury, a state taxing authority, or other government agencies;
- (c) warnings or notices citing government codes or form numbers not required by the United States Postal Service to be shown on the mailing;
- (d) the term "official business," or similar language implying official or government business, without also including the name of the sender;
- (e) any suggestion or representation that the solicitor is affiliated with any state or federal agency, municipality, federally insured financial institution, trust company, building and loan association, or other entity that it does not actually represent;
- (f) any suggestion or representation that the solicitor is any entity other than the sender itself; or
- (g) any other materials that violate state or federal laws pertaining to advertising or unfair, deceptive, or abusive acts or practices.

(4) When an advertisement includes information about a borrower's current loan that the licensee did not obtain from a solicitation, application, or loan, a licensee must provide the borrower with the following information, in the same size type font as the rest of the information in the advertisement:

- (a) the name of the source of the information; and
- (b) a statement that:
 - (i) this is an advertisement;
 - (ii) this is an offer for a new loan;
 - (iii) the licensee is not affiliated with the borrower's lender; and
 - (iv) this offer is not related to the consumer's existing mortgage lender or holder of the loan.

(5) A licensee shall not advertise an interest rate unless that rate is actually available at the time of the advertisement. Whenever a specific interest rate is advertised, the mortgage broker must retain a copy of the lender's rate sheet, or other supporting rate information, and the APR calculation for the advertised interest rate.

(6) Licensees are responsible for the legality, accuracy, and reliability of their advertising.

AUTH: 32-9-130, 32-9-149, MCA

IMP: 32-9-124, 32-9-149, MCA

STATEMENT OF REASONABLE NECESSITY: HB 107 includes an amendment to 32-9-149(3), MCA, which provides that the department may adopt rules to define false, deceptive, or misleading advertising. Buying or financing a home is one of the largest, most complicated, and vitally important decisions facing consumers in Montana. It is necessary to define false, deceptive, or misleading advertising in the interest of protecting Montana consumers from advertising that may create confusion about mortgage financing.

New Rule III(1) provides a general description of advertisements the department will consider false, misleading, or deceptive. The specified practices have been identified as misleading or deceptive by other state and federal financial services regulatory agencies. The list provides a framework to help licensees identify advertising practices considered false, misleading, or deceptive.

New Rule III(2) provides a list of problematic terms or statements that cannot be used in advertising because they are likely to mislead consumers and potentially harm consumers. Licensees cannot guarantee that they are able to offer the lowest or best rates. This is because it is impossible for licensees to know all the rates being offered by their competitors. Additionally, not all mortgage brokers or mortgage lenders publish or advertise their available interest rates. Therefore, licensees must avoid making such a representation.

Licensees cannot use the word "free" or other similar terms to imply that they are offering a no cost loan. This is problematic because the cost of credit is not only tied to the fees charged when obtaining a loan. The cost of credit is also determined by the interest rate. As an example, the interest rate can be increased to offset loan closing fees. Thus, it is misleading to say the loan is free because the borrower is paying for the loan in the form of a higher interest rate over the life of the loan.

Additionally, it is deceptive for a licensee to advertise loan terms that it knows it cannot provide. This is false advertising which makes it impossible for consumers to accurately compare loan terms among mortgage licensees. Consumers may pay higher fees if they settle on using a mortgage broker or mortgage lender that ultimately cannot deliver the loan terms it advertises.

This proposed rule also provides it is a false, deceptive, or misleading practice for licensees to make false claims in respect to their ability to obtain loans for borrowers with bad or no credit. This is critical to ensure licensees do not lure consumers with bad or no credit through advertising if they have no history of helping these consumers. A consumer may be baited into choosing a loan product with negative amortization, an increase in the principal balance of a loan which is caused when a loan product does not require a consumer to make a payment that covers the amount of interest due. This non-traditional mortgage loan product warrants the additional disclosure in advertisements to allow consumers to be better informed regarding loans with negative amortization.

New Rule III(3) describes a particular type of advertising considered false, misleading, or deceptive. Use of such advertising by segments of the mortgage industry has been criticized by consumers for creating the false appearance that the advertisement is from a governmental agency or a bank or credit union. This rule

clarifies that it is a misleading and deceptive practice for licensees to suggest they are affiliated with or represent any entity other than themselves. It specifically prohibits use of logos, images, or emblems resembling those used by government agencies. Many consumers trust local, state, and federal governments and depository financial institutions such as banks or credit unions where they maintain accounts. It is unfair for a licensee to deceive a consumer and prey upon this trust when it misrepresents itself in that context.

New Rule III(4) addresses advertising which contains information about a consumer's current mortgage loan when a licensee has not obtained that loan information directly from the consumer. The provisions of this section require the licensee to disclose their source of information and explain that their solicitation is for a new loan not from the consumer's lender. It is common for lenders to glean publicly available documents such as mortgage deeds to help generate potential leads for new mortgage loans. This affords greater transparency to consumers about which licensees are soliciting their business and allows them to make informed decisions about the persons offering them financing.

New Rule III(5) is necessary to ensure licensees do not engage in bait and switch tactics pertaining to interest rates since rates are a primary consideration when consumers are shopping for a mortgage. It is reasonable to require licensees to maintain supporting documentation to demonstrate that an interest rate was available in the event of an examination or enforcement action.

New Rule III(6) reinforces that licensees are accountable for the content in their advertising. This provision is necessary, so licensees do not shift blame for false, deceptive, or misleading advertising to employees or a third-party vendor.

NEW RULE IV INTERNET OR ELECTRONIC ADVERTISING (1) For the purpose of this rule, "Internet" means the Internet, the World Wide Web, or Internet-based electronic information distribution networks, and any derivative delivery systems or evolutions of such delivery systems that may be connected to individual computers, terminals, and other consumer electronic interface devices through which information is delivered via computer servers connected via phone lines or other cable, wire, fiber, wireless, or other analogous linkages to a computer, computer network or networks including, but not limited to, websites, e-mail, text messaging, multimedia advertising, social media, and/or banner advertisements.

(2) Licensees who engage in any form of Internet or electronic advertising shall comply with the requirements of this rule. This rule does not apply to traditional forms of advertising or promotion, such as newspaper, television, or radio advertisements, or direct mailings.

(3) A licensee must provide the following in any Internet or electronic advertising:

(a) the licensee's name as entered into NMLS and NMLS unique identifier; and

(b) if loan originators are named, their NMLS unique identifier must closely follow the names.

(4) A licensee must provide a link to their own NMLS Consumer Access webpage on any of its websites.

(5) If a loan originator maintains a separate website used in any way for or related to mortgage origination activity, the sponsoring licensee's name and NMLS unique identifier must appear on the website.

(6) All web addresses used by licensees must be disclosed by the entity in their NMLS record.

(7) Internet or electronic advertising content used to solicit Montana consumers must comply with all relevant Montana state and federal statutes for specific services and products advertised.

AUTH: 32-9-149, MCA

IMP: 32-9-124, 32-9-149, MCA

STATEMENT OF REASONABLE NECESSITY: HB 107 amended 32-9-149(5), MCA, which provides that the department may adopt rules to establish requirements for licensee advertising using the Internet or any electronic format. Buying or financing a home is one of the largest, most complicated, and vitally important decisions facing consumers in Montana. The Internet is playing a larger role in the mortgage profession. This rule is necessary to establish requirements for the mortgage industry when it communicates to consumers in advertising through the Internet or any electronic format. It is critical that these forms of advertising are fully transparent, so consumers know who is soliciting their business.

New Rule IV(1) provides a definition of "Internet" in order to clarify forms of electronic advertising subject to this rule. New Rule IV(2) specifies that this rule only applies to Internet or electronic advertising and is not applicable to more traditional forms of advertising listed.

New Rule IV(3) sets forth requirements that will enable consumers to more easily identify the individuals and businesses they are doing business with when shopping for mortgages online. The inclusion of a licensee's entity or individual name and license number in online advertising enables consumers to be better informed about who is soliciting their business.

New Rule IV(4) requires licensees to add a link to a licensee's NMLS Consumer Access webpage on any of their websites. The NMLS Consumer Access portal allows consumers to verify licensees' contact information, license status, and whether public enforcement actions exist. Linking to the NMLS portal promotes transparency to consumers and awareness of the tool. This is also a requirement that has been adopted by and is consistent with other state mortgage regulators' requirements.

New Rule IV(5) is proposed to ensure that mortgage loan originators are held to the same standard as entities in respect to website requirements. Additionally, it requires the mortgage loan originator to include their sponsoring entity's name and NMLS unique identifier. The rule is necessary because some mortgage loan originators market their own websites and it is important for consumers to be able to identify who is soliciting their business.

New Rule IV(6) is necessary to ensure the department can identify websites used by licensees. These websites should identify who is responsible for their content. However, if it is not clear who is responsible for the content, the information contained on the NMLS provides an additional means for the department to verify

who is operating a website. This is important if the department needs to contact a licensee with concerns related to website content.

New Rule IV(7) clarifies that a licensee's Internet or electronic advertising must comply with state and federal statutes when licensees are promoting products and services.

5. Concerned persons may present their data, views, or arguments concerning the proposed action to Kelly O'Sullivan, Legal Counsel, Division of Banking and Financial Institutions, P.O. Box 200546, Helena, Montana 59620-0546; faxed to the office at (406) 841-2930; or e-mailed to banking@mt.gov; and must be received no later than 5:00 p.m., December 9, 2019.

6. If persons who are directly affected by the proposed action[s] wish to express their data, views, or arguments orally or in writing at a public hearing, they must make written request for a hearing and submit this request along with any written comments to the person listed in 4 above no later than 5:00 p.m., November 25, 2019.

7. If the Division of Banking and Financial Institutions receives requests for a public hearing on the proposed action from either 10 percent or 25, whichever is less, of the persons directly affected by the proposed action; from the appropriate administrative rule review committee of the Legislature; from a governmental subdivision or agency; or from an association having not less than 25 members who will be directly affected, a hearing will be held at a later date. Notice of the hearing will be published in the Montana Administrative Register. Ten percent of those directly affected has been determined to be 318 persons based on the 3,180 existing mortgage loan originator, mortgage broker, mortgage lender, and mortgage servicer licensees.

8. An electronic copy of this proposal notice is available through the department's website at <http://doa.mt.gov/administrativerules>. The department strives to make its online version of the notice conform to the official published version, but advises all concerned persons that if a discrepancy exists between the official version and the department's online version, only the official text will be considered. In addition, although the department works to keep its website accessible at all times, concerned persons should be aware that the website may be unavailable during some periods, due to system maintenance or technical problems.

9. The Division of Banking and Financial Institutions maintains a list of interested persons who wish to receive notices of rulemaking actions proposed by this division. Persons who wish to have their name added to the mailing list shall make a written request that includes the name, mailing address, and e-mail address of the person to receive notices and specifies that the person wishes to receive notices regarding division rulemaking actions. Notices will be sent by e-mail unless a mailing preference is noted in the request. Such written requests may be mailed or delivered to Heather Hardman, Division of Banking and Financial Institutions, 301 S. Park, Ste. 316, P.O. Box 200546, Helena, Montana 59620-0546; faxed to the

office at (406) 841-2930; e-mailed to banking@mt.gov; or may be made by completing a request form at any rules hearing held by the department.

10. The bill sponsor contact requirements of 2-4-302, MCA, apply and have been fulfilled. The primary bill sponsor, Representative Shane Morigeau, was contacted by mail on June 7, 2019.

11. The department has determined that under 2-4-111, MCA, the proposed adoption of the above-stated rules will not significantly and directly impact small businesses.

By: /s/ John Lewis
John Lewis, Director
Department of Administration

By: /s/ Don Harris
Don Harris, Rule Reviewer
Department of Administration

Certified to the Secretary of State October 29, 2019.