DEPARTMENT OF PROFESSIONAL AND FINANCIAL REGULATION

30 BUREAU OF CONSUMER CREDIT PROTECTION
Chapter 550

029 BUREAU OF FINANCIAL INSTITUTIONS
Chapter 144 (Regulation 44)

GUIDELINES FOR DETERMINING REASONABLE, TANGIBLE NET BENEFIT AND ABILITY TO PAY

SECTION 1: Summary

This Chapter, promulgated jointly by the Bureau of Consumer Credit Protection and the Bureau of Financial Institutions, is intended to delineate the concepts of "reasonable, tangible net benefit" and "ability to pay" set forth in the "Act to Protect Maine Homeowners from Predatory Lending," Chapter 273 of the Public Laws of 2007.

1. Reasonable, Tangible Net Benefit. Pursuant to Title 9-A M.R.S.A. §§ 8-103(1-A) paragraph P and 8-206-D, sub § 1, paragraph B, a creditor may not knowingly or intentionally make a residential mortgage loan to a borrower who refinances an existing residential mortgage loan when the new residential mortgage loan does not have reasonable, tangible net benefit to the borrower, considering all of the circumstances, including, but not limited to, the terms of both the new and refinanced loans, the cost of the new loan and the borrower's circumstances. Refinancing without providing such a benefit is known as "flipping" a residential mortgage loan. Section 5, part 1 of this Chapter defines the requirements for compliance with Title 9-A M.R.S.A. §8-206-D, sub § 1, paragraph B.

2. Ability to Pay. Pursuant to Title 9-A M.R.S.A. §8-206-D, sub § 1, paragraph G, a subprime mortgage loan may not be extended to a borrower, unless a reasonable creditor would believe at the time the loan is closed that the borrower will be able to make the scheduled payments associated with the subprime mortgage loan. Section 5, part 2 of this Chapter sets forth the criteria for determining whether or not a reasonable creditor would believe at the time the subprime mortgage loan is closed that the borrower will be able to make the scheduled payments associated with the subprime mortgage loan.

SECTION 2: Authority

1. Title 9-A M.R.S.A. §6-104(1)paragraph E permits the Administrator to adopt, amend, and repeal rules to carry out the specific provisions of the Consumer Credit Code.

2. Title 9-A M.R.S.A. §§6-103 and 1-301(2) state that, except in cases in which a supervised financial organization is the creditor, the Administrator is the Superintendent of the Bureau of Consumer Credit Protection. In cases in which a supervised financial organization is the creditor, the Administrator is the Superintendent of the Bureau of Financial Institutions.

3. Title 9-B M.R.S.A. §215 permits the Superintendent of the Bureau of Financial Institutions to implement rules relating to the supervision of financial institutions or their subsidiaries, or financial institution holding companies or their subsidiaries.

4. Pursuant to Public Law 2007, Chapter 273, Section A-40, the Superintendent of the Bureau of Consumer Credit Protection and the Superintendent of the Bureau of Financial Institutions shall adopt rules authorized by Title 9-A M.R.S.A. §8-206-D, sub § 1, paragraph B before January 1, 2008.

5. Pursuant to Title 9-A M.R.S.A. §8-206-D, sub § 1, paragraph G, subparagraph (3), the Administrator shall adopt, amend and repeal routine technical rules in accordance with Title 5, chapter 375, subchapter 2-A, defining with reasonable specificity the requirements for determining whether or not a borrower has a reasonable ability to repay a subprime mortgage loan, taking into account the considerations set forth in Title 9-A. M.R.S.A. §8-206-D, sub § 1, paragraph G, subparagraphs (1) and (2) and the following federal regulations and guidelines, as amended from time to time:

A. Final Interagency Guidance on Nontraditional Mortgage Product Risks;
B. Credit Risk Management Guidance for Home Equity Lending;
C. Expanded Guidance for Subprime Lending Programs; and
D. Interagency Guidance on Subprime Lending.

6. Pursuant to Title 9-A M.R.S.A. §8-206-D, sub §1, paragraph B, the Administrator shall adopt rules defining with reasonable specificity the requirements for compliance with the prohibition against flipping a residential mortgage loan, and such rules are routine technical rules pursuant to Title 5, chapter 375, subchapter 2-A.

SECTION 3: Purpose

1. This Chapter describes the requirements that creditors must follow to avoid engaging in the act or practice of "flipping" a residential mortgage loan. "Flipping" a residential mortgage loan means refinancing a residential mortgage loan to a borrower when the borrower receives no reasonable, tangible net benefit. This Chapter provides a form for creditors and borrowers to use to determine whether or not the borrower is receiving a reasonable, tangible net benefit when such loans are made.

2. The Chapter also sets forth the criteria for creditors to use to determine whether or not, at the time a subprime mortgage loan is made, the borrower will be able to make the scheduled payments associated with such a loan.

SECTION 4: Definitions

For the purpose of this Chapter, the following terms have the following meanings:

A. "Borrower" has the same meaning as set forth in Title 9-A M.R.S.A. §8-103 sub §1-A, paragraph F;

B. "Composite rate of interest" means, for any residential mortgage loan with a variable rate feature, a composite annual percentage rate calculated, taking into account the initial interest rate for as long as it remains in effect and adjusting the interest rate in accordance with the terms of the residential mortgage loan, including any periodic and maximum caps on adjustments, until the interest rate charged is a fully indexed rate. For any previous residential mortgage loan, the "composite rate" means a composite annual percentage rate similarly calculated, beginning with the interest rate in effect on the fifteenth (15^{th}) day of the month immediately preceding the month in which the loan application was received by the creditor and adjusting the interest rate in accordance with the terms of the previous residential mortgage loan, including any periodic and maximum caps on adjustments, until the interest rate is a fully indexed rate.

C. "Creditor" has the same meaning as set forth in Title 9-A M.R.S.A. §8-103, sub §1-A paragraph L, and includes "Mortgage Broker" as defined in Title 9-A M.R.S.A. §8-103 sub §1-A paragraph S;

D. "Flipping a residential mortgage loan" has the same meaning as set forth in Title 9-A M.R.S.A. §8-103, sub §1-A paragraph P;

E. "Fully amortizing payment schedule" means a schedule based on the term of the loan. For example, the amortizing payment for a loan with a 5-year interest-only period and a 30-year term would be calculated based on a 30-year amortization schedule. For balloon mortgages that contain a borrower option for an extended amortization period, the fully amortizing payment schedule can be based on the full term the borrower may choose.

F. "Fully indexed rate" means the index rate[1] prevailing at origination plus the margin that will apply after the expiration of an introductory interest rate.

G. "Open-end credit" has the same meaning as set forth in Title 9-A M.R.S.A. §1-301(26);

H. "Residential mortgage loan" has the same meaning as set forth in Title 9-A M.R.S.A. §8-103 sub §1-A paragraph W;

I. "Subprime mortgage loan" has the same meaning as set forth in Title 9-A M.R.S.A. §8-103 sub §1-A paragraph BB.

J. "Points and fees" has the same meaning as set forth in Title 9-A M.R.S.A. §8-103 sub §1-A paragraph U.

K. "Mortgage broker" has the same meaning as set forth in Title 9-A M.R.S.A. §8-103 sub §1-A paragraph S.

SECTION 5: General Provisions

1. Reasonable, Tangible Net Benefit

A. A creditor may not knowingly or intentionally engage in the act or practice of "flipping" a residential mortgage loan. "Flipping a residential mortgage loan" means the making of a residential mortgage loan to a borrower that refinances an existing residential mortgage loan when the new loan does not have a reasonable, tangible net benefit to the borrower considering all the circumstances, including, but not

[1] The "index rate" is a published interest rate to which the interest rate on an adjustable rate mortgage is tied. Some commonly used indices include the 1-Year Constant Maturity Treasury Rate (CMT); the 6-Month London Interbank Offered Rate (LIBOR); the 11th District Cost of Funds (COFI); and the Moving Treasury Average (MTA), a 12-Month moving average of the monthly average yields of U.S. Treasury securities adjusted to a constant maturity of one year. The margin is the number of percentage points a creditor adds to the index value to calculate the adjustable rate mortgage interest rate at each adjustment period. In different interest rate scenarios, the fully indexed rate for an adjustable rate mortgage loan based on a lagging index (*e.g.* MTA rate) may be significantly different from the rate on a comparable 30-year fixed rate product. In these cases, a credible market rate should be used to qualify the borrower and determine repayment capacity.

limited to, the terms of both the new and refinanced loans, the cost of the new loan and the borrower's circumstances.

B. If circumstances indicate that more than three (3) years have passed since the time the most recent financing or refinancing occurred, then a subsequent refinancing shall not be considered "flipping."

C. If three (3) or fewer years have passed since the most recent financing or refinancing occurred, factors to be considered by a creditor in determining if a borrower receives a reasonable, tangible net benefit include, but are not limited to, the following:

(1) Whether the borrower's new monthly payment is lower than the total of all monthly obligations being financed, taking into account the costs and fees as disclosed on the HUD-1 settlement statement;

(a) If the residential mortgage loan is not a conventional fixed rate residential mortgage loan, the borrower's monthly payment is the payment that fully amortizes the loan at the composite rate of interest, as that term is defined in Paragraph 4(B) of this Chapter, over the term of the loan. For open-end credit loans, the new monthly payment must be based on the amount drawn by the borrower at the time the new residential mortgage loan is made;

(b) In determining whether or not the borrower's new monthly payment is lower than the total of all monthly obligations being financed, taking into account the costs and fees as disclosed on the HUD-1 settlement statement, the time for recouping the costs and fees as disclosed in the HUD-1 settlement statement shall be calculated over a period of three (3) years and this amount shall be added to the borrower's new monthly payment. The costs and fees as disclosed on the HUD-1 settlement statement shall include all costs and fees, whether or not they are incorporated into and financed through the new residential mortgage loan(s);

(2) Whether there is a change that is beneficial to the consumer in the amortization period of the new residential mortgage loan;

(3) Whether the borrower receives cash in excess of the costs and fees as disclosed on the HUD-1 settlement statement, as part of the refinancing. The costs and fees as disclosed on the HUD-1 settlement statement shall include all costs and fees, whether or not they are incorporated into and financed through the new residential mortgage loan;

(4) Whether the borrower's rate of interest is reduced or, in the event that more than one loan is being refinanced, the weighted average of the rates of interest of the previous loans is reduced;

(5) Whether there is a change from an adjustable to a fixed

rate loan; and

(6) Whether the refinancing is necessary to respond to a *bona fide* personal need or an order of a court of competent jurisdiction.

D. If three (3) or fewer years have passed since the most recent financing or refinancing occurred, a creditor shall provide the borrower with a written disclosure conspicuously stating the name, address and telephone number of the creditor, briefly describing the new residential mortgage loan, and identifying the factor or factors considered by the creditor in determining whether the borrower is receiving a reasonable, tangible net benefit from the new residential mortgage loan. The form shall be signed and dated by both the creditor and the borrower. A disclosure in substantially the same form as found in Attachment "A" complies with this Chapter.

E. The creditor shall explain its reasonable, tangible net benefit analysis to the borrower, and shall present the Reasonable, Tangible Net Benefit Form to the borrower for signing, prior to or upon making the new residential mortgage loan.

F. Once the Reasonable, Tangible Net Benefit Form has been duly completed and signed by the creditor and the borrower, the creditor shall immediately provide a copy of the Form to the borrower.

G. A duly completed and signed Reasonable, Tangible Net Benefit Form creates a rebuttable presumption for the creditor that the borrower is receiving a reasonable, tangible net benefit from the new residential mortgage loan.

<u>2. Ability to Repay</u>

A creditor may not extend a subprime mortgage loan to a borrower, unless a reasonable creditor would believe at the time the loan is made that the borrower will be able to make the scheduled payments associated with the loan.

A. The determination of a borrower's reasonable ability to repay a subprime mortgage loan must include, but is not limited to, the following:

(1) The borrower's income, including statements submitted by or on behalf of the borrower in the loan application, except that a creditor may not disregard facts and circumstances that indicate that the income statements submitted by or on behalf of the borrower are inaccurate or incomplete;

(2) The borrower's credit history;

(3) The borrower's current obligations, including other secured and unsecured debts;

(4) The borrower's employment status;

(5) The debt-to-income ratio of the borrower's monthly gross income, including the borrower's total monthly housing-related payments, all principal, interest, taxes and insurance; and

(6) The borrower's other available financial resources, excluding the borrower's equity in the principal dwelling that secures or would secure the subprime mortgage loan.

B. The calculation assumptions used by the creditor in evaluating the borrower's ability to repay the subprime mortgage loans must include:

(1) The monthly payment amounts based on, at a minimum, the fully indexed rate, assuming a fully amortizing payment schedule;

(2) The verification of income by:

(a) Review of a borrower's tax returns, payroll receipts, or records of accounts from a borrower's financial institution, or reasonable third party verification thereof, in determining a borrower's ability to make the scheduled payments associated with the subprime mortgage loan; or

(b) Review of reasonable alternatives to the borrower's tax returns, payroll receipts or records of accounts from a borrower's financial institution, or reasonable third party verification thereof, in determining a borrower's ability to make the scheduled payment associated with the subprime loan. "Reasonable alternatives" include, but are not limited to, statements from investment advisors, broker-dealers and others in a fiduciary relationship with the borrower;

"Reasonable third party verification" and "reasonable alternatives" must reflect the borrower's actual income. A statement that provides only estimated, projected, anticipated, or a range of, earnings for a borrower's type or class of employment is not a reasonable third party verification of, or reasonable alternative to other evidence of, the borrower's ability to make the scheduled payments associated with the subprime mortgage loan; and

(3) For products that permit negative amortization, a repayment analysis based upon the initial loan amount plus any balance increase that may accrue from the negative amortization provision.

3. <u>Enforcement</u>

Failure to comply with the provisions of this Chapter may result in imposition of damages, penalties, and other remedial actions, as set forth in Title 9-A M.R.S.A. §§8-108, 8-109, 8-206-E, 8-208, 8-209, and all other applicable provisions of law.

EFFECTIVE DATE: December 31, 2007

Attachment "A" to the Reasonable, Tangible Net Benefit and Ability to Pay Rule

STATE OF MAINE – REASONABLE, TANGIBLE NET BENEFIT DISCLOSURE FORM

This disclosure is being provided to you, in order to afford you the protections required by the "Act to Protect Maine Homeowners from Predatory Lending" which the Maine Legislature enacted in 2007. The Act protects borrowers from certain loan brokering and lending practices. One of these practices is known as "flipping a residential mortgage loan."

WHAT IS FLIPPING A RESIDENTIAL MORTGAGE LOAN? Flipping a residential mortgage loan is the making of a residential mortgage loan (the "new loan") to a borrower who refinances an existing loan on or before the third anniversary of the making of the existing loan, when the new loan does not have a "reasonable, tangible net benefit" to the borrower.

Because three (3) or fewer years have passed since your most recent financing or refinancing, the creditor is required to show that, in making the new loan to you, you are receiving a "reasonable, tangible net benefit," including, but not limited to, at least one of the following:

1. **Your new monthly payment is lower** than the total of all monthly obligations being financed. The lender and mortgage broker, if one is used, must take into account all settlement costs, as disclosed on the HUD-1 settlement statement, as part of the refinancing. In determining whether or not your new monthly payment is lower than the total of all monthly obligations being financed, taking into account the costs and fees as disclosed on the HUD-1 settlement statement, the lender and mortgage broker, if one is used, must add in the costs and fees as disclosed in the HUD-1 settlement statement, spread out over your first three (3) years of payments;

2. **There is a beneficial change** in the amortization period of the new loan;

3. **You receive cash in excess of all costs and fees**, as disclosed on the HUD-1 settlement statement, as part of the refinancing;

4. **The rate of interest of your existing loan is reduced** or, in the event that more than one loan is being refinanced, the weighted average rate of interest of the existing loans is reduced;

5. **There is a change from an adjustable rate loan or loans to a fixed rate loan;** and/or

6. **The refinancing is necessary to respond to a bona fide personal need** or an order of a court of competent jurisdiction.

BASED UPON THE LENDER'S AND MORTGAGE BROKER'S REVIEW OF ALL OF THE CIRCUMSTANCES CONCERNING THE NEW LOAN AND ANY DEBTS TO BE PAID FROM THE PROCEEDS OF THE NEW LOAN, THE NEW LOAN PROVIDES A ("√" THOSE FACTORS USED TO DEMONSTRATE REASONABLE, TANGIBLE NET BENEFIT):

☐ **LOWER MONTHLY PAYMENT**

YOUR MONTHLY PAYMENT WILL DECREASE FROM: $__________________________ TO: $_________________.

☐ **BENEFICIAL CHANGE IN THE AMORTIZATION PERIOD OF THE NEW LOAN**

THE TERM OF THE NEW LOAN WILL CHANGE AS FOLLOWS:

FROM: ____
(number of months remaining on the existing loan)

TO: ____
(number of months to maturity on the new loan)

AND THIS IS BENEFICIAL TO THE BORROWER BECAUSE:
____
____.

☐ **RECEIPT OF CASH IN EXCESS OF COSTS AND FEES AS DISCLOSED ON THE HUD-1 SETTLEMENT STATEMENT**

FUNDS ARE BEING PROVIDED TO YOU OR ON YOUR BEHALF IN THE AMOUNT OF $_______________________, WHICH IS THE AMOUNT IN EXCESS OF THE COSTS AND FEES DISCLOSED ON THE HUD-1 SETTLEMENT STATEMENT.

☐ **REDUCTION IN CURRENT INTEREST RATE OR WEIGHTED AVERAGE INTEREST RATE**

THE INTEREST RATE ON THE NEW LOAN IS____________%, WHICH IS LOWER THAN THE CURRENT RATE, OR WEIGHTED AVERAGE RATE, WHICHEVER IS APPLICABLE, ON YOUR EXISTING LOAN(S) OF __________%.

☐ **CHANGE FROM AN ADJUSTED RATE LOAN TO A FIXED RATE LOAN**

THE INTEREST RATE ON THE NEW LOAN WILL CHANGE FROM THE EXISTING LOAN'S ADJUSTABLE RATE OF _____________ PLUS MARGIN __________% TO THE NEW LOAN'S FIXED RATE OF ________%.

☐ **"BONA FIDE PERSONAL NEED" ON BEHALF OF ONE OR MORE OF THE BORROWER(S)**
THE "BONA FIDE PERSONAL NEED" OF THE BORROWER(S) IS:____
____
____
____.

After reviewing all relevant information, the lender and mortgage broker, if one was used, confirm that they have performed the analysis of the applicable reasonable, tangible net benefit as identified in the checked box(es) above and that they have explained the analysis to the borrower. The borrower(s) acknowledge(s) that the lender and mortgage broker, if one was used, have identified and explained the reasonable, tangible net benefit(s).

__I have reviewed and explained this Form and the answers provided therein to the borrower.

_______________________________,___________
Agent/Loan Officer's printed name   Title

____
Agent/Loan Officer's signature

On behalf of: _______________________________
(Name of Lender)

Date: ___________________

__I have reviewed and explained this Form and the answers provided therein to the borrower.

_______________________________________, _____________
Agent/Loan Officer's printed name   Title

____
Agent/Loan Officer's signature

On behalf of: _________________________________
(Name of Mortgage Broker)

Date: _________________

____
Borrower's printed name

____
Borrower's signature

Date:___________________

____
Co-borrower's printed name

____
Co-borrower's signature

Date:___________________

* If the terms of the refinancing change after the mortgage broker explains its answers to the borrower and signs this form, the lender shall explain its answers to the borrower and sign a new form.