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PROTECTING CONSUMERS SINCE 1975

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Administrative Interpretation No. 23.20-2401

FEDERAL AVERAGE PRIME OFFER RATE MAY BE USED AS A SUBSTITUTE FOR RETIRED NET YIELDS WHEN PERFORMING THE THRESHOLD CALCULATIONS REQUIRED BY THE HIGH-COST AND CONSUMER HOME LOANS ACT.

The Department has been asked to provide an opinion regarding the correct means of calculating conforming discount points on certain loans made under the South Carolina Consumer Protection Code as referenced measurements have been, or will be, discontinued. Chapter 23 of Title 37 regulates various aspects of “High-Cost and Consumer Home Loans.” Specifically, Section 37-23-20 of that chapter provides definitions of terms which are in pertinent part set forth below:

(5) “Conventional conforming discount points” means loan discount points knowingly paid by the borrower for the purpose of reducing, and which in fact result in a bona fide reduction of, the interest rate applicable to the loan, so long as the home loan has an annual percentage rate that does not exceed the conventional mortgage rate by more than one percentage point.

(6) “Conventional mortgage rate” means the required net yield for a ninety-day standard mandatory delivery commitment for a reasonably comparable loan from either the Federal National Mortgage Association or the Federal Home Loan Mortgage Corporation, whichever is greater.

.....

(15) “Threshold” means either (A) or (B) in a loan transaction, whichever is applicable:

.....

(B) the total points and fees payable by the borrower at or before the loan closing exceed:

(i) five percent of the total loan amount if the total loan amount is twenty thousand dollars or more;



(ii) the lesser of eight percent of the total loan amount or one thousand dollars if the total loan amount is less than twenty thousand dollars; or

(iii) three percent of the total loan amount for nonreal estate secured manufactured housing transactions if the total loan amount in the nonreal estate secured housing transaction is twenty thousand dollars or more;

(C) except that the following discount points and prepayment fees and penalties are excluded from the calculation of the total points and fees payable by the borrower:

(i) up to and including two conventional conforming discount points payable by the borrower in connection with the loan transaction, but only if the interest rate from which the loan's interest rate is discounted does not exceed by more than one percentage point the required net yield for a ninety day standard mandatory delivery commitment for a reasonably comparable loan from either the Federal National Mortgage Association or the Federal Home Loan Mortgage Corporation, whichever is greater; or

(ii) up to and including one conventional conforming discount point payable by the borrower in connection with the loan transaction, but only if the interest rate from which the loan's interest rate is discounted does not exceed by more than two percentage points the required net yield for a ninety day standard mandatory delivery commitment for a reasonably comparable loan from either the Federal National Mortgage Association or the Federal Home Loan Mortgage Corporation, whichever is greater;

(iii) a conventional prepayment penalty.

S.C. Code Ann. § 37-23-20 (emphasis added).

The difficulty in performing the required calculation is a result of the seller/servicer companies Federal Home Loan Mortgage Corporation ("Freddie Mac") and Federal National Mortgage Association ("FNMA") phasing out their publication of required net yields referenced in subsections (C)(i) and (ii) of Section 37-23-20(15). Freddie Mac ceased publishing required net yields on January 25, 2013. FNMA has stated it will discontinue publication of required net yields June 3, 2024.¹ The apparent result is that lenders and borrowers may be unable to accurately calculate the measurement of excludable discount points under subsections (C)(i) and (ii) on loans subject to the calculations required by Section 37-23-20(15). This leads to an inability to determine whether points and fees exceed the so-called "threshold" for determining if the transaction is a "high cost home loan" under Section 37-23-20(9) and (15)(B). The finance industry, therefore, needs standards it can rely on to determine whether or not discount points or prepayment fees assessed pursuant to Section 37-23-20(15)(C) are excludable from the "threshold" calculation of subsection (B) of that Section.

The General Assembly has determined that loans under Chapter 23 of Title 37 should be legally authorized as long as the loans are made within the guidelines of that Chapter and subject to

¹ See <https://singlefamily.fanniemae.com/pricing-execution/historical-daily-required-net-yields> (last visited 5/3/2024)




its consumer protections. The Department has attempted to determine if any other indices or measurements could provide a reasonable substitute for the publications of Freddie Mac and FNMA. The Department solicited input from mortgage lender and broker licensees and other knowledgeable persons in finance industries about possible alternative indices that could be used. All commenters suggested an index or measurement known as the Average Prime Offer Rate as described in Regulation Z, the implementing regulation for the Federal Truth in Lending Act, at 12 C.F.R. § 1026.35.

Section 1026.35 implements the Home Ownership Equity and Protection Act (“HOEPA”). Like the South Carolina High-Cost and Consumer Home Loans Act, HOEPA seeks to identify and regulate high-priced mortgage loans and high-cost mortgages based on the level of rates and charges applicable to the underlying transactions. Subsection (a)(1) sets forth the annual percentage rate levels at which mortgage or other dwelling financed loans will meet the threshold for the consumer protections of HOEPA coverage. Subsection (a)(2) further defines the measurement of Average Prime Offer Rate (“APOR”) and indicates the Consumer Financial Protection Bureau will publish the APOR on a weekly basis.² At present, tables of APORs are published weekly on the Federal Financial Institutions Examination Council (“FFIEC”) website at <https://ffiec.cfpb.gov/documentation/tools/rate-spread> (last visited 5/3/2024).

The General Assembly set the underlying purposes and policies of Title 37, South Carolina Consumer Protection Code, to include to “conform the regulation of consumer credit transactions to the policies of the Federal Consumer Protection Act.” S.C. Code Ann. § 37-1-102(2). The Code defines “Federal Consumer Protection Act” and specifically references the Truth in Lending Act and regulations issued thereunder. S.C. Code Ann. § 37-1-302. The Department compared the FNMA required net yield and APOR indices for dates when both were published. From the sample compared, the APOR is always higher than the required net yield with the difference ranging from 0.029% to 1.232% for 15-year loans and 0.245% to 0.997% for 30-year loans. See attached Exhibit A.

It is the opinion of the Department of Consumer Affairs that the term “Average Prime Offer Rate” as defined by 12 C.F.R. § 1026.35(a)(2), as amended, that applies to a comparable transaction, as published by the United States Consumer Financial Protection Bureau as of the last date the discounted interest rate for the transaction is set before consummation may be substituted for the required net yield referenced in S.C. Code Ann. Section 37-23-20(6) and (15). Such substituted calculation, if done correctly, should be deemed compliant with the requirements of Section 37-23-20(15)(C) until such time as the General Assembly amends the statute. The General Assembly’s desire to conform the Code to the Federal Consumer Protection Act, input from the professional industry, and similarities in the APOR and FNMA indices provide a solid foundation for the substitution.



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² The methodology the CFPB uses to calculate APOR can be found at <https://ffiec.cfpb.gov/tools/rate-spread/methodology> (last visited 5/3/2024).



EXHIBIT A

| Date | 15yr APOR | 15yr FNMA | Diff 15yr | 30yr APOR | 30yr FNMA | Diff 30yr |
|------------|-----------|-----------|-----------|-----------|-----------|-----------|
| 4/3/2023 | 5.67 | 5.1575 | 0.5125 | 6.32 | 5.80807 | 0.51193 |
| 4/10/2023 | 5.65 | 5.03542 | 0.61458 | 6.35 | 5.6928 | 0.6572 |
| 4/17/2023 | 5.73 | 5.29543 | 0.43457 | 6.42 | 5.95906 | 0.46094 |
| 4/24/2023 | 5.93 | 5.35849 | 0.57151 | 6.44 | 5.93372 | 0.50628 |
| 6/5/2023 | 6.33 | 5.70577 | 0.62423 | 6.74 | 6.35983 | 0.38017 |
| 6/12/2023 | 6.19 | 5.65314 | 0.53686 | 6.7 | 6.16744 | 0.53256 |
| 6/26/2023 | 6.21 | 5.5953 | 0.6147 | 6.63 | 6.10129 | 0.52871 |
| 8/7/2023 | 6.46 | 5.99196 | 0.46804 | 6.91 | 6.49479 | 0.41521 |
| 8/14/2023 | 6.46 | 6.29997 | 0.16003 | 6.96 | 6.64576 | 0.31424 |
| 8/21/2023 | 6.61 | 6.58038 | 0.02962 | 7.15 | 6.85146 | 0.29854 |
| 8/28/2023 | 6.78 | 6.44634 | 0.33366 | 7.26 | 6.73354 | 0.52646 |
| 10/2/2023 | 6.88 | 6.53382 | 0.34618 | 7.4 | 7.0154 | 0.3846 |
| 10/16/2023 | 6.96 | 6.71734 | 0.24266 | 7.57 | 7.22412 | 0.34588 |
| 10/23/2023 | 7.24 | 7.04624 | 0.19376 | 7.72 | 7.4749 | 0.2451 |
| 10/30/2023 | 7.26 | 6.75293 | 0.50707 | 7.84 | 7.32928 | 0.51072 |
| 12/4/2023 | 6.77 | 5.77165 | 0.99835 | 7.23 | 6.35621 | 0.87379 |
| 12/11/2023 | 6.5 | 5.81405 | 0.68595 | 7.01 | 6.38982 | 0.62018 |
| 12/18/2023 | 6.56 | 5.32826 | 1.23174 | 6.98 | 5.98303 | 0.99697 |
| 1/8/2024 | 6.04 | 5.47038 | 0.56962 | 6.66 | 6.11427 | 0.54573 |
| 1/22/2024 | 6.03 | 5.51409 | 0.51591 | 6.59 | 6.08233 | 0.50767 |
| 1/29/2024 | 6.18 | 5.48082 | 0.69918 | 6.65 | 5.98788 | 0.66212 |
| 2/5/2024 | 6.02 | 5.6298 | 0.3902 | 6.55 | 6.17879 | 0.37121 |
| 2/12/2024 | 6.18 | 5.62408 | 0.55592 | 6.66 | 6.19632 | 0.46368 |
| 2/26/2024 | 6.35 | 5.83783 | 0.51217 | 6.9 | 6.41437 | 0.48563 |
| 3/4/2024 | 6.52 | 5.78125 | 0.73875 | 6.92 | 6.36773 | 0.55227 |
| 3/11/2024 | 6.37 | 5.55494 | 0.81506 | 6.82 | 6.13165 | 0.68835 |
| 3/18/2024 | 6.21 | 5.82929 | 0.38071 | 6.71 | 6.4543 | 0.2557 |
| 3/25/2024 | 6.39 | 5.65771 | 0.73229 | 6.88 | 6.24278 | 0.63722 |
| 4/1/2024 | 6.29 | 5.53898 | 0.75102 | 6.76 | 6.24244 | 0.51756 |

