

ATTORNEY GENERAL

November 20, 1974

RICHARD F. SCHAUB, *Commissioner*
Department of Banking
36 West State Street
Trenton, New Jersey 08625

FORMAL OPINION NO. 15-1974

Dear Commissioner Schaub:

You have inquired whether the prohibition on the charging of points in connection with a mortgage loan contained in N.J.S.A. 46:10B-10 would prevent the participation of New Jersey mortgage lenders in the Conventional Home Mortgage Purchase Program (hereinafter referred to as the "Program") that is being offered by the Government National Mortgage Association (hereinafter referred to as "GNMA") pursuant to the Emergency Home Purchase Assistance Act of 1974* (hereinafter referred to as the "Act"), 12 U.S.C.A. §1723e. For the reason expressed below, it is our opinion that N.J.S.A. 46:10B-10 does not prohibit the participation of New Jersey mortgage lenders in the Program.

Heretofore, GNMA was authorized to purchase only FHA-insured or VA-guaranteed mortgages. See 12 U.S.C.A. § 1717b(1). The instant Program was designed to broaden federal support of the mortgage market by allowing GNMA to purchase conventionally financed home mortgages. To this end, Congress has made an initial appropriation of \$1.5 billion, of which \$47 million has been allocated to New Jersey. The Program, administered through the facilities of the Federal National Mortgage Association, will operate in the following manner: The private mortgage lenders will enter into a GNMA general commitment contract.** A lender would, before commitment, telephone GNMA stating that it has a mortgage and seeks GNMA approval. Then, having obtained approval, the lender would close the mortgage and subsequently negotiate it to GNMA. You have informed us that the Secretary of the Department of Housing and Urban Development will provide by regulation that an aggregate of 6 1/2 points will be charged to both the purchaser and seller, 2 points to be kept by the mortgage lender and 4 1/2 points to be retained by GNMA. As a matter of fact, this administrative determination has already been set forth in the *GNMA Conventional Seller/Service Guide*.

N.J.S.A. 46:10B-10 provides that:

"Except as otherwise provided by law, no mortgage loan shall be made at an interest rate in excess of the rate authorized by section 31:1-1 of the Revised Statutes. The charging of points in connection with a mortgage loan is prohibited. For the purposes of this act, 'points' means an amount of money or other consideration paid for the making of a mortgage loan, other than interest payable pursuant to the terms of the mortgage loan, *but does not include any such sum paid pursuant to a statute of this State or of the United States*, nor does it include reasonable expenses and charges." (Emphasis added.)

The underscored language creates an exception to the prohibition on points. This exception has properly been the basis upon which the assessment of points has

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been permitted in New Jersey in conjunction with the making of FHA/VA mortgage loans. It should be noted that the number and allocation of points charged in connection with FHA/VA loans are set by regulation, not by the enabling statute itself.*** *FHA Administrative Rules* subsection 203, ch. XIII, §§ 1301-03, 24 C.F.R. § 203.27; *Mortgagee Guide; Application Through Commitment*, formerly the *FHA Mortgagee Handbook*. See also *Lord v. Marine Midland Trust Co.*, 61 Misc.2d 776, 306 N.Y.S.2d 82, 86 (Sup. Ct. 1969). The Program will operate in the same manner, *i.e.*, the Secretary of the Department of Housing and Urban Development will set by regulation the number and allocation of points to be charged.**** But the fact that the points are set by regulation and not by statute does not take either the FHA/VA programs or the new Program out of the above-noted exception. It is apparent, first of all, that points seem to be generally contemplated by the enabling statutes and, as such, points might well be considered as being paid pursuant to the statutes themselves. Beyond this, and more importantly, however, such regulations, when validly issued by an administrative agency, have the force and effect of law, *Paul v. United States*, 371 U.S. 245, 83 S. Ct. 426, 9 L. Ed. 2d 292 (1963), and have been held to be included within the term "the law of the state." *United States v. Howard*, 352 U.S. 212, 77 S. Ct. 303, 1 L. Ed. 2d 261 (1957). Furthermore, the word "statute" has been held to include regulations of an administrative agency. *Ala. Public Service Commission v. Southern Ry. Co.*, 341 U.S. 341, 342-43, 71 S. Ct. 762, 95 L. Ed. 1002 (1951); *Sigma Chi Fraternity v. Regents of University of Colorado* 258 F. Supp. 515, 521-22 (D. Colo. 1966). But see *United States v. Mersky*, 361 U.S. 431, 437, 80 S. Ct. 459, 4 L. Ed. 2d 423 (1959).

Based upon the foregoing, it is clear that the fact that points are set by regulation and are not specifically listed in the body of the enabling legislation is not of consequence in this context and both the FHA/VA programs and the Program with which we are here specifically concerned fall within the statutory exception of N.J.S.A. 46:10B-10. For the reasons expressed above, N.J.S.A. 46:10B-10 does not prohibit the participation of New Jersey mortgage lenders in the program.

Very truly yours,

WILLIAM F. HYLAND

Attorney General

By: MICHAEL E. GOLDMAN

Deputy Attorney General

* Public Law 93-449, approved October 18, 1974, a copy of which is attached hereto as "Exhibit A."

** Under present Federal guidelines, this contract must be entered by November 30, 1974.

*** For a full discussion of the points system on FHA/VA mortgages, see Hood and Kushner, *Real Estate Finance: The Discount Point System and Its Effects on Federally Insured Loans*, 40 U. Mo. K.C. Law Rev. 1 (1971).

**** We have been informed that there is some question as to the propriety of the Secretary's establishment of points in connection with the Program. See letter from Senator John Sparkman, *et als.* to James T. Lynn, Secretary of Housing and Urban Development, dated November 11, 1974, a copy of which is attached hereto as "Exhibit B." For purposes of this opinion, we assume the validity of the Secretary's regulation unless and until a contrary judicial decision is handed down.