

**This correspondence is submitted on behalf of the National Private Lenders Association by Jonathan Hornik, Esq. and Peter Kelegian, Esq. of LaRocca Hornik Rosen & Greenberg, LLP.**

**For the following reasons we strongly believe that Section 802(d) remain in the bill so that it is clear that SB 5470 (NY TILA) does not apply to “a commercial financing transaction secured by real property”.**

### **SB 5470 (NY TILA)**

As currently drafted SB 5470 (NY TILA) would require that a provider of “commercial financing” provide a recipient of same with a host of disclosures at the time of extending a specific offer. “Commercial financing” in NY TILA means financing in which the proceeds are not intended by the recipient to be used primarily for personal, family or household purposes (Section 801(b)). Section 802(d) expressly exempts **“a commercial financing transaction secured by real property”** from the requirements that the bill imposes on providers of commercial financing. Revisions currently under consideration to the bill would (a) remove the exemption for “a commercial financing transaction secured by real property” and (b) prohibit any provider subject to NY TILA from charging a prepayment penalty.

### **Recommendation and Reasons**

It is vital to commercial mortgage lenders, including those making loans in amounts of \$50,000 to \$2,000,000, that NY TILA not apply to them. For the following reasons, the Section 802(d) exemption for “commercial financing transactions secured by real property” should remain in the bill, and the prepayment penalty prohibition should not be added to the bill:

- While it does not appear from a close reading of NY TILA that it was intended to apply to “commercial financing transactions secured by real property” — the intention of the drafters is to extend the consumer protections afforded by federal TILA to certain potentially vulnerable borrowers in factoring, sales-based, and other secured and unsecured transactions — as NY TILA does not otherwise expressly exclude commercial mortgage lending, the Section 802(d) exemption should remain in the bill. The bill as drafted would seemingly apply to private lenders who make real estate secured loans under [\$500,000/\$2,000,000] in New York, Without the a clear exemption, real estate lenders and those that purchase those loans for securitization and other credit enhancement purposes, would not have clarity on the applicable of the bill and will likely mandate compliance in abundance of caution. In addition, as mentioned below, the prepayment penalty prohibitions set forth in SB 5470 will negatively affect the ability for commercial loans secured by real property to be included in securitizations thus ultimately drying up available credit for NY lenders and borrowers.
- Without the exemption, NY TILA may have the unintended consequence of regulating virtually all commercial mortgage loans made to sophisticated commercial borrowers in New York State, loans which are already regulated by many of a panoply of state and federal laws and regulations covering licensing, fair lending practices, and adequate disclosures to consumer and commercial borrowers. These laws include the NY Banking Law, which sets forth licensing requirements for commercial lenders in New York; the SAFE Act (which mandates a nationwide licensing and registration system for residential mortgage loan originators); TILA (Reg. Z), which sets forth disclosure, advertising, and other requirements for various consumer credit transactions, including

mortgage loans; RESPA (Reg. X), which prohibits kickbacks and unearned fees, requires disclosure of mortgage settlement charges, and regulates servicing activities such as escrow maintenance, imposition of force-placed insurance, and loss mitigation; HMDA (Reg. C), which requires covered financial institutions to collect and report data regarding mortgage loan originations, applications, and purchases; ECOA (Reg. B), which scrutinizes all deferred-payment credit transactions, including secured transactions involving real estate for discrimination on basis of race, national origin, religion, sex, gender, marital status, age, or public assistance status; and the FHA, which prohibits discrimination on basis of race, religion, sex, disability, etc.

Specifically, commercial mortgage lenders doing business in New York are already regulated by:

- The New York Banking Law, under which a license is required for any person engaged in New York State in the business of making a commercial or business loan to an individual in an amount less than \$50,000. *NY Bank. Law Section 340*. (The Department of Financial Services is the regulator and licensor of loans that fit the description.)
  - It should also be noted that real estate brokers have to be licensed in New York.
- ECOA (Equal Credit Opportunity Act): Commercial mortgage lenders are regulated by ECOA (*15 USC §1691(a)*), which prohibits discrimination “against any application with respect to any aspect of a credit transaction on the basis of race, color, religion, national origin, sex or marital status”. Lenders are required under Reg. B to provide prospective borrowers with Adverse Action Notices, and are required to comply with a range of information gathering requirements, appraisal requirements, investigation procedures, standards of creditworthiness, terms of credit, furnishing of credit information, revocation/alteration/termination of credit, and collection procedures. Regulation B also requires that business purpose lenders on first-lien loans secured by a residential structure that contains one to four units disclose to applicants that they have the right to receive copies of appraisals and other written valuations. Enforcement is through the Federal Trade Commission and individual and class actions. Awards of punitive damages can be severe.
- FHA (Fair Housing Act) (*42 U.S.C. 3601 et seq.*): The FHA prohibits discrimination on the basis of race, color, national origin, religion, sex, familial status, and disability. The Act applies to any individual or entity whose business engages in “residential real estate-related transactions”, and includes commercial mortgage lending secured by residential property. Enforcement is through HUD, the US Attorney General, and private actions for civil penalties and can be severe.
- HMDA (Home Mortgage Disclosure Act). Commercial mortgage lenders making loans on nonowner occupied properties primarily for purpose of purchase, rehabilitation, and refinance are subject to the data collection and reporting requirements of HMDA. Loan-level data is collected and reported on ethnicity, race, sex, age, income, various factors in credit decision, action taken, reason for denial, interest rate, certain contractual features, etc. HMDA violations are subject to administrative and civil money penalties. Compliance is enforced by FRB, FDIC, HUD, and CFPB among others.

- Without the exemption, NY TILA may subject commercial mortgage lenders to the cost of unnecessary disclosure and other requirements, which, together with the proposed prohibition on the charging of prepayment penalties, would increase borrowing costs and discourage entry of commercial mortgage lenders into the New York real estate market, thereby putting the state's mortgage lending and real estate market at a disadvantage vis a vis those of other states.
- Prohibition on charging prepayment penalties would drastically impair the attractiveness of New York loans to investors in commercial mortgage-backed securities (those investors expect guaranteed yields, an important part of which is derived from income from prepayment penalties), further harming New York's commercial real estate market.
- The applicability of prepayment penalties has already been addressed by the New York Legislature. See NY Gen. Oblig. Law Section 5-501(3)(b), which limits restrictions on prepayment penalties to owner-occupied real estate mortgages (allowing assessment of penalty against a loan secured by a 1-6 family owner-occupied real estate mortgage that pays off within the first year, as long as the prepayment penalty provision is expressly included in the loan documents). In effect this exempts commercial loans to entities on non-owner occupied residential property from any restrictions on prepayment penalties.

### **Conclusion**

Private commercial mortgage lenders are regulated by a range of state and national laws and regulations tailored to the specific nature of the commercial product. The sophisticated commercial borrower generally does not require the level or type of regulatory oversight that can benefit less experienced and sophisticated consumers or borrowers. The drafters of NY TILA acknowledge this by including in the bill the Section 802(d) exemption for commercial financing transactions secured by real property, which exemption should remain in the bill to be signed by the governor.

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