

**First Regular Session
Sixty-sixth General Assembly
STATE OF COLORADO**

PREAMENDED

*This Unofficial Version Includes Committee
Amendments Not Yet Adopted on Second Reading*

LLS NO. 07-0823.01 Duane Gall

SENATE BILL 07-216

SENATE SPONSORSHIP

Veiga,

HOUSE SPONSORSHIP

Marshall,

Senate Committees

Business, Labor and Technology
Appropriations

House Committees

Business Affairs and Labor
Appropriations

A BILL FOR AN ACT

101 **CONCERNING ADDITIONAL CONSUMER PROTECTIONS IN RESIDENTIAL**
102 **MORTGAGE LOAN TRANSACTIONS, AND MAKING AN**
103 **APPROPRIATION IN CONNECTION THEREWITH.**

Bill Summary

(Note: This summary applies to this bill as introduced and does not necessarily reflect any amendments that may be subsequently adopted.)

Creates a duty of good faith and fair dealing for mortgage brokers in their communications and transactions with borrowers. Requires refinancing transactions to have a tangible, net benefit to borrowers.

Specifically defines acts and practices that are deemed unconscionable when committed by mortgage brokers, mortgage lenders, real estate brokers, real estate appraisers, and others. In regard to such

Shading denotes HOUSE amendment. Double underlining denotes SENATE amendment.

Capital letters indicate new material to be added to existing statute.

Dashes through the words indicate deletions from existing statute.

SENATE
3rd Reading Unamended
April 25, 2007

SENATE
Amended 2nd Reading
April 24, 2007

acts and practices, waives the otherwise applicable requirement that there be evidence of bad faith overreaching or unequal bargaining power before a court may find an act or practice unconscionable.

Directs the banking board and the director of the division of real estate to adopt rules incorporating appropriate provisions of the "Interagency Guidance on Nontraditional Mortgage Product Risks" promulgated by the United States department of the treasury and other federal agencies.

1 *Be it enacted by the General Assembly of the State of Colorado:*

2 **SECTION 1.** Part 1 of article 102 of title 11, Colorado Revised
3 Statutes, is amended BY THE ADDITION OF A NEW SECTION to
4 read:

5 **11-102-106. Nontraditional mortgages - consumer protections**
6 **- rules - incorporation of federal interagency guidance.** THE BANKING
7 BOARD SHALL ADOPT RULES GOVERNING THE MARKETING OF
8 NONTRADITIONAL MORTGAGES BY BANKING INSTITUTIONS. IN ADOPTING
9 SUCH RULES, THE BOARD SHALL INCORPORATE APPROPRIATE PROVISIONS
10 OF THE FINAL "INTERAGENCY GUIDANCE ON NONTRADITIONAL
11 MORTGAGE PRODUCT RISKS" RELEASED ON SEPTEMBER 29, 2006, BY THE
12 OFFICE OF THE COMPTROLLER OF THE CURRENCY AND THE OFFICE OF
13 THRIFT SUPERVISION IN THE FEDERAL DEPARTMENT OF THE TREASURY, THE
14 BOARD OF GOVERNORS OF THE FEDERAL RESERVE SYSTEM, THE FEDERAL
15 DEPOSIT INSURANCE CORPORATION, AND THE NATIONAL CREDIT UNION
16 ADMINISTRATION, AS SUCH PUBLICATION MAY BE AMENDED.

17 **SECTION 2.** Part 9 of article 61 of title 12, Colorado Revised
18 Statutes, is amended BY THE ADDITION OF THE FOLLOWING NEW
19 SECTIONS to read:

20 **12-61-904.6. Duty of good faith and fair dealing - rules.** (1) A
21 MORTGAGE BROKER SHALL HAVE A DUTY OF GOOD FAITH AND FAIR

1 DEALING IN ALL COMMUNICATIONS AND TRANSACTIONS WITH A
2 BORROWER. SUCH DUTY INCLUDES, BUT IS NOT LIMITED TO:

3 (a) THE DUTY NOT TO RECOMMEND OR INDUCE THE BORROWER TO
4 ENTER INTO A TRANSACTION THAT DOES NOT HAVE A REASONABLE,
5 TANGIBLE NET BENEFIT TO THE BORROWER, CONSIDERING ALL OF THE
6 CIRCUMSTANCES, INCLUDING THE TERMS OF A LOAN, THE COST OF A LOAN,
7 AND THE BORROWER'S CIRCUMSTANCES; AND

8 (b) THE DUTY NOT TO COMMIT ANY UNCONSCIONABLE ACT OR
9 PRACTICE LISTED IN SECTION 38-40-105 (1.7), C.R.S.

10 (2) FOR PURPOSES OF IMPLEMENTING SUBSECTION (1) OF THIS
11 SECTION, THE DIRECTOR MAY ADOPT RULES DEFINING WHAT CONSTITUTES
12 A REASONABLE, TANGIBLE NET BENEFIT TO THE BORROWER.

13 (3) A VIOLATION OF THIS SECTION CONSTITUTES A DECEPTIVE
14 TRADE PRACTICE UNDER THE "COLORADO CONSUMER PROTECTION ACT",
15 ARTICLE 1 OF TITLE 6, C.R.S.

16 **12-61-910.4. Nontraditional mortgages - consumer protections**
17 **- rules - incorporation of federal interagency guidance.** THE DIRECTOR
18 SHALL ADOPT RULES GOVERNING THE MARKETING OF NONTRADITIONAL
19 MORTGAGES BY MORTGAGE BROKERS. IN ADOPTING SUCH RULES, THE
20 DIRECTOR SHALL INCORPORATE APPROPRIATE PROVISIONS OF THE FINAL
21 "INTERAGENCY GUIDANCE ON NONTRADITIONAL MORTGAGE PRODUCT
22 RISKS" RELEASED ON SEPTEMBER 29, 2006, BY THE OFFICE OF THE
23 COMPTROLLER OF THE CURRENCY AND THE OFFICE OF THRIFT SUPERVISION
24 IN THE FEDERAL DEPARTMENT OF THE TREASURY, THE BOARD OF
25 GOVERNORS OF THE FEDERAL RESERVE SYSTEM, THE FEDERAL DEPOSIT
26 INSURANCE CORPORATION, AND THE NATIONAL CREDIT UNION
27 ADMINISTRATION, AS SUCH PUBLICATION MAY BE AMENDED.

1 **SECTION 3.** 12-61-908 (1), Colorado Revised Statutes, is
2 amended to read:

3 **12-61-908. Fees.** (1) The director may set the fee for registration
4 under this part 9. The fee shall be set in an amount ~~not to exceed two~~
5 ~~hundred dollars,~~ that offsets the direct and indirect costs of implementing
6 this part 9. The moneys collected pursuant to this section shall be
7 transferred to the state treasurer, who shall credit them to the mortgage
8 broker registration cash fund.

9

10 **SECTION 4.** 38-40-105 (2) (c), Colorado Revised Statutes, is
11 amended, and the said 38-40-105 is further amended BY THE
12 ADDITION OF THE FOLLOWING NEW SUBSECTIONS, to read:

13 **38-40-105. Prohibited acts by originators of certain mortgage**
14 **loans - unconscionable acts and practices - definitions.** (1.7)
15 (a) A MORTGAGE BROKER OR MORTGAGE ORIGINATOR SHALL NOT
16 COMMIT, OR ASSIST OR FACILITATE THE COMMISSION OF, THE FOLLOWING
17 ACTS OR PRACTICES, WHICH ARE HEREBY DEEMED UNCONSCIONABLE:

18 (I) ENGAGING IN A PATTERN OR PRACTICE OF PROVIDING
19 RESIDENTIAL MORTGAGE LOANS TO CONSUMERS BASED PREDOMINANTLY
20 ON ACQUISITION OF THE FORECLOSURE OR LIQUIDATION VALUE OF THE
21 CONSUMER'S COLLATERAL WITHOUT REGARD TO THE CONSUMER'S ABILITY
22 TO REPAY A LOAN IN ACCORDANCE WITH ITS TERMS; EXCEPT THAT ANY
23 REASONABLE METHOD MAY BE USED TO DETERMINE A BORROWER'S
24 ABILITY TO REPAY;

25

26 (II) KNOWINGLY OR INTENTIONALLY FLIPPING A RESIDENTIAL
27 MORTGAGE LOAN. AS USED IN THIS SUBPARAGRAPH (II), "FLIPPING"

1 MEANS MAKING A RESIDENTIAL MORTGAGE LOAN THAT REFINANCES AN
2 EXISTING RESIDENTIAL MORTGAGE LOAN WHEN THE NEW LOAN DOES NOT
3 HAVE REASONABLE, TANGIBLE NET BENEFIT TO THE CONSUMER
4 CONSIDERING ALL OF THE CIRCUMSTANCES, INCLUDING THE TERMS OF
5 BOTH THE NEW AND REFINANCED LOANS, THE COST OF THE NEW LOAN,
6 AND THE CONSUMER'S CIRCUMSTANCES. THIS SUBPARAGRAPH (II) APPLIES
7 REGARDLESS OF WHETHER THE INTEREST RATE, POINTS, FEES, AND
8 CHARGES PAID OR PAYABLE BY THE CONSUMER IN CONNECTION WITH THE
9 REFINANCING EXCEED ANY THRESHOLDS SPECIFIED BY LAW.

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11 (III) ENTERING INTO A RESIDENTIAL MORTGAGE LOAN
12 TRANSACTION KNOWING THERE WAS NO REASONABLE PROBABILITY OF
13 PAYMENT OF THE OBLIGATION BY THE CONSUMER.

14 (b) ONLY THE ORIGINAL PARTIES TO A TRANSACTION SHALL HAVE
15 A RIGHT OF ACTION UNDER THIS SUBSECTION (1.7), AND NO ACTION OR
16 CLAIM UNDER THIS SUBSECTION (1.7) MAY BE BROUGHT AGAINST A
17 PURCHASER FROM, OR ASSIGNEE OF, A PARTY TO THE TRANSACTION.

18 (2) (c) (I) In order to support a finding of unconscionability, there
19 must be evidence of some bad faith overreaching on the part of the
20 mortgage broker or mortgage originator such as that which results from
21 an unreasonable inequality of bargaining power or under other
22 circumstances in which there is an absence of meaningful choice on the
23 part of one of the parties, together with contract terms that are, under
24 standard industry practices, unreasonably favorable to the mortgage
25 broker, mortgage originator, or lender.

26 (II) THIS PARAGRAPH (c) SHALL NOT APPLY TO AN
27 UNCONSCIONABLE ACT OR PRACTICE UNDER SUBSECTION (1.7) OF THIS

1 SECTION.

2 (6) AS USED IN THIS SECTION, UNLESS THE CONTEXT OTHERWISE
3 REQUIRES:

4 (a) "CONSUMER" HAS THE MEANING SET FORTH IN SECTION 5-1-301
5 (10), C.R.S.

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7 (b) "DWELLING" HAS THE MEANING SET FORTH IN SECTION 5-1-301
8 (18), C.R.S.

9 (c) "MORTGAGE BROKER" HAS THE MEANING SET FORTH IN
10 SECTION 12-61-902 (5), C.R.S.

11 (d) "MORTGAGE LENDER" HAS THE MEANING SET FORTH IN
12 SECTION 12-61-902 (6), C.R.S.

13 (e) "MORTGAGE ORIGINATOR" MEANS A PERSON WHO IS IN THE
14 BUSINESS OF ORIGINATING RESIDENTIAL MORTGAGE LOANS.

15 (f) "ORIGINATE" HAS THE MEANING SET FORTH IN SECTION
16 12-61-902 (7), C.R.S.

17 (g) "RESIDENTIAL MORTGAGE LOAN" HAS THE MEANING SET FORTH
18 IN SECTION 12-61-902 (8), C.R.S.

19 **SECTION 5. Appropriation.** (1) In addition to any other
20 appropriation, there is hereby appropriated, out of any moneys in the
21 mortgage broker registration cash fund created in Section 12-61-908 (2),
22 Colorado Revised Statutes, not otherwise appropriated, to the department
23 of regulatory agencies, for the fiscal year beginning July 1, 2007, the sum
24 of three hundred nine-two thousand two hundred forty-two dollars
25 (\$392,242), cash funds, and 1.5 FTE, or so much thereof as may be
26 necessary, for the implementation of this act. Of said sum, forty-eight
27 thousand four hundred fifty-six dollars (\$48,456) shall be allocated to the

1 executive director's office for the purchase of legal services from the
2 department of law and three hundred forty-three thousand seven hundred
3 eighty-six dollars (\$343,786) and 1.5 FTE shall be allocated to the
4 division of real estate.

5 (2) (a) In addition to any other appropriation, there is hereby
6 appropriated, to the department of law, for the fiscal year beginning July
7 1, 2007, the sum of forty-eight thousand four hundred fifty-six dollars
8 (\$48,456) and 0.4 FTE, or so much thereof as may be necessary, for the
9 provision of legal services to the department of regulatory agencies
10 related to the implementation of this act. Said sum shall be from cash
11 funds exempt received from the department of regulatory agencies,
12 executive director's office out of the appropriation for legal services in
13 subsection 1 of this section.

14 (b) In addition to any other appropriation, there is hereby
15 appropriated, to the department of law, for allocation to the consumer
16 protection section, for the fiscal year beginning July 1, 2007, the sum of
17 two hundred sixty-five thousand eighty-five dollars (\$265,085) and 3.0
18 FTE, or so much thereof as may be necessary, for the implementation of
19 this act. Said sum shall be from cash funds exempt received from the
20 department of regulatory agencies, out of the appropriation to the division
21 of real estate in subsection 1 of this section.

22 **SECTION 6. Effective date - applicability.** This act shall take
23 effect July 1, 2007, and shall apply to offenses committed on or after said
24 date.

25 **SECTION 7. Safety clause.** The general assembly hereby finds,
26 determines, and declares that this act is necessary for the immediate
27 preservation of the public peace, health, and safety.