

First Regular Session  
Sixty-sixth General Assembly  
STATE OF COLORADO

INTRODUCED

LLS NO. 07-0823.01 Duane Gall

SENATE BILL 07-216

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SENATE SPONSORSHIP

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HOUSE SPONSORSHIP

(None),

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Senate Committees  
Business, Labor and Technology

House Committees

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A BILL FOR AN ACT

101 CONCERNING ADDITIONAL CONSUMER PROTECTIONS IN RESIDENTIAL  
102 MORTGAGE LOAN TRANSACTIONS.

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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 acts and practices, waives the otherwise applicable requirement that there

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.*

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.

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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.

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.** (1) A  
21 MORTGAGE BROKER SHALL HAVE A DUTY OF GOOD FAITH AND FAIR  
22 DEALING IN ALL COMMUNICATIONS AND TRANSACTIONS WITH A

1 BORROWER. SUCH DUTY INCLUDES, BUT IS NOT LIMITED TO:

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

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

9 (2) A VIOLATION OF THIS SECTION CONSTITUTES A DECEPTIVE  
10 TRADE PRACTICE UNDER THE "COLORADO CONSUMER PROTECTION ACT",  
11 ARTICLE 1 OF TITLE 6, C.R.S.

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

24 **SECTION 3.** The introductory portion to 38-40-105 (1), Colorado  
25 Revised Statutes, is amended, and the said 38-40-105 (1) is further  
26 amended BY THE ADDITION OF A NEW PARAGRAPH, to read:

27 **38-40-105. Prohibited acts by participants in certain mortgage**

1     **loan transactions - unconscionable acts and practices - definitions.**

2     (1) The following acts by any mortgage broker, ~~or~~ mortgage originator,  
3     MORTGAGE LENDER, MORTGAGE LOAN APPLICANT, REAL ESTATE BROKER,  
4     REAL ESTATE AGENT, REAL ESTATE APPRAISER, OR CLOSING AGENT with  
5     respect to any loan that is secured by a first or subordinate mortgage or  
6     deed or trust lien against a dwelling are prohibited:

7             (e) TO KNOWINGLY COMMIT, OR ASSIST OR FACILITATE THE  
8     COMMISSION OF, ANY UNCONSCIONABLE ACT OR PRACTICE UNDER  
9     SUBSECTION (1.7) OF THIS SECTION.

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 A NEW SUBSECTION, to read:

13            **38-40-105. Prohibited acts by originators of certain mortgage**  
14     **loans - unconscionable acts and practices - definitions.** (1.7) THE  
15     FOLLOWING ACTS OR PRACTICES ARE HEREBY DEEMED UNCONSCIONABLE:

16            (a) ARRANGING FOR OR MAKING A RESIDENTIAL MORTGAGE LOAN  
17     THAT PROVIDES FOR AN INTEREST RATE APPLICABLE AFTER DEFAULT THAT  
18     IS HIGHER THAN THE INTEREST RATE THAT APPLIES BEFORE DEFAULT,  
19     EXCLUDING:

20            (I) RATES OF INTEREST FOR JUDGMENTS APPLICABLE TO THE LOAN  
21     UNDER SECTION 5-12-102 OR 5-12-103, C.R.S.; AND

22            (II) INTEREST RATE CHANGES IN A VARIABLE-RATE LOAN  
23     TRANSACTION THAT ARE OTHERWISE CONSISTENT WITH THE PROVISIONS  
24     OF THE LOAN DOCUMENTS;

25            (b) ENGAGING IN A PATTERN OR PRACTICE OF PROVIDING  
26     CONSUMER TRANSACTIONS TO CONSUMERS BASED PREDOMINANTLY ON  
27     ACQUISITION OF THE FORECLOSURE OR LIQUIDATION VALUE OF THE

1 CONSUMER'S COLLATERAL WITHOUT REGARD TO THE CONSUMER'S ABILITY  
2 TO REPAY A LOAN IN ACCORDANCE WITH ITS TERMS; EXCEPT THAT ANY  
3 REASONABLE METHOD MAY BE USED TO DETERMINE A BORROWER'S  
4 ABILITY TO REPAY;

5 (c) MAKING A CONSUMER TRANSACTION THAT PERMITS THE  
6 CREDITOR TO DEMAND REPAYMENT OF THE OUTSTANDING BALANCE OF A  
7 RESIDENTIAL MORTGAGE LOAN IN ADVANCE OF THE ORIGINAL MATURITY  
8 DATE UNLESS THE CREDITOR DOES SO IN GOOD FAITH DUE TO THE  
9 CONSUMER'S FAILURE TO ABIDE BY THE MATERIAL TERMS OF THE LOAN;

10 (d) KNOWINGLY REPLACING, REFINANCING, OR CONSOLIDATING A  
11 ZERO INTEREST RATE OR OTHER LOW-RATE RESIDENTIAL MORTGAGE LOAN  
12 MADE BY A GOVERNMENTAL OR NONPROFIT LENDER WITH ANOTHER LOAN  
13 UNLESS THE CURRENT HOLDER OF THE LOAN CONSENTS IN WRITING TO THE  
14 REFINANCING AND THE CONSUMER PRESENTS WRITTEN CERTIFICATION  
15 FROM A THIRD-PARTY NONPROFIT ORGANIZATION COUNSELOR APPROVED  
16 BY THE UNITED STATES DEPARTMENT OF HOUSING AND URBAN  
17 DEVELOPMENT THAT THE CONSUMER RECEIVED COUNSELING ON THE  
18 ADVISABILITY OF THE LOAN TRANSACTION. FOR PURPOSES OF THIS  
19 PARAGRAPH (d), A "LOW-RATE RESIDENTIAL MORTGAGE LOAN" MEANS A  
20 RESIDENTIAL MORTGAGE LOAN THAT CARRIES A CURRENT INTEREST RATE  
21 TWO PERCENTAGE POINTS OR MORE BELOW THE CURRENT YIELD ON  
22 UNITED STATES TREASURY SECURITIES WITH A COMPARABLE MATURITY.  
23 IF THE LOAN'S CURRENT INTEREST RATE IS EITHER A DISCOUNTED  
24 INTRODUCTORY RATE OR A RATE THAT AUTOMATICALLY STEPS UP OVER  
25 TIME, THE FULLY INDEXED RATE OR THE FULLY STEPPED-UP RATE, AS  
26 APPLICABLE, SHALL BE USED, IN LIEU OF THE CURRENT RATE, TO  
27 DETERMINE WHETHER A LOAN IS A LOW-RATE RESIDENTIAL MORTGAGE

1 LOAN.

2 (e) INSTRUCTING THE CONSUMER TO IGNORE ANY WRITTEN  
3 INFORMATION REGARDING THE INTEREST RATE AND DOLLAR VALUE OF  
4 POINTS BECAUSE THEY WOULD BE LOWER FOR THE LOAN BEING OFFERED  
5 TO THE CONSUMER;

6 (f) RECOMMENDING OR ENCOURAGING A CONSUMER TO DEFAULT  
7 ON A RESIDENTIAL MORTGAGE LOAN OR ANY CONSUMER TRANSACTION OR  
8 REVOLVING CREDIT LOAN AGREEMENT;

9 (g) CHARGING A LATE FEE MORE THAN ONCE WITH RESPECT TO A  
10 SINGLE LATE PAYMENT. IF A LATE PAYMENT FEE IS DEDUCTED FROM A  
11 PAYMENT MADE ON A LOAN AND SUCH DEDUCTION CAUSES A SUBSEQUENT  
12 DEFAULT ON A SUBSEQUENT PAYMENT, NO LATE PAYMENT FEE MAY BE  
13 IMPOSED FOR SUCH DEFAULT. IF A LATE PAYMENT FEE HAS BEEN IMPOSED  
14 ONCE WITH RESPECT TO A PARTICULAR LATE PAYMENT, NO SUCH FEE MAY  
15 BE IMPOSED WITH RESPECT TO ANY FUTURE PAYMENT THAT WOULD HAVE  
16 BEEN TIMELY AND SUFFICIENT BUT FOR THE PREVIOUS DEFAULT.

17 (h) FAILING TO DISCLOSE TO THE CONSUMER AT THE CLOSING OF  
18 A CONSUMER TRANSACTION, INCLUDING WITHOUT LIMITATION A  
19 RESIDENTIAL MORTGAGE LOAN, THAT A CONSUMER IS NOT REQUIRED TO  
20 COMPLETE A CONSUMER TRANSACTION MERELY BECAUSE THE CONSUMER  
21 HAS RECEIVED PRIOR ESTIMATES OF CLOSING COSTS OR HAS SIGNED AN  
22 APPLICATION AND SHOULD NOT CLOSE A LOAN TRANSACTION THAT  
23 CONTAINS DIFFERENT TERMS AND CONDITIONS THAN THOSE THE  
24 CONSUMER WAS PROMISED;

25 (i) ARRANGING FOR OR MAKING A CONSUMER TRANSACTION THAT  
26 INCLUDES TERMS UNDER WHICH MORE THAN TWO PERIODIC PAYMENTS  
27 REQUIRED UNDER THE CONSUMER TRANSACTION ARE CONSOLIDATED AND

1 PAID IN ADVANCE FROM THE LOAN PROCEEDS PROVIDED TO THE  
2 CONSUMER;

3 (j) VIOLATING SECTION 6-1-717, C.R.S., AS ENACTED BY SENATE  
4 BILL 07-085, ENACTED AT THE FIRST REGULAR SESSION OF THE  
5 SIXTY-SIXTH GENERAL ASSEMBLY;

6 (k) FINANCING, DIRECTLY OR INDIRECTLY, ANY CREDIT, LIFE,  
7 DISABILITY, OR UNEMPLOYMENT INSURANCE PREMIUMS, ANY OTHER LIFE  
8 OR HEALTH INSURANCE PREMIUMS, OR ANY DEBT COLLECTION  
9 AGREEMENT. INSURANCE PREMIUMS CALCULATED AND PAID ON A  
10 MONTHLY BASIS SHALL NOT BE CONSIDERED FINANCED BY THE LENDER.

11 (l) KNOWINGLY OR INTENTIONALLY FLIPPING A RESIDENTIAL  
12 MORTGAGE LOAN. AS USED IN THIS PARAGRAPH (l), "FLIPPING" MEANS  
13 MAKING A RESIDENTIAL MORTGAGE LOAN THAT REFINANCES AN EXISTING  
14 RESIDENTIAL MORTGAGE LOAN WHEN THE NEW LOAN DOES NOT HAVE  
15 REASONABLE, TANGIBLE NET BENEFIT TO THE CONSUMER CONSIDERING  
16 ALL OF THE CIRCUMSTANCES, INCLUDING THE TERMS OF BOTH THE NEW  
17 AND REFINANCED LOANS, THE COST OF THE NEW LOAN, AND THE  
18 CONSUMER'S CIRCUMSTANCES. THIS PARAGRAPH (l) APPLIES REGARDLESS  
19 OF WHETHER THE INTEREST RATE, POINTS, FEES, AND CHARGES PAID OR  
20 PAYABLE BY THE CONSUMER IN CONNECTION WITH THE REFINANCING  
21 EXCEED ANY THRESHOLDS SPECIFIED BY LAW.

22 (m) KNOWINGLY TAKING ADVANTAGE OF THE INABILITY OF A  
23 CONSUMER TO REASONABLY PROTECT THE CONSUMER'S INTERESTS  
24 BECAUSE OF THE CONSUMER'S KNOWN PHYSICAL OR MENTAL INFIRMITIES,  
25 ILLITERACY, OR UNFAMILIARITY WITH THE ENGLISH LANGUAGE;

26 (n) ENTERING INTO A CONSUMER TRANSACTION THAT INCLUDES OR  
27 IS CONNECTED WITH A RESIDENTIAL MORTGAGE LOAN KNOWING THERE

1 WAS NO REASONABLE PROBABILITY OF PAYMENT OF THE OBLIGATION BY  
2 THE CONSUMER;

3 (o) ENFORCING OR ATTEMPTING TO ENFORCE BY ANY MEANS,  
4 INCLUDING BUT NOT LIMITED TO THE FILING OF A CIVIL ACTION:

5 (I) A PREPAYMENT PENALTY ON A LOAN SECURED BY A FIRST  
6 MORTGAGE ON RESIDENTIAL REAL ESTATE IN AN AMOUNT LESS THAN  
7 SEVENTY-FIVE THOUSAND DOLLARS; OR

8 (II) ANY UNCONSCIONABLE ARBITRATION CLAUSE,  
9 UNCONSCIONABLE CLAUSE REQUIRING THE CONSUMER TO PAY THE  
10 CREDITOR'S ATTORNEY FEES, OR UNCONSCIONABLE LIQUIDATED DAMAGES  
11 CLAUSE INCLUDED IN A RESIDENTIAL MORTGAGE LOAN CONTRACT; AND

12 (p) BY REFERRING TO ANY CLAUSE LISTED IN SUBPARAGRAPH (II)  
13 OF PARAGRAPH (o) OF THIS SUBSECTION (1.7), ATTEMPTING TO INDUCE THE  
14 CONSUMER TO TAKE OR REFRAIN FROM TAKING ANY SPECIFIC ACTION.

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

23 (II) THIS PARAGRAPH (c) SHALL NOT APPLY TO AN  
24 UNCONSCIONABLE ACT OR PRACTICE UNDER SUBSECTION (1.7) OF THIS  
25 SECTION, OTHER THAN AN UNCONSCIONABLE CLAUSE SPECIFIED IN  
26 SUBPARAGRAPH (II) OF PARAGRAPH (o) OF SUBSECTION (1.7).

27 **SECTION 5. Effective date - applicability.** This act shall take

1 effect July 1, 2007, and shall apply to offenses committed on or after said  
2 date.

3 **SECTION 6. Safety clause.** The general assembly hereby finds,  
4 determines, and declares that this act is necessary for the immediate  
5 preservation of the public peace, health, and safety.