

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

**REVISED**

*This Version Includes All Amendments Adopted  
on Second Reading in the Second House*

LLS NO. 07-0823.01 Duane Gall

**SENATE BILL 07-216**

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**SENATE SPONSORSHIP**

**Veiga,**

**HOUSE SPONSORSHIP**

**Marshall,**

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**Senate Committees**

Business, Labor and Technology  
Appropriations

**House Committees**

Business Affairs and Labor  
Appropriations

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**A BILL FOR AN ACT**

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

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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

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.*

HOUSE  
Amended 2nd Reading  
May 2, 2007

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.

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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, 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.

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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) EXCEPT AS THIS SUBSECTION (1.7) MAY BE ENFORCED BY THE  
15 ATTORNEY GENERAL OR A DISTRICT ATTORNEY, ONLY THE ORIGINAL  
16 PARTIES TO A TRANSACTION SHALL HAVE A RIGHT OF ACTION UNDER THIS  
17 SUBSECTION (1.7), AND NO ACTION OR CLAIM UNDER THIS SUBSECTION  
18 (1.7) MAY BE BROUGHT AGAINST A PURCHASER FROM, OR ASSIGNEE OF, A  
19 PARTY TO THE TRANSACTION.

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

1 (II) THIS PARAGRAPH (c) SHALL NOT APPLY TO AN  
2 UNCONSCIONABLE ACT OR PRACTICE UNDER SUBSECTION (1.7) OF THIS  
3 SECTION.

4 (6) AS USED IN THIS SECTION, UNLESS THE CONTEXT OTHERWISE  
5 REQUIRES:

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

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

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

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

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

17 (f) "ORIGINATE" HAS THE MEANING SET FORTH IN SECTION  
18 12-61-902 (7), C.R.S.

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

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

1 necessary, for the implementation of this act. Of said sum, forty-eight  
2 thousand four hundred fifty-six dollars (\$48,456) shall be allocated to the  
3 executive director's office for the purchase of legal services from the  
4 department of law and three hundred forty-three thousand seven hundred  
5 eighty-six dollars (\$343,786) and 1.5 FTE shall be allocated to the  
6 division of real estate.

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

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

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

27 **SECTION 7. Safety clause.** The general assembly hereby finds,

- 1 determines, and declares that this act is necessary for the immediate
- 2 preservation of the public peace, health, and safety.