

**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

(None),

Senate Committees

Business, Labor and Technology
Appropriations

House Committees

A BILL FOR AN ACT

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

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.

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.** (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, AS SUCH PUBLICATION MAY BE AMENDED.

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25 **SECTION 3.** 38-40-105 (2) (c), Colorado Revised Statutes, is
26 amended, and the said 38-40-105 is further amended BY THE
27 ADDITION OF THE FOLLOWING NEW SUBSECTIONS, to read:

1 **38-40-105. Prohibited acts by originators of certain mortgage**
2 **loans - unconscionable acts and practices - definitions. (1.7)**

3 **(a) A MORTGAGE BROKER OR MORTGAGE ORIGINATOR SHALL NOT**
4 **COMMIT, OR ASSIST OR FACILITATE THE COMMISSION OF, THE FOLLOWING**
5 **ACTS OR PRACTICES, WHICH ARE HEREBY DEEMED UNCONSCIONABLE:**

6 **(I)** ENGAGING IN A PATTERN OR PRACTICE OF PROVIDING
7 CONSUMER CREDIT TRANSACTIONS TO CONSUMERS BASED
8 PREDOMINANTLY ON ACQUISITION OF THE FORECLOSURE OR LIQUIDATION
9 VALUE OF THE CONSUMER'S COLLATERAL WITHOUT REGARD TO THE
10 CONSUMER'S ABILITY TO REPAY A LOAN IN ACCORDANCE WITH ITS TERMS;
11 EXCEPT THAT ANY REASONABLE METHOD MAY BE USED TO DETERMINE A
12 BORROWER'S ABILITY TO REPAY;

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

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

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

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

7 (2) (c) (I) In order to support a finding of unconscionability, there
8 must be evidence of some bad faith overreaching on the part of the
9 mortgage broker or mortgage originator such as that which results from
10 an unreasonable inequality of bargaining power or under other
11 circumstances in which there is an absence of meaningful choice on the
12 part of one of the parties, together with contract terms that are, under
13 standard industry practices, unreasonably favorable to the mortgage
14 broker, mortgage originator, or lender.

15 (II) THIS PARAGRAPH (c) SHALL NOT APPLY TO AN
16 UNCONSCIONABLE ACT OR PRACTICE UNDER SUBSECTION (1.7) OF THIS
17 SECTION.

18 (6) AS USED IN THIS SECTION, UNLESS THE CONTEXT OTHERWISE
19 REQUIRES:

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

22 (b) "CONSUMER CREDIT TRANSACTION" HAS THE MEANING SET
23 FORTH IN SECTION 5-1-301 (12), C.R.S.

24 (c) "DWELLING" HAS THE MEANING SET FORTH IN SECTION 5-1-301
25 (18), C.R.S.

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

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

3 (f) "MORTGAGE ORIGINATOR" MEANS A PERSON WHO IS IN THE
4 BUSINESS OF ORIGINATING RESIDENTIAL MORTGAGE LOANS.

5 (g) "ORIGINATE" HAS THE MEANING SET FORTH IN SECTION
6 12-61-902 (7), C.R.S.

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

9 **SECTION 4. Effective date - applicability.** This act shall take
10 effect July 1, 2007, and shall apply to offenses committed on or after said
11 date.

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