

**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**

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**SENATE SPONSORSHIP**

**Veiga,**

**HOUSE SPONSORSHIP**

**(None),**

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**Senate Committees**

Business, Labor and Technology  
Appropriations

**House Committees**

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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.*

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

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

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

27 **12-61-908. Fees.** (1) The director may set the fee for registration

1 under this part 9. The fee shall be set in an amount not to exceed two  
2 hundred dollars, that offsets the direct and indirect costs of implementing  
3 this part 9. The moneys collected pursuant to this section shall be  
4 transferred to the state treasurer, who shall credit them to the mortgage  
5 broker registration cash fund.

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

10 **38-40-105. Prohibited acts by originators of certain mortgage**  
11 **loans - unconscionable acts and practices - definitions. (1.7) ==**

12 (a) A MORTGAGE BROKER OR MORTGAGE ORIGINATOR SHALL NOT  
13 COMMIT, OR ASSIST OR FACILITATE THE COMMISSION OF, THE FOLLOWING  
14 ACTS OR PRACTICES, WHICH ARE HEREBY DEEMED UNCONSCIONABLE:

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

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23 (II) KNOWINGLY OR INTENTIONALLY FLIPPING A RESIDENTIAL  
24 MORTGAGE LOAN. AS USED IN THIS SUBPARAGRAPH (II), "FLIPPING"  
25 MEANS MAKING A RESIDENTIAL MORTGAGE LOAN THAT REFINANCES AN  
26 EXISTING RESIDENTIAL MORTGAGE LOAN WHEN THE NEW LOAN DOES NOT  
27 HAVE REASONABLE, TANGIBLE NET BENEFIT TO THE CONSUMER

1       CONSIDERING ALL OF THE CIRCUMSTANCES, INCLUDING THE TERMS OF  
2       BOTH THE NEW AND REFINANCED LOANS, THE COST OF THE NEW LOAN,  
3       AND THE CONSUMER'S CIRCUMSTANCES. THIS SUBPARAGRAPH (II) APPLIES  
4       REGARDLESS OF WHETHER THE INTEREST RATE, POINTS, FEES, AND  
5       CHARGES PAID OR PAYABLE BY THE CONSUMER IN CONNECTION WITH THE  
6       REFINANCING EXCEED ANY THRESHOLDS SPECIFIED BY LAW.

7                                ==  
8               (III) ENTERING INTO A CONSUMER TRANSACTION THAT INCLUDES  
9       OR IS CONNECTED WITH A RESIDENTIAL MORTGAGE LOAN KNOWING THERE  
10      WAS NO REASONABLE PROBABILITY OF PAYMENT OF THE OBLIGATION BY  
11      THE CONSUMER.

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

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

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

27               (6) AS USED IN THIS SECTION, UNLESS THE CONTEXT OTHERWISE

1 REQUIRES:

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

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

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

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

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

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

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

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

18 **SECTION 5. Appropriation.** (1) In addition to any other  
19 appropriation, there is hereby appropriated, out of any moneys in the  
20 mortgage broker registration cash fund created in Section 12-61-908 (2),  
21 Colorado Revised Statutes, not otherwise appropriated, to the department  
22 of regulatory agencies, for the fiscal year beginning July 1, 2007, the sum  
23 of three hundred seventy-four thousand seventy-seven dollars (\$374,077),  
24 cash funds, and 1.5 FTE, or so much thereof as may be necessary, for the  
25 implementation of this act. Of said sum, forty-eight thousand four  
26 hundred fifty-six dollars (\$48,456) shall be allocated to the executive  
27 director's office for the purchase of legal services from the department of

1 law and three hundred twenty-five thousand six hundred twenty-one  
2 dollars (\$325,621) and 1.5 FTE shall be allocated to the division of real  
3 estate.

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

13 (b) In addition to any other appropriation, there is hereby  
14 appropriated, to the department of law, for allocation to the consumer  
15 protection section, for the fiscal year beginning July 1, 2007, the sum of  
16 two hundred forty-six thousand nine hundred twenty dollars (\$246,920)  
17 and 3.0 FTE, or so much thereof as may be necessary, for the  
18 implementation of this act. Said sum shall be from cash funds exempt  
19 received from the department of regulatory agencies, out of the  
20 appropriation to the division of real estate in subsection 1 of this section.

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

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