

NOTE: This bill has been prepared for the signature of the appropriate legislative officers and the Governor. To determine whether the Governor has signed the bill or taken other action on it, please consult the legislative status sheet, the legislative history, or the Session Laws.



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,

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real estate brokers, real estate appraisers, and others. In regard to such 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 read:

4 **11-102-106. Nontraditional mortgages - consumer protections**
5 **- rules - incorporation of federal interagency guidance.** THE BANKING
6 BOARD SHALL ADOPT RULES GOVERNING THE MARKETING OF
7 NONTRADITIONAL MORTGAGES BY BANKING INSTITUTIONS. IN ADOPTING
8 SUCH RULES, THE BOARD SHALL INCORPORATE APPROPRIATE PROVISIONS
9 OF THE FINAL "INTERAGENCY GUIDANCE ON NONTRADITIONAL MORTGAGE
10 PRODUCT RISKS" RELEASED ON SEPTEMBER 29, 2006, BY THE OFFICE OF
11 THE COMPTROLLER OF THE CURRENCY AND THE OFFICE OF THRIFT
12 SUPERVISION IN THE FEDERAL DEPARTMENT OF THE TREASURY, THE BOARD
13 OF GOVERNORS OF THE FEDERAL RESERVE SYSTEM, THE FEDERAL DEPOSIT
14 INSURANCE CORPORATION, AND THE NATIONAL CREDIT UNION
15 ADMINISTRATION, AS SUCH PUBLICATION MAY BE AMENDED.

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

19

20 **12-61-904.5. Broker's relationship to borrower - rules.** (1) A

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1 MORTGAGE BROKER SHALL HAVE A DUTY OF GOOD FAITH AND FAIR
2 DEALING IN ALL COMMUNICATIONS AND TRANSACTIONS WITH A
3 BORROWER. SUCH DUTY INCLUDES, BUT IS NOT LIMITED TO:

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

9 (b) THE DUTY TO MAKE A REASONABLE INQUIRY CONCERNING THE
10 BORROWER'S CURRENT AND PROSPECTIVE INCOME, EXISTING DEBTS AND
11 OTHER OBLIGATIONS, AND ANY OTHER INFORMATION KNOWN TO THE
12 MORTGAGE BROKER AND, AFTER MAKING SUCH INQUIRY, TO MAKE HIS OR
13 HER BEST EFFORTS TO RECOMMEND, BROKER, OR ORIGINATE A
14 RESIDENTIAL MORTGAGE LOAN THAT TAKES INTO CONSIDERATION THE
15 INFORMATION SUBMITTED BY THE BORROWER; AND

16 (c) THE DUTY NOT TO COMMIT ANY UNCONSCIONABLE ACT OR
17 PRACTICE LISTED IN SECTION [38-40-105](#) (1.7), C.R.S.

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

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

24 **[12-61-910.4](#). Nontraditional mortgages - consumer**
25 **protections - rules - incorporation of federal interagency guidance.**
26 THE DIRECTOR SHALL ADOPT RULES GOVERNING THE MARKETING OF
27 NONTRADITIONAL MORTGAGES BY MORTGAGE BROKERS. IN ADOPTING

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1 SUCH RULES, THE DIRECTOR SHALL INCORPORATE APPROPRIATE
2 PROVISIONS OF THE FINAL "INTERAGENCY GUIDANCE ON NONTRADITIONAL
3 MORTGAGE PRODUCT RISKS" RELEASED ON SEPTEMBER 29, 2006, BY THE
4 OFFICE OF THE COMPTROLLER OF THE CURRENCY AND THE OFFICE OF
5 THRIFT SUPERVISION IN THE FEDERAL DEPARTMENT OF THE TREASURY, THE
6 BOARD OF GOVERNORS OF THE FEDERAL RESERVE SYSTEM, THE FEDERAL
7 DEPOSIT INSURANCE CORPORATION, AND THE NATIONAL CREDIT UNION
8 ADMINISTRATION, AS SUCH PUBLICATION MAY BE AMENDED.

9 **SECTION 3. [12-61-908](#)** (1), Colorado Revised Statutes, is
10 amended to read:

11 **[12-61-908](#). Fees.** (1) The director may set the fee for registration
12 under this part 9. The fee shall be set in an amount ~~not to exceed two~~
13 ~~hundred dollars~~, that offsets the direct and indirect costs of implementing
14 this part 9. The moneys collected pursuant to this section shall be
15 transferred to the state treasurer, who shall credit them to the mortgage
16 broker registration cash fund.

17

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

21 **38-40-105. Prohibited acts by originators of certain mortgage**
22 **loans - unconscionable acts and practices - definitions.** (1.7) (a) A
23 MORTGAGE BROKER OR MORTGAGE ORIGINATOR SHALL NOT COMMIT, OR
24 ASSIST OR FACILITATE THE COMMISSION OF, THE FOLLOWING ACTS OR
25 PRACTICES, WHICH ARE HEREBY DEEMED UNCONSCIONABLE:

26 (I) ENGAGING IN A PATTERN OR PRACTICE OF PROVIDING
27 RESIDENTIAL MORTGAGE LOANS TO CONSUMERS BASED PREDOMINANTLY

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

6

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

18

19 (III) ENTERING INTO A RESIDENTIAL MORTGAGE LOAN
20 TRANSACTION KNOWING THERE WAS NO REASONABLE PROBABILITY OF
21 PAYMENT OF THE OBLIGATION BY THE CONSUMER.

22 (b) EXCEPT AS THIS SUBSECTION (1.7) MAY BE ENFORCED BY THE
23 ATTORNEY GENERAL OR A DISTRICT ATTORNEY, ONLY THE ORIGINAL
24 PARTIES TO A TRANSACTION SHALL HAVE A RIGHT OF ACTION UNDER THIS
25 SUBSECTION (1.7), AND NO ACTION OR CLAIM UNDER THIS SUBSECTION
26 (1.7) MAY BE BROUGHT AGAINST A PURCHASER FROM, OR ASSIGNEE OF, A
27 PARTY TO THE TRANSACTION.

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1 (2) (c) (I) In order to support a finding of unconscionability, there
2 must be evidence of some bad faith overreaching on the part of the
3 mortgage broker or mortgage originator such as that which results from an
4 unreasonable inequality of bargaining power or under other circumstances

5 in which there is an absence of meaningful choice on the part of one of the
6 parties, together with contract terms that are, under standard industry
7 practices, unreasonably favorable to the mortgage broker, mortgage
8 originator, or lender.

9 (II) THIS PARAGRAPH (c) SHALL NOT APPLY TO AN
10 UNCONSCIONABLE ACT OR PRACTICE UNDER SUBSECTION (1.7) OF THIS
11 SECTION.

12 (6) AS USED IN THIS SECTION, UNLESS THE CONTEXT OTHERWISE
13 REQUIRES:

14 (a) "CONSUMER" HAS THE MEANING SET FORTH IN SECTION [5-1-301](#)
15 (10), C.R.S.

16

17 (b) "DWELLING" HAS THE MEANING SET FORTH IN SECTION [5-1-301](#)
18 (18), C.R.S.

19 (c) "MORTGAGE BROKER" HAS THE MEANING SET FORTH IN SECTION
20 [12-61-902](#) (5), C.R.S.

21 (d) "MORTGAGE LENDER" HAS THE MEANING SET FORTH IN SECTION
22 [12-61-902](#) (6), C.R.S.

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

25 (f) "ORIGINATE" HAS THE MEANING SET FORTH IN SECTION
26 [12-61-902](#) (7), C.R.S.

27 (g) "RESIDENTIAL MORTGAGE LOAN" HAS THE MEANING SET FORTH

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1 IN SECTION [12-61-902](#) (8), C.R.S.

2 **SECTION 5. Appropriation.** (1) In addition to any other
3 appropriation, there is hereby appropriated, out of any moneys in the
4 mortgage broker registration cash fund created in Section [12-61-908](#) (2),
5 Colorado Revised Statutes, not otherwise appropriated, to the department
6 of regulatory agencies, for the fiscal year beginning July 1, 2007, the sum
7 of three hundred nine-two thousand two hundred forty-two dollars
8 (\$392,242), cash funds, and 1.5 FTE, or so much thereof as may be
9 necessary, for the implementation of this act. Of said sum, forty-eight
10 thousand four hundred fifty-six dollars (\$48,456) shall be allocated to the
11 executive director's office for the purchase of legal services from the
12 department of law and three hundred forty-three thousand seven hundred
13 eighty-six dollars (\$343,786) and 1.5 FTE shall be allocated to the
14 division of real estate.

15 (2) (a) In addition to any other appropriation, there is hereby
16 appropriated, to the department of law, for the fiscal year beginning July 1,
17 2007, the sum of forty-eight thousand four hundred fifty-six dollars

18 (\$48,456) and 0.4 FTE, or so much thereof as may be necessary, for the
19 provision of legal services to the department of regulatory agencies related
20 to the implementation of this act. Said sum shall be from cash funds
21 exempt received from the department of regulatory agencies, executive
22 director's office out of the appropriation for legal services in subsection
23 1 of this section.

24 (b) In addition to any other appropriation, there is hereby
25 appropriated, to the department of law, for allocation to the consumer
26 protection section, for the fiscal year beginning July 1, 2007, the sum of
27 two hundred sixty-five thousand eighty-five dollars (\$265,085) and 3.0

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1 FTE, or so much thereof as may be necessary, for the implementation of
2 this act. Said sum shall be from cash funds exempt received from the
3 department of regulatory agencies, out of the appropriation to the division
4 of real estate in subsection 1 of this section.

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

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