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SENATE BILL NO. 989

Offered January 10, 2007

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A BILL to amend and reenact §§ 6.1-409, 6.1-417, 6.1-419, 6.1-420, 6.1-422, 6.1-426, 6.1-428, 6.1-430, and 6.1-431 of the Code of Virginia, relating to the Mortgage Lender and Broker Act; mortgage loan servicing practices; penalties.

 Patron—Deeds

Referred to Committee on Commerce and Labor

Be it enacted by the General Assembly of Virginia:

1. That §§ 6.1-409, 6.1-417, 6.1-419, 6.1-420, 6.1-422, 6.1-426, 6.1-428, 6.1-430, and 6.1-431 of the Code of Virginia are amended and reenacted as follows:

§ 6.1-409. Definitions.

As used in this chapter, the following words and terms shall have the following meanings unless the context requires a different meaning:

"Acceleration" means a demand for immediate repayment of the entire balance of a home loan.

"Borrower" means any natural person obligated to repay a mortgage loan, including a co-borrower or cosigner.

"Commission" means the State Corporation Commission.

"Commissioner" means the Commissioner of the Bureau of Financial Institutions.

"Mortgage broker" means any person who directly or indirectly negotiates, places or finds mortgage loans for others, or offers to negotiate, place or find mortgage loans for others. Any licensed mortgage lender that, pursuant to an executed originating agreement with the Virginia Housing Development Authority, acts or offers to act as an originating agent of the Virginia Housing Development Authority in connection with a mortgage loan shall not be deemed to be acting as a mortgage broker with respect to such mortgage loan but shall be deemed to be acting as a mortgage lender with respect to such mortgage loan, notwithstanding that the Virginia Housing Development Authority is or would be the payee on the note evidencing such mortgage loan and that the Virginia Housing Development Authority provides or would provide the funding of such mortgage loan prior to or at the settlement thereof.

"Mortgage lender" means any person who directly or indirectly originates or makes mortgage loans.

"Mortgage loan" means a loan made to an individual, the proceeds of which are to be used primarily for personal, family or household purposes, which loan is secured by a mortgage or deed of trust upon any interest in one- to four-family residential owner-occupied property located in the Commonwealth, regardless of where made, including the renewal or refinancing of any such loan, but excluding (i) loans or extensions of credit to buyers of real property for any part of the purchase price of such property by persons selling such property owned by them, (ii) loans to persons related to the lender by blood or marriage, and (iii) loans to persons who are bona fide employees of the lender. "Mortgage loan" shall not include any loan that is made primarily for a business, commercial, or agricultural purpose.

"Mortgage loan servicing" means receiving any scheduled periodic payments from a borrower pursuant to the terms of any mortgage loan and making the payments of principal and interest and such other payments with respect to the amounts received from the borrower as may be required pursuant to the terms of the mortgage loan.

"Person" means any individual, firm, corporation, partnership, association, trust, or legal or commercial entity or group of individuals however organized.

"Principal" means any person who, directly or indirectly, owns or controls (i) ten percent or more of the outstanding stock of a stock corporation or (ii) a ten percent or greater interest in a nonstock corporation or a limited liability company.

"Residential property" means improved real property used or occupied, or intended to be used or occupied, for residential purposes.

"Servicer" means the person responsible for the servicing of a mortgage loan, including the person who makes or holds a mortgage loan if such person also services the mortgage loan. The term does not include:

1. The Federal Deposit Insurance Corporation or the Resolution Trust Corporation, in connection with assets acquired, assigned, sold, or transferred pursuant to § 13(c) of the Federal Deposit Insurance Act or as receiver or conservator of an insured depository institution; and

2. The Federal National Mortgage Corporation; the Federal Home Loan Mortgage Corporation; the Resolution Trust Corporation; the Federal Deposit Insurance Corporation; the federal Department of

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59 *Housing and Urban Development (HUD), including the Government National Mortgage Association and*
60 *the Federal Housing Administration, including cases in which a mortgage insured under the National*
61 *Housing Act (12 U.S.C. 1701 et seq.) is assigned to HUD; the National Credit Union Administration;*
62 *the Farmers Home Administration; and the Department of Veterans Affairs, in any case in which the*
63 *assignment, sale, or transfer of the servicing of the mortgage loan is preceded by termination of the*
64 *contract for servicing the loan for cause, commencement of proceedings for bankruptcy of the servicer,*
65 *or commencement of proceedings by the Federal Deposit Insurance Corporation or Resolution Trust*
66 *Corporation for conservatorship or receivership of the servicer (or an entity by which the servicer is*
67 *owned or controlled).*

68 *"Servicing" means receiving any scheduled periodic payments from a borrower pursuant to the terms*
69 *of any mortgage loan, including amounts for escrow accounts under section 10 of the federal Real*
70 *Estate Settlement Practices Act, 12 U.S.C. § 2609 et seq., and making the payments to the owner of the*
71 *loan or other third parties of principal and interest and such other payments with respect to the*
72 *amounts received from the borrower as may be required pursuant to the terms of the mortgage servicing*
73 *loan documents or servicing contract. In the case of a home equity conversion mortgage or reverse*
74 *mortgage, servicing includes making payments to the borrower.*

75 § 6.1-417. Retention of books, accounts and records.

76 A. Every lender or broker required to be licensed under this chapter *and every servicer* shall
77 maintain in its licensed offices such books, accounts and records as the Commission may reasonably
78 require in order to determine whether such lender or broker is complying with the provisions of this
79 chapter and rules and regulations adopted in furtherance thereof. Such books, accounts and records shall
80 be maintained apart and separate from any other business in which the lender or broker is involved.

81 B. Each mortgage lender required to be licensed under this chapter *and every servicer* shall retain for
82 at least three years after final payment is made on any mortgage loan or the mortgage loan is sold,
83 whichever first occurs, copies of the note, settlement statement, truth-in-lending disclosure and such
84 other papers or records relating to the loan as may be required by rule or regulation. Each mortgage
85 broker required to be licensed under this chapter shall retain for at least three years after a mortgage
86 loan is made the original contract for his compensation, a copy of the settlement statement, and an
87 account of fees received in connection with the loan, and such other papers or records as may be
88 required by rule or regulation.

89 § 6.1-419. Investigations; examinations.

90 The Commission may, by its designated officers and employees, as often as it deems necessary,
91 investigate and examine the affairs, business, premises and records of any lender or broker required to
92 be licensed under this chapter *and every servicer* insofar as they pertain to any business for which a
93 license is required by this chapter *or servicing activity regulated pursuant to this chapter*. Examinations
94 of such mortgage lenders shall be conducted at least once in each three-year period. In the course of
95 such investigations and examinations, the owners, members, officers, directors, partners and employees
96 of such lender ~~or~~, broker, *or servicer* being investigated or examined shall, upon demand of the person
97 making such investigation or examination, afford full access to all premises, books, records and
98 information which the person making such investigation or examination deems necessary. For the
99 foregoing purposes, the person making such investigation or examination shall have authority to
100 administer oaths, examine under oath all the aforementioned persons, and compel the production of
101 papers and objects of all kinds. *The expenses incurred by the Commission in conducting investigations*
102 *and examinations of servicers under this chapter shall be paid from fees collected under § 6.1-420.*

103 § 6.1-420. Annual fees.

104 A. In order to defray the costs of their examination, supervision and regulation, every mortgage
105 lender required to be licensed under this chapter shall pay an annual fee calculated in accordance with a
106 schedule set by the Commission. The schedule shall bear a reasonable relationship to the business
107 volume of such individual mortgage lenders, the actual costs of their examinations, and to other factors
108 relating to their supervision and regulation. Every mortgage broker required to be licensed under this
109 chapter shall pay an annual fee calculated in accordance with a schedule set by the Commission. The
110 schedule shall bear a reasonable relationship to the volume of business transacted by such mortgage
111 broker, to the actual cost of examination and to other factors relating to their supervision and regulation.
112 All such fees shall be assessed on or before April 25 for every calendar year. All such fees shall be paid
113 by the licensed mortgage lenders and mortgage brokers to the State Treasurer on or before May 25
114 following each assessment.

115 B. In addition to the annual fee prescribed in subsection A of this section, when it becomes
116 necessary to examine or investigate the books and records of a mortgage lender or mortgage broker
117 required to be licensed under this chapter *or any servicer* at a location outside the Commonwealth, the
118 mortgage lender ~~or~~, mortgage broker, *or servicer* shall be liable for and shall pay to the Commission
119 within thirty days of the presentation of an itemized statement, the actual travel and reasonable living
120 expenses incurred on account of its examination, supervision and regulation, or shall pay at a reasonable

per diem rate approved by the Commission.

§ 6.1-422. Prohibited predatory practices.

A. No lender or broker required to be licensed under this chapter shall:

1. Obtain any agreement or instrument in which blanks are left to be filled in after execution;

2. Take an interest in collateral other than the real estate or residential property securing a mortgage loan, including any fixtures and appliances thereon and any mobile or manufactured home placed on such real estate even if such mobile or manufactured home is not permanently affixed thereto;

3. Obtain any exclusive dealing or exclusive agency agreement from any borrower;

4. Delay closing of any mortgage loan for the purpose of increasing interest, costs, fees, or charges payable by the borrower;

5. Obtain any agreement or instrument executed by a borrower which contains an acceleration clause permitting the unpaid balance of a mortgage loan to be declared due for any reason other than failure to make timely payments of interest and principal, submitting false information in connection with an application for the mortgage loan, breaching any representation or covenant made in the agreement or instrument, or failing to perform any other obligations undertaken in the agreement or instrument;

6. If acting as a mortgage lender, fail to require the person closing the mortgage loan to provide to the borrower prior to closing of the mortgage loan, a (i) settlement statement and (ii) disclosure which conforms to that required by the provisions of 15 U.S.C. (§ 1601 et seq.) and Regulation Z, 12 CFR Part 226; or

7. Recommend or encourage a person to default on an existing loan or other debt, if such default adversely affects such person's creditworthiness, in connection with the solicitation or making of a mortgage loan that refinances all or any portion of such existing loan or debt.

B. No mortgage broker required to be licensed under this chapter shall:

1. Except for documented costs of credit report and appraisals, receive compensation from a borrower until a written commitment to make a mortgage loan is given to the borrower by a mortgage lender;

2. Receive compensation from a mortgage lender of which he is a principal, partner, trustee, director, officer or employee;

3. Receive compensation from a borrower in connection with any mortgage loan transaction in which he is the lender or a principal, partner, trustee, director or officer of the lender;

4. Receive compensation from the borrower other than that specified in a written agreement signed by the borrower; or

5. Receive compensation for negotiating, placing or finding a mortgage loan where such mortgage broker, or any person affiliated with such mortgage broker, has otherwise acted as a real estate broker, agent or salesman in connection with the sale of the real estate which secures the mortgage loan and such mortgage broker or affiliated person has received or will receive any other compensation or thing of value from the lender, borrower, seller or any other person, unless the borrower is given the following notice in writing at the time the mortgage broker services are first offered to the borrower:

NOTICE

WE HAVE OFFERED TO ASSIST YOU IN OBTAINING A MORTGAGE LOAN. IF WE ARE SUCCESSFUL IN OBTAINING A LOAN FOR YOU, WE WILL CHARGE AND COLLECT FROM YOU A FEE OF % OF THE LOAN AMOUNT.

WE DO NOT REPRESENT ALL OF THE LENDERS IN THE MARKET AND THE LENDERS WE DO REPRESENT MAY NOT OFFER THE LOWEST INTEREST RATES OR BEST TERMS AVAILABLE TO YOU. YOU ARE FREE TO SEEK A LOAN WITHOUT OUR ASSISTANCE, IN WHICH EVENT YOU WILL NOT BE REQUIRED TO PAY US A FEE FOR THAT SERVICE.

IF YOU ARE A MEMBER OF A CREDIT UNION YOU SHOULD COMPARE OUR INTEREST RATES AND TERMS WITH THE MORTGAGE LOANS AVAILABLE THROUGH YOUR CREDIT UNION.

.....
BORROWER'S SIGNATURE

.....
BORROWER'S SIGNATURE

The foregoing notice shall be in at least 10-point type and the prospective borrower shall acknowledge receipt of the written notice.

As used in this subdivision, the term "affiliated person of a mortgage broker" means any person which is a subsidiary, stockholder, partner, trustee, director, officer or employee of a mortgage broker, and any corporation ten percent or more of the capital stock of which is owned by a mortgage broker or by any person which is a subsidiary, stockholder, partner, trustee, director, officer or employee of a mortgage broker.

C. Notwithstanding the provisions of subdivision 5 of subsection B, no person shall act as a mortgage broker in connection with any real estate sales transaction in which such person, or any person

181 affiliated with such person (as defined in subdivision 5 of subsection B), has acted as a real estate
 182 broker, agent or salesman and has received or will receive compensation in connection with such
 183 transaction, unless such person was regularly engaged in acting as a mortgage broker in the
 184 Commonwealth as of February 25, 1989. However, the provisions of this chapter shall not be construed
 185 to prohibit a real estate broker, as defined in § 54.1-2100, who is either an owner of an interest in a real
 186 estate firm or acts as a real estate broker in a sole proprietorship from having an ownership interest in a
 187 mortgage broker or mortgage lender, as defined in this chapter, or from receiving returns on investment
 188 arising from such ownership interest or payment of compensation for services actually performed for
 189 such mortgage broker or lender.

190 *D. No servicer shall:*

191 *1. Fail to take timely action to respond to a borrower's requests to correct errors relating to*
 192 *allocation of payments, final balances for purposes of paying off the mortgage loan, or other duties*
 193 *relating to the servicing of the mortgage loan;*

194 *2. Fail to respond to an inquiry submitted by a borrower to the extent that a servicer of a federally*
 195 *related mortgage has a duty to respond to an inquiry pursuant to 12 U.S.C. § 2605(e);*

196 *3. Fail to apply promptly to the mortgage loan all payments received;*

197 *4. Take any action, or refrain from taking any action, for the primary purpose of creating a default*
 198 *under the terms of a mortgage loan;*

199 *5. Charge a borrower a late payment charge unless the loan documents specifically authorize the*
 200 *charge;*

201 *6. Commence or prosecute any activity or proceeding, including nonjudicial proceedings, to sell*
 202 *property pursuant to a deed of trust or mortgage or otherwise foreclose upon a security interest or lien*
 203 *securing the mortgage loan, if:*

204 *a. The activity or proceeding is not authorized by the terms of the deed of trust, mortgage, or*
 205 *security agreement; or*

206 *b. The borrower has cured or tendered payment to cure any default or defaults under the terms of*
 207 *the deed of trust, mortgage, or security agreement within any time period during which such cure is*
 208 *permitted under the terms of the deed of trust, mortgage, or security agreement;*

209 *7. Hold or return to the borrower any payment received on the mortgage loan without applying the*
 210 *payment to the mortgage loan;*

211 *8. Fail to reverse any late fee or similar assessment that is charged in error;*

212 *9. Fail to give the borrower timely notice of loan payment amount changes due to escrow analysis*
 213 *or other payment adjustments;*

214 *10. Charge a late fee or similar assessment as a result of the servicer's failure to notify the borrower*
 215 *timely of any change in the mortgage loan payment amount due to escrow analysis or other payment*
 216 *adjustments;*

217 *11. Fail to attempt in a timely manner to resolve disputes regarding the receipt or application of*
 218 *payments or information in the borrower's mortgage loan account;*

219 *12. Fail to respond promptly to a borrower's inquiry regarding, and fail to fulfill any request for,*
 220 *information regarding the mortgage loan in a timely manner; or*

221 *13. Recommend or encourage default on an existing loan or other debt prior to and in connection*
 222 *with the closing or planned closing of a mortgage loan that refinances all or any portion of such*
 223 *existing loan or debt.*

224 *§ 6.1-426. Cease and desist orders.*

225 If the Commissioner determines that any lender or broker required to be licensed hereunder *or any*
 226 *servicer* has violated any provision of this chapter or any regulation adopted pursuant to thereto, he may,
 227 upon ~~twenty-one~~ 21 days' notice in writing, order such person to cease and desist from such practices
 228 and to comply with the provisions of this chapter. The notice shall be sent by certified mail to the
 229 principal place of business of such lender ~~or~~, broker, *or servicer* and shall state the grounds for the
 230 contemplated action. Within ~~fourteen~~ 14 days of mailing the notice, the person or persons named therein
 231 may file with the Clerk of the Commission a written request for a hearing. If a hearing is requested, the
 232 Commissioner shall not issue a cease and desist order except based upon findings made at such hearing.
 233 Such hearing shall be conducted in accordance with the provisions of Title 12.1. The Commission may
 234 enforce compliance with any such order issued under this section by imposition and collection of such
 235 fines and penalties as may be prescribed by Commission regulations.

236 *§ 6.1-428. Fines for violations.*

237 In addition to the authority conferred under §§ 6.1-425 and 6.1-426, the Commission may impose a
 238 fine or penalty not exceeding \$2,500 upon any lender or broker required to be licensed under this
 239 chapter *or any servicer* who it determines, in proceedings commenced in accordance with the Rules of
 240 Practice and Procedure of the Commission, has violated any of the provisions of this chapter. For the
 241 purposes of this section, each separate violation shall be subject to the fine or penalty herein prescribed,
 242 and each day after the date of notification, excluding Sundays and holidays, as prescribed in § 2.2-3300,

that an unlicensed person engages in the business or holds himself out to the general public as a mortgage lender or mortgage broker shall constitute a separate violation.

§ 6.1-430. Authority of Attorney General; referral by Commission to Attorney General.

If the Commission determines that a mortgage lender or broker licensed under this chapter is in violation of, or has violated, any provision of Articles 3 (§ 6.1-330.53 et seq.) through 12 (§ 6.1-330.80 et seq.) of Chapter 7.3 of this title or § 6.1-422.1, *or that a servicer is in violation of, or has violated, any provision of subsection D of § 6.1-422*, the Commission may refer the information to the Attorney General and may request that the Attorney General investigate such violations. In the case of such referral, the Attorney General is hereby authorized to seek to enjoin violations of such laws. The circuit court having jurisdiction may enjoin such violations notwithstanding the existence of an adequate remedy at law.

Upon such referral of the Commission, the Attorney General may also seek, and the circuit court may order or decree damages and such other relief allowed by law, including restitution to the extent available to borrowers under applicable law. Persons entitled to any relief as authorized by this section shall be identified by order of the court within 180 days from the date of the order permanently enjoining the unlawful act or practice.

In any action brought by the Attorney General by virtue of the authority granted in this provision, the Attorney General shall be entitled to seek attorney's fees and costs.

§ 6.1-431. Private action still maintainable.

A. Nothing in this ~~article~~ *chapter* shall be construed to preclude any:

1. Any individual or entity who suffers loss as a result of a violation of Articles 3 (§ 6.1-330.53 et seq.) through 12 (§ 6.1-330.80 et seq.) of Chapter 7.3 of this title from maintaining an action to recover damages or restitution and, as provided by statute, attorney's fees; *or*

2. *Any borrower who suffers a loss as a result of a violation of any provision of subsection D of § 6.1-422 from maintaining an action to recover, in addition to reasonable attorneys' fees and costs, the greater of (i) \$1,000 or (ii) the amount of actual damages, if any, sustained.*

B. However, in any matter in which the Attorney General has exercised his authority pursuant to § 6.1-430, an individual action shall not be maintainable if the individual has received damages or restitution pursuant to § 6.1-430.