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SENATE BILL NO. 258

Offered January 9, 2008

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A BILL to amend and reenact §§ 6.1-409, 6.1-411, and 6.1-431 of the Code of Virginia and to amend the Code of Virginia by adding sections numbered 6.1-422.2 through 6.1-422.5, relating to mortgage lending and brokering practices, including subprime loans, negative amortization, special loans, and residential mortgage fraud; penalties.

Patron—Deeds

Referred to Committee on Commerce and Labor

Be it enacted by the General Assembly of Virginia:

1. That §§ 6.1-409, 6.1-411, and 6.1-431 of the Code of Virginia are amended and reenacted and that the Code of Virginia is amended by adding sections numbered 6.1-422.2 through 6.1-422.5, 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:

"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.

"Negative amortization" occurs when the borrower's compliance with any repayment option offered pursuant to the terms of a mortgage loan is insufficient to satisfy the interest accruing on the loan, resulting in an increase in the loan balance. Negative amortization does not occur when a residential mortgage loan is originated, subsidized, or guaranteed by or through an agency of the Commonwealth, a locality, or nonprofit organization, and bears one or more of the following nonstandard payment terms that substantially benefit the borrower: payments vary with income; payments of principal and interest are deferred until the maturity date of the loan or the sale of the residence; principal or interest is forgivable under specified conditions; or where no interest or an annual interest rate of two percent or less is charged in connection with the 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.

"Subprime loan" means:

1. In an adjustable rate loan secured by a first lien on residential property that can increase in interest rate but not decrease in interest rate below the fully indexed rate at the time of origination, a loan for which the annual percentage rate (APR) is greater than two percentage points above the yield *on United States Treasury securities having comparable periods of maturity, as of the 15th day of the preceding month if the rate is set between the first and the 14th day of the month and as of the 15th day of the current month if the rate is set on or after the 15th day;*

2. In the case of any other loan secured by a first lien on residential property, a loan for which the APR is greater than three percentage points above the yield on United States Treasury securities having comparable periods of maturity, as of the 15th day of the preceding month if the rate is set between the first and the 14th day of the month and as of the 15th day of the current month if the rate is set on or after the 15th day; and

3. In the case of any loan secured by a subordinate lien on a residential property, a loan for which the APR is greater than five percentage points above the yield on United States Treasury securities having comparable periods of maturity, as of the 15th day of the preceding month if the rate is set between the first and the 14th day of the month and as of the 15th day of the current month if the rate is set on or after the 15th day.

For purposes of this definition, the annual percentage rate has the meaning given in Code of Federal Regulations, title 12, part 226.

§ 6.1-411. Persons exempt from chapter.

The following shall be exempt from the licensing and*, except as provided in §§ 6.1-422.2 through 6.1-422.5, the* other provisions of this chapter:

1. Lenders making three or fewer mortgage loans in any period of 12 consecutive months;

2. Any person subject to the general supervision of or subject to examination by the Commissioner pursuant to Chapter 2 (§ 6.1-3 et seq.), Chapter 3.01 (§ 6.1-194.1 et seq.), Chapter 4.01 (§ 6.1-225.1 et seq.), Chapter 5 (§ 6.1-227 et seq.) or Chapter 13 (§ 6.1-381 et seq.) of this title;

3. Any lender authorized to engage in business as a bank, savings institution or credit union under the laws of the United States, any state or territory of the United States, or the District of Columbia, and subsidiaries and affiliates of such entities which lender, subsidiary or affiliate is subject to the general supervision or regulation of or subject to audit or examination by a regulatory body or agency of the United States, any state or territory of the United States, or the District of Columbia;

4. Nonprofit corporations making mortgage loans to promote home ownership or improvements for the disadvantaged;

5. Agencies of the federal government, or any state or municipal government, or any quasi-governmental agency making or brokering mortgage loans under the specific authority of the laws of any state or the United States;

6. Persons acting as fiduciaries with respect to any employee pension benefit plan qualified under the Internal Revenue Code who make mortgage loans solely to plan participants from plan assets;

7. Any insurance company;

8. Persons licensed by the Commonwealth as attorneys, real estate brokers, or real estate salesmen, not actively and principally engaged in negotiating, placing or finding mortgage loans, when rendering services as an attorney, real estate broker or real estate salesman; however, a real estate broker or real estate salesman who receives any fee, commission, kickback, rebate or other payment for directly or indirectly negotiating, placing or finding a mortgage loan for others shall not be exempt from the provisions of this chapter;

9. Persons acting in a fiduciary capacity conferred by authority of any court;

10. Persons licensed as small business investment companies by the Small Business Administration; and

11. The Virginia Housing Development Authority and persons who (i) are approved by the Virginia Housing Development Authority pursuant to its rules and regulations to act as field originators with respect to mortgage loans made under its programs and (ii) are not engaged in any other activities for which a license is required to be obtained under this chapter.

§ 6.1-422.2. Loans to pay off special mortgages prohibited; exception.

A. As used in this section:

"Authorized independent loan counselor" means a nonprofit, third-party individual or organization providing homebuyer education programs, foreclosure prevention services, mortgage loan counseling, or credit counseling certified by the United States Department of Housing and Urban Development or an agency of the Commonwealth.

"Special mortgage" means a residential mortgage loan originated, subsidized, or guaranteed by or through an agency of the Commonwealth, a locality, or a nonprofit organization, that bears one or more of the following nonstandard payment terms that substantially benefit the borrower: (i) payments vary with income; (ii) payments of principal or interest are not required or can be deferred under specified conditions; (iii) principal or interest is forgivable under specified conditions; or (iv) where no interest or an annual interest rate of two percent or less is charged in connection with the loan.

B. No mortgage lender or broker, no person required to be licensed under this chapter, and no person exempt from the licensing requirements of this chapter other than a state or federally chartered *bank, state or federally chartered savings institution, state or federally chartered credit union, or person making, providing, or arranging a mortgage loan originated or purchased by an agency of the Commonwealth or a locality, shall make, provide, or arrange for a residential mortgage loan, all or a portion of the proceeds of which are used to fully or partially pay off a special mortgage, unless the borrower has obtained a written certification from an authorized independent loan counselor that the borrower has received counseling on the advisability of the loan transaction.*

6.1-422.3. Prepayment penalties on subprime loans prohibited; exception.

Notwithstanding any provision of Article 12 (§ 6.1-330.80 et seq.) of Chapter 7.3 of this title to the contrary, no mortgage lender or broker, no person required to be licensed under this chapter, and no person exempt from the licensing requirements of this chapter other than a state or federally chartered bank, state or federally chartered savings institution, state or federally chartered credit union, or person making, providing or arranging a mortgage loan originated or purchased by an agency of the Commonwealth or a locality, shall make, provide, or arrange for a subprime loan that contains a provision requiring or permitting the imposition of a penalty, fee, premium, or other charge in the event the loan is prepaid in whole or in part. This prohibition shall not apply to any loan with a principal amount that, or, in the case of an open-end credit plan, in which the borrower's initial maximum credit limit, exceeds the conforming loan size limit for a single-family dwelling as established from time to time by the Federal National Mortgage Association or its successor.

§ 6.1-422.4. Negative amortization loans.

No mortgage lender or broker, no person required to be licensed under this chapter, and no person exempt from the licensing requirements of this chapter other than a state or federally chartered bank, state or federally chartered savings institution, state or federally chartered credit union, or person making, providing or arranging a mortgage loan originated or purchased by an agency of the Commonwealth or a locality, shall make, provide, or arrange for a residential mortgage loan, other than a reverse mortgage pursuant to United States Code, title 15, chapter 41, if the borrower's compliance with any repayment option offered pursuant to the terms of the loan will result in negative amortization during any six-month period.

§ 6.1-422.5. Residential mortgage fraud; penalty.

A. As used in this section, "mortgage lending process" means the process through which an individual seeks or obtains a mortgage loan including, but not limited to, solicitation, application, or origination, negotiation of terms, third-party provider services, underwriting, signing and closing, and funding of the loan. Documents involved in the mortgage lending process include, but are not limited to, uniform residential loan applications or other loan applications; appraisal reports; HUD-1 settlement statements; supporting personal documentation for loan applications such as W-2 forms, verifications of income and employment, bank statements, tax returns, and payroll stubs; and any required disclosures.

B. It shall be unlawful for any person to:

1. Knowingly make or cause to be made any deliberate and material misstatement, misrepresentation, or omission during the mortgage lending process with the intention that it be relied on by a mortgage lender, borrower, or any other party to the mortgage lending process;

2. Knowingly use or facilitate the use of any deliberate and material misstatement, misrepresentation, or omission, knowing the same to contain a material misstatement, misrepresentation, or omission, during the mortgage lending process with the intention that it be relied on by a mortgage lender, borrower, or any other party to the mortgage lending process; or

3. Conspire to violate subdivision 1 or 2.

C. A conviction under this section shall not be predicated solely upon information lawfully disclosed under federal disclosure laws, regulations, and interpretations related to the mortgage lending process.

D. Violations of this section shall be punishable as a Class 1 misdemeanor. Any violation resulting in financial loss of greater than $200 shall be punishable as a Class 6 felony. Any second or subsequent conviction shall be punishable as a Class 6 felony.

E. Upon conviction, in addition to any other punishment, a person found guilty of violating this section shall be ordered by the court to make restitution as the court deems appropriate to any person injured or suffering damages as the proximate result of such violation.

§ 6.1-431. Private action still maintainable.

A. A borrower injured by a violation of the standards, duties, prohibitions, or requirements of §§ 6.1-422 through 6.1-422.4 may bring an action to recover damages sustained, statutory damages equal to the amount of all lender fees included in the amount of the principal of the mortgage loan, and punitive damages if appropriate, together with costs and reasonable attorneys' fees.

B. Nothing in this article shall be construed to preclude 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. 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.

C. The remedies provided in this section are cumulative and do not restrict any other right or remedy otherwise available to the borrower.

2. That the provisions of this act may result in a net increase in periods of imprisonment or commitment. Pursuant to § 30-19.1:4, the estimated amount of the necessary appropriation cannot be determined for periods of imprisonment in state adult correctional facilities and is $0 for periods of commitment to the custody of the Department of Juvenile Justice.