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HOUSE BILL NO. 1776

Offered January 14, 2009

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A BILL to amend and reenact §§ 6.1-409, 6.1-422.1, 6.1-430, and 6.1-431 of the Code of Virginia and to amend the Code of Virginia by adding a section numbered 6.1-422.2, relating to the Mortgage Lender and Broker Act; duties and liabilities of mortgage brokers.

Patrons—McClellan, Peace and Valentine; Senator: McEachin

Referred to Committee for Courts of Justice

Be it enacted by the General Assembly of Virginia:

1. That §§ 6.1-409, 6.1-422.1, 6.1-430, and 6.1-431 of the Code of Virginia are amended and reenacted and that the Code of Virginia is amended by adding a section numbered 6.1-422.2 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:

"Borrower" means any person who has made, or on whose behalf another person has made, an application for a mortgage loan to a mortgage broker or to a mortgage lender.

"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 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 secured by a mortgage or deed of trust upon any interest in a more than four-family residential property or property used for a commercial or agricultural purpose.

"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.

§ 6.1-422.1. "Flipping" prohibited.

A. As used in this section, "flipping" a mortgage loan means refinancing a mortgage loan within 12 months following the date the refinanced mortgage loan was originated, unless the refinancing is in the borrower's best interest. Factors to be considered in determining the same would include but not be limited to whether:

1. The borrower's new monthly payment is lower than the total of all monthly obligations being financed, taking into account the costs and fees;
2. There is a change in the amortization period of the new loan;
3. The borrower receives cash in excess of the costs and fees of refinancing;
4. The borrower's note rate of interest is reduced;
5. There is a change from an adjustable to a fixed rate loan, taking into account costs and fees; or
6. The refinancing is necessary to respond to a bona fide personal need or an order of a court of

59 competent jurisdiction.

60 B. No mortgage lender or broker shall knowingly or intentionally engage in the act or practice of
61 "flipping" a mortgage loan. This provision shall apply regardless of whether the interest rate, points,
62 fees, and charges paid or payable by the borrower in connection with the refinancing exceed any
63 limitation established pursuant to Article 9 (§ 6.1-330.69 et seq.) of Chapter 7.3 of this title.

64 C. The Attorney General, the Commission, or any party to a mortgage loan may enforce the
65 provisions of this section or § 6.1-422.

66 D. ~~In any suit instituted by a borrower who alleges that the defendant violated this section or~~
67 ~~§ 6.1-422, the presiding judge may, in the judge's discretion, allow reasonable attorneys' fees to the~~
68 ~~attorney representing the prevailing party, such attorneys' fees to be taxed as a part of the court costs~~
69 ~~and payable by the losing party, upon a finding by the presiding judge that (i) the party charged with~~
70 ~~the violation has willfully engaged in the act or practice with which he was charged; or (ii) the party~~
71 ~~instituting the action knew, or should have known, that the action was frivolous and malicious.~~

72 E. The provisions of this section shall be in addition to, and shall not impair, the rights of and
73 remedies available to borrowers in mortgage loans otherwise provided by law.

74 § 6.1-422.2. *Duties of mortgage brokers to borrowers.*

75 A mortgage broker, in addition to any other duties imposed by statutory or common law, shall
76 comply with the following duties:

77 1. Act in the borrower's best interest and in the utmost good faith toward the borrower and shall not
78 compromise a borrower's right or interest in favor of another's right or interest, including a right or
79 interest of the mortgage broker;

80 2. Make reasonable efforts to secure a mortgage loan that is in the best interests of the borrower
81 considering borrower circumstances and loan characteristics, including but not limited to the product
82 type, rates, charges, and repayment terms of the loan; and

83 3. Use reasonable skill, care, and diligence.

84 § 6.1-430. Authority of the Attorney General; referral by Commission to Attorney General.

85 A. If the Commission determines that a mortgage lender or broker licensed under this chapter is in
86 violation, or has violated, any provision of Articles 3 (§ 6.1-330.53 et seq.) through 12 (§ 6.1-330.80 et
87 seq.) of Chapter 7.3 of this title ~~or, § 6.1-422.1, or § 6.1-422.2,~~ the Commission may refer the
88 information to the Attorney General and may request that the Attorney General investigate such
89 violations. In the case of such referral, the Attorney General is hereby authorized to seek to enjoin
90 violations of such laws. The circuit court having jurisdiction may enjoin such violations notwithstanding
91 the existence of an adequate remedy at law.

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

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

99 B. The Attorney General shall be authorized to bring an action to enjoin violations of the Real Estate
100 Settlement Procedures Act of 1974 (RESPA), 12 U.S.C. § 2601 et seq., to the extent authorized by §§ 8
101 and 16 of RESPA, 12 U.S.C. §§ 2607 and 2614.

102 § 6.1-431. Private right of action.

103 ~~Nothing in this article shall be construed to preclude any individual or entity~~ A borrower who suffers
104 a 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
105 Chapter 7.3 ~~of any provision of this title from maintaining~~ chapter may bring an action to recover actual
106 damages ~~or restitution and, as provided by statute,~~ In addition to any damages awarded, such person
107 also may be awarded attorney's fees and court costs. If the trier of fact finds that the violation was
108 willful, it may increase damages to an amount not exceeding three times the damages sustained.
109 However, in any matter in which the Attorney General has exercised his authority pursuant to § 6.1-430,
110 an individual action shall not be maintainable if the individual has received damages or restitution
111 pursuant to § 6.1-430.