

**GENERAL ASSEMBLY OF NORTH CAROLINA
SESSION 2007**

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**HOUSE BILL 1817
Committee Substitute Favorable 5/16/07
Senate Commerce, Small Business and Entrepreneurship Committee Substitute
Adopted 7/28/07
Fourth Edition Engrossed 8/1/07**

Short Title: Protect Consumers - Covered Loans.

(Public)

Sponsors:

Referred to:

April 19, 2007

A BILL TO BE ENTITLED

1
2 AN ACT TO PROTECT CONSUMERS REGARDING COVERED LOANS AND TO
3 INCREASE THE COMMISSIONER'S DISCIPLINARY AUTHORITY OVER
4 LICENSEES UNDER THE MORTGAGE LENDING ACT.

5 The General Assembly of North Carolina enacts:

6 **SECTION 1.** G.S. 24-1.1E(a)(5) reads as rewritten:

7 "(5) "Points and fees" is defined as provided in this subdivision.

8 a. The term includes all of the following:

- 9 1. All items required to be disclosed under sections
10 226.4(a) and 226.4(b) of Title 12 of the Code of Federal
11 Regulations, as amended from time to time, except
12 interest or the time-price differential.
- 13 2. All charges for items listed under section 226.4(c)(7) of
14 Title 12 of the Code of Federal Regulations, as amended
15 from time to time, but only if the lender receives direct
16 or indirect compensation in connection with the charge
17 or the charge is paid to an affiliate of the lender;
18 otherwise, the charges are not included within the
19 meaning of the phrase "points and fees".
- 20 3. ~~All compensation paid directly by the borrower to a~~
21 ~~mortgage broker not otherwise included in~~
22 ~~sub-subdivision a.1. or a.2. of this subdivision.~~To the
23 extent not otherwise included in sub-subdivision a.1. or
24 a.2. of this subdivision, all compensation paid from any
25 source to a mortgage broker, including compensation
26 paid to a mortgage broker in a table-funded transaction.

A bona fide sale of a loan in the secondary mortgage market shall not be considered a table-funded transaction, and a table-funded transaction shall not be considered a secondary market transaction.

4. The maximum prepayment fees and penalties which may be charged or collected under the terms of the loan documents.

b. Notwithstanding the remaining provisions of this subdivision, the term does not include (i) taxes, filing fees, recording and other charges and fees paid or to be paid to public officials for determining the existence of or for perfecting, releasing, or satisfying a security interest; and (ii) fees paid to a person other than a lender or an affiliate of the lender or to the mortgage broker or an affiliate of the mortgage broker for the following: fees for tax payment services; fees for flood certification; fees for pest infestation and flood determinations; appraisal fees; fees for inspections performed prior to closing; credit reports; surveys; attorneys' fees (if the borrower has the right to select the attorney from an approved list or otherwise); notary fees; escrow charges, so long as not otherwise included under sub-subdivision a. of this subdivision; title insurance premiums; and ~~fire~~ premiums for insurance against loss or damage to property, including hazard insurance and flood insurance premiums, provided that the conditions in section 226.4(d)(2) of Title 12 of the Code of Federal Regulations are met.

c. For open-end credit plans, the term includes those points and fees described in sub-subdivisions a.1. through a.3. of this subdivision that are charged at or before loan closing, plus (i) the minimum additional fees the borrower would be required to pay to draw down an amount equal to the total loan amount, and (ii) the maximum prepayment fees and penalties which may be charged or collected under the terms of the loan documents."

SECTION 2. G.S. 24-1.1E(a) is amended by adding the following new subdivisions to read:

"(4a) "Mortgage broker" is as defined in G.S. 53-243.01(14).

...

(5a) A "table-funded transaction" is a loan transaction closed by a mortgage broker in the mortgage broker's own name with funds advanced by a person other than the mortgage broker in which the loan is assigned contemporaneously or within one business day of the funding of the loan to the person that advanced the funds."

SECTION 3. G.S. 24-1.1E is amended by adding a new subsection to read:

1 "(g) A mortgage broker who brokers a high-cost home loan that violates any
2 provisions of subsection (b) or (c) of this section shall be jointly and severally liable
3 with the lender."

4 **SECTION 4.** Article 1 of Chapter 24 of the General Statutes is amended by
5 adding a new section to read:

6 **"§ 24-1.1F. Rate spread home loans.**

7 "(a) Definitions.–The following definitions apply for purposes of this section:

8 (1) Annual percentage rate. – The annual percentage rate for the loan
9 calculated according to the provisions of the federal Truth-in-Lending
10 Act (15 U.S.C. § 1601, et seq.) and the regulations promulgated
11 thereunder by the Federal Reserve Board, as that Act and regulations
12 are amended from time to time.

13 (2) Closed-end loan. – A loan other than an open-end credit plan as
14 defined in this section.

15 (3) Home loan. – A loan that has all of the following characteristics:

16 a. The loan is not an equity line of credit as defined in
17 G.S. 24-9(a)(2), a construction loan as defined in G.S. 24-10(c),
18 or a reverse mortgage transaction.

19 b. The borrower is a natural person.

20 c. The debt is incurred by the borrower primarily for personal,
21 family, or household purposes.

22 d. The principal amount of the loan does not exceed the
23 conforming loan size limit for a single-family dwelling as
24 established from time to time for Fannie Mae.

25 e. The loan is secured by (i) a security interest in a manufactured
26 home, as defined in G.S. 143-147(7), in the State which is or
27 will be occupied by the borrower as the borrower's principal
28 dwelling, (ii) a mortgage or deed of trust on real property in the
29 State upon which there is located an existing structure designed
30 principally for occupancy of from one to four families that is or
31 will be occupied by the borrower as the borrower's principal
32 dwelling, or (iii) a mortgage or deed of trust on real property in
33 the State upon which there is to be constructed using the loan
34 proceeds a structure or structures designed principally for
35 occupancy of from one to four families which, when completed,
36 will be occupied by the borrower as the borrower's principal
37 dwelling.

38 f. A purpose of the loan is to (i) purchase the dwelling, (ii)
39 construct, repair, rehabilitate, remodel, or improve the dwelling
40 or the real property on which it is located, (iii) satisfy and
41 replace an existing obligation secured by the same real
42 property, or (iv) consolidate existing consumer debts into a new
43 home loan.

- 1 (4) Mortgage broker. – A mortgage broker as defined in
2 G.S. 53-243.01(14).
- 3 (5) Obligor. – Each borrower, co-borrower, cosigner, or guarantor
4 obligated to repay a rate spread home loan.
- 5 (6) Open-end credit plan. – Credit extended by a lender under a plan in
6 which (i) the lender reasonably contemplates repeated transactions, (ii)
7 the lender may charge interest or otherwise impose a finance charge
8 from time to time on an outstanding unpaid balance, and (iii) the
9 amount of credit that may be extended to the obligor during the term of
10 the plan, up to any credit limit set by the lender, is generally made
11 available to the extent that any outstanding balance is repaid.
- 12 (7) Rate spread home loan. – A home loan in which all the following
13 apply:
- 14 a. The difference between the annual percentage rate for the loan
15 and the yield on U.S. Treasury securities having comparable
16 periods of maturity is either equal to or greater than (i) 3
17 percentage points (3%), if the loan is secured by a first lien
18 mortgage or deed of trust, or (ii) 5 percentage points (5%), if
19 the loan is secured by a subordinate lien mortgage or deed of
20 trust. Without regard to whether the loan is subject to or
21 reportable under the provisions of the Home Mortgage
22 Disclosure Act (12 U.S.C. § 2801, et seq.) (HMDA), the
23 difference between the annual percentage rate and the yield on
24 Treasury securities having comparable periods of maturity shall
25 be determined using the same procedures and calculation
26 methods applicable to loans that are subject to the reporting
27 requirements of HMDA, as those procedures and calculation
28 methods are amended from time to time, provided that the yield
29 on Treasury securities shall be determined as of the fifteenth
30 day of the month prior to the application for the loan.
- 31 b. The difference between the annual percentage rate for the loan
32 and the conventional mortgage rate is either equal to or greater
33 than (i) 1.75 percentage points (1.75%), if the loan is secured by
34 a first lien mortgage or deed of trust, or (ii) 3.75 percentage
35 points (3.75%), if the loan is secured by a subordinate lien
36 mortgage or deed of trust. For purposes of this calculation, the
37 "conventional mortgage rate" means the most recent daily
38 contract interest rate on commitments for fixed-rate first
39 mortgages published by the Board of Governors of the Federal
40 Reserve System in its Statistical Release H.15, or any
41 publication that may supersede it, during the week preceding
42 the week in which the interest rate for the loan is set.
- 43 (b) No prepayment fees or penalties shall be charged or collected on a rate spread
44 home loan.

1 (c) No lender shall make a rate spread home loan unless the lender reasonably
2 and in good faith believes at the time the loan is consummated that one or more of the
3 obligors, when considered individually or collectively, has the ability to repay the loan
4 according to its terms and to pay applicable real estate taxes and hazard insurance
5 premiums. If a lender making a rate spread home loan knows that one or more mortgage
6 loans secured by the same real property will be made contemporaneously to the same
7 borrower with the rate spread home loan being made by that lender, the lender making
8 the rate spread home loan must document the borrower's ability to repay the combined
9 payments of all loans on the same real property.

10 (1) A lender's analysis of an obligor's ability to repay a rate spread home
11 loan according to the loan terms and to pay related real estate taxes and
12 insurance premiums shall be based on a consideration of the obligor's
13 credit history, current and expected income, current obligations,
14 employment status, and other financial resources other than the
15 obligor's equity in the real property that secures repayment of the rate
16 spread home loan.

17 (2) In determining an obligor's ability to repay a rate spread home loan,
18 the lender shall take reasonable steps to verify the accuracy and
19 completeness of information provided by or on behalf of the obligor
20 using tax returns, payroll receipts, bank records, reasonable alternative
21 methods, or reasonable third-party verification.

22 (3) In determining an obligor's ability to repay a rate spread home loan
23 according to its terms when the loan has an adjustable rate feature, the
24 lender shall take into consideration any balance increase that may
25 accrue from any negative amortization provision. The lender shall
26 calculate the monthly payment amount for principal and interest by
27 assuming (i) the loan proceeds are fully disbursed on the date of the
28 loan closing, (ii) the loan is to be repaid in substantially equal monthly
29 amortizing payments of principal and interest over the entire term of
30 the loan, with no balloon payment, and (iii) the interest rate over the
31 entire term of the loan is a fixed rate equal to the fully indexed interest
32 rate at the time of the loan closing, without considering any initial
33 discounted rate. The "fully indexed interest rate at the time of the loan
34 closing" is the interest rate that would have applied at the time of the
35 closing had the initial interest rate been determined by the application
36 of the same interest rate formula, (for example, an interest rate index
37 plus or minus a margin) that applies under the terms of the loan
38 documents to subsequent interest rate adjustments, disregarding any
39 limitations on the amount by which the interest rate may change at any
40 one time.

41 (4) A lender's analysis of an obligor's ability to repay a rate spread loan
42 may utilize reasonable commercially recognized underwriting
43 standards and methodologies, including automated underwriting

1 systems, provided the standards and methodologies comply with the
2 provisions of this section.

3 (d) The making of a rate spread home loan which violates subsection (b) or (c) of
4 this section is hereby declared usurious in violation of the provisions of this Chapter. In
5 addition, any prepayment penalty in violation of this section shall be unenforceable.
6 However, an obligor shall not be entitled to recover twice for the same wrong. The
7 Attorney General, the Commissioner of Banks, or any party to a rate spread home loan
8 may enforce the provisions of this section. This section establishes specific consumer
9 protections in rate spread home loans in addition to other consumer protections that may
10 be otherwise available by law. A mortgage broker who brokers a rate spread home loan
11 that violates the provisions of this section shall be jointly and severally liable with the
12 lender.

13 (e) The provisions of this section shall apply to any person who in bad faith
14 attempts to avoid the application of this section by (i) dividing any loan transaction into
15 separate parts for the purpose and with the intent of evading the provisions of this
16 section, or (ii) any other such subterfuge.

17 (f) A lender in a rate spread home loan who, when acting in good faith, fails to
18 comply with this section, will not be deemed to have violated this section if the lender
19 establishes that either:

20 (1) Within 90 days of the loan closing and prior to the institution of any
21 action against the lender under this section, the borrower was notified
22 of the compliance failure, the lender tendered appropriate restitution,
23 the lender offered, at the borrower's option, either to (i) make the rate
24 spread home loan comply with subsection (b) or (c), or (ii) change the
25 terms of the loan in a manner beneficial to the borrower so that the
26 loan will no longer be considered a rate spread home loan subject to
27 the provisions of this section, and within a reasonable period of time
28 following the borrower's election of remedies, the lender took
29 appropriate action based on the borrower's choice; or

30 (2) The compliance failure was not intentional and resulted from a bona
31 fide error notwithstanding the maintenance of procedures reasonably
32 adopted to avoid such errors, and within 120 days after the discovery
33 of the compliance failure and prior to the institution of any action
34 against the lender under this section or the lender's receipt of written
35 notice of the compliance failure, the borrower was notified of the
36 compliance failure, the lender tendered appropriate restitution, the
37 lender offered, at the borrower's option, either to (i) make the rate
38 spread home loan comply with subsection (b) or (c) of this section, or
39 (ii) change the terms of the loan in a manner beneficial to the borrower
40 so that the loan will no longer be considered a rate spread home loan
41 subject to the provisions of this section, and within a reasonable period
42 of time following the borrower's election of remedies, the lender took
43 appropriate action based on the borrower's choice. Examples of a bona
44 fide error include clerical, calculation, computer malfunction and

1 programming, and printing errors. An error of legal judgment with
2 respect to a person's obligations under this section is not a bona fide
3 error.

4 (g) The provisions of this section shall be severable, and if any phrase, clause,
5 sentence, or provision is declared to be invalid or is preempted by federal law or
6 regulation, the validity of the remainder of this section shall not be affected thereby."

7 **SECTION 5.** G.S. 24-10.2 is amended by adding a new subsection to read:

8 "(h) A mortgage broker who brokers a consumer home loan that violates the
9 provisions of this section shall be jointly and severally liable with the lender."

10 **SECTION 6.** G.S. 53-243.04 reads as rewritten:

11 **"§ 53-243.04. Rule-making authority.**

12 The ~~Banking Commission~~Commissioner may adopt any rules when—~~it~~ that the
13 Commissioner deems necessary to carry out the provisions of this Article, to provide for
14 the protection of the borrowing public, and to instruct mortgage lenders or brokers in
15 interpreting this ~~Article~~Article, and to implement and interpret the provisions of
16 G.S. 24-1.1E, 24-1.1F, and 24-10.2 as they apply to licensees under this Article."

17 **SECTION 7.** G.S. 53-243.10 reads as rewritten:

18 **"§ 53-243.10. Mortgage broker duties.**

19 A mortgage broker, including any mortgage broker licensee and any person required
20 to be licensed as a mortgage broker under this Article, shall, in addition to duties
21 imposed by other statutes or at common law;law, shall do all of the following:

22 (1) Safeguard and account for any money handled for the
23 borrower;~~borrower.~~

24 (2) Follow reasonable and lawful instructions from the
25 borrower;~~borrower.~~

26 (3) Act with reasonable skill, care, and ~~diligence;~~and diligence.

27 (4) Make reasonable efforts,~~with lenders with whom the broker regularly~~
28 does business to secure a loan that is reasonably advantageous to the
29 borrower considering all the circumstances, including the rates,
30 charges, and repayment terms of the loan and the loan options for
31 which the borrower qualifies with such lenders.~~loan.~~

32 (5) Timely and clearly disclose to the borrower material information as
33 specified by the Commission that may be expected to influence the
34 borrower's decision and is reasonably accessible to the mortgage
35 broker, including the total compensation the mortgage broker expects
36 to receive from any and all sources in connection with each loan
37 option presented to the borrower.

38 (6) Notify before closing each lender of the particulars of each of the other
39 lender's loans if the mortgage broker knows that more than one
40 mortgage loan will be made by different lenders contemporaneously to
41 a borrower secured by the same real property.

42 (7) Ensure that any services offered to any applicant shall be available and
43 offered to all similarly situated applicants on an equal basis.

- 1 (8) In transactions where the broker has the ability to make credit
2 decisions, use reasonable means to provide borrower with prompt
3 credit decisions on its loan applications and, where the credit is denied,
4 to comply fully with the notification requirements applicable state and
5 federal law.
- 6 (9) Ensure that its advertising materials are designed to make customers
7 and potential customers aware that one mortgage broker does not
8 discriminate on any prohibited basis.
- 9 (10) Provide applicants to whom credit has been denied opportunities to
10 correct or explain adverse or inadequate information, or to provide
11 additional information."

12 **SECTION 8.** G.S. 53-243.11 reads as rewritten:

13 **"§ 53-243.11. Prohibited activities.**

14 In addition to the activities prohibited under other provisions of this Article, it shall
15 be unlawful for any person in the course of any mortgage loan transaction:

- 16 (1) To misrepresent or conceal the material facts or make false promises
17 likely to influence, persuade, or induce an applicant for a mortgage
18 loan or a mortgagor to take a mortgage loan, or to pursue a course of
19 misrepresentation through agents or otherwise.
- 20 (2) To refuse improperly to issue a satisfaction of a mortgage.
- 21 (3) To fail to account for or to deliver to any person any funds, documents,
22 or other thing of value obtained in connection with a mortgage loan,
23 including money provided by a borrower for a real estate appraisal or a
24 credit report, which the mortgage banker, broker, or loan officer is not
25 entitled to retain under the circumstances.
- 26 (4) To pay, receive, or collect in whole or in part any commission, fee, or
27 other compensation for brokering a mortgage loan in violation of this
28 Article, including a mortgage loan brokered by any unlicensed person
29 other than an exempt person.
- 30 (5) To charge or collect any fee or rate of interest or to make or broker any
31 mortgage loan with terms or conditions or in a manner contrary to the
32 provisions of Chapter 24 of the General Statutes.
- 33 (6) To advertise mortgage loans, including rates, margins, discounts,
34 points, fees, commissions, or other material information, including
35 material limitations on the loans, unless the person is able to make the
36 mortgage loans available to a reasonable number of qualified
37 applicants.
- 38 (7) To fail to disburse funds in accordance with a written commitment or
39 agreement to make a mortgage loan.
- 40 (8) To engage in any transaction, practice, or course of business that is not
41 in good faith or fair dealing or that constitutes a fraud upon any
42 person, in connection with the brokering or making of, or purchase or
43 sale of, any mortgage loan.

- 1 (9) To fail promptly to pay when due reasonable fees to a licensed
2 appraiser for appraisal services that are:
3 a. Requested from the appraiser in writing by the mortgage broker
4 or mortgage banker or an employee of the mortgage broker or
5 mortgage banker; and
6 b. Performed by the appraiser in connection with the origination or
7 closing of a mortgage loan for a customer or the mortgage
8 broker or mortgage banker.
- 9 (10) To broker a mortgage loan ~~which~~that contains a prepayment penalty if
10 the principal amount of the loan is one hundred fifty thousand dollars
11 (\$150,000) or ~~less~~less or if the loan is a rate spread home loan as
12 defined in G.S. 24-1.1F.
- 13 (11) To improperly influence or attempt to improperly influence ~~through~~
14 ~~coercion, extortion, or bribery,~~ the development, reporting, result, or
15 review of a real estate appraisal sought in connection with a mortgage
16 loan. Nothing in this subdivision shall be construed to prohibit a
17 mortgage broker or mortgage banker from asking the appraiser to do
18 one or more of the following:
19 a. Consider additional appropriate property information.
20 b. Provide further detail, substantiation, or explanation for the
21 appraiser's value conclusion.
22 c. Correct errors in the appraisal report.
- 23 (12) To fail to comply with the mortgage loan servicing transfer, escrow
24 account administration, or borrower inquiry response requirements
25 imposed by sections 6 and 10 of the Real Estate Settlement Procedures
26 Act (RESPA), 12 U.S.C. § 2605 and § 2609, and regulations adopted
27 there under by the Secretary of the Department of Housing and Urban
28 Development.
- 29 (13) To broker a rate spread adjustable rate mortgage loan without
30 disclosing to the borrower the terms and costs associated with a fixed
31 rate loan from the same lender at the lowest annual percentage rate for
32 which the borrower qualifies.
- 33 (14) To fail to comply with applicable federal laws and regulations related
34 to mortgage lending.
- 35 (15) To engage in unfair, misleading, or deceptive advertising related to a
36 solicitation for a mortgage loan."

37 **SECTION 9.** G.S. 53-243.12 is amended by adding a new subsection to
38 read:

39 "(m) Subject to the provisions of G.S. 53-243.03, the Commissioner may, by order,
40 prohibit licensees under this Article from engaging in acts and practices in connection
41 with mortgage loans that the Commissioner finds to be unfair, deceptive, designed to
42 evade the laws of this State, or that are not in the best interest of the borrowing public."

43 **SECTION 10.** This act becomes effective January 1, 2008. Section 1 of this
44 act applies to consumer home loans entered into on or after that date.