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BANKING AND FINANCE

Financial Institutions: Provide for Licensing of Mortgage Lenders and Mortgage Brokers

CODE SECTIONS: O.C.G.A. §§ 7-1-1000 to -1020 (new)
BILL NUMBER: HB 237
ACT NUMBER: 367
SUMMARY: The Act sets forth guidelines for the licensing and regulation of mortgage brokers and mortgage bankers by the state Department of Banking and Finance (Department). The Act calls for the Department to investigate mortgage companies and individual bankers applying for licenses and to review their lending practices before renewing licenses. A person convicted of violating the Act is guilty of a misdemeanor punishable by imprisonment for less than a year, by a fine not exceeding \$1000, or by both.
EFFECTIVE DATE: April 7, 1993

History

As a result of unscrupulous practices by some mortgage lenders and brokers, the Georgia General Assembly passed a law that regulates mortgage lenders and brokers.¹ Prior to this legislation, mortgage lenders and brokers were not regulated and did not have to be licensed in order to conduct their business activities.² As a result, some of these individuals often took advantage of uneducated consumers who were in desperate financial situations.³ Now unscrupulous mortgage lenders and brokers that have been accused of "gouging" poor borrowers will be licensed and regulated by the Georgia Department of Banking and Finance.⁴

Realizing that some individuals were losing their property as a result of unfair lending practices, Representative Grace Davis introduced HB 237 in the House Committee on Banks and Banking.⁵ HB 237 sought

1. Interview with Rep. Grace Davis, House District No. 48 (July 1, 1993) [hereinafter Davis Interview].

2. *Id.*

3. *Id.*

4. Ben Smith III, *House OKs Licensing Mortgage Companies*, ATLANTA CONST., Feb. 12, 1993, at E3.

5. HB 237, as introduced, 1993 Ga. Gen. Assem.

to regulate and license mortgage lenders and brokers.⁶ The original bill was substituted in the House Committee on Banks and Banking by a more thorough bill.⁷ Later, the House Committee substitute was sent to the House floor where it was amended.⁸ HB 237 passed in the House and went on to the Senate to be voted on.⁹ After the bill was submitted to the Senate Committee on Banks and Banking, it was substituted in Committee and that Senate Committee substitute was adopted by the Senate.¹⁰ The House concurred with the amendments made by the Senate and HB 237 was passed by the Georgia General Assembly.¹¹ The bill was subsequently signed by the Governor on April 7, 1993.¹²

HB 237, as introduced, proposed to amend title 7 of the Georgia Code by adding a new chapter 8.¹³ The House Committee on Banks and Banking, however, submitted a substitute which changed the bill from a new chapter to a new article.¹⁴ One of the most significant changes that the House Committee substitute proposed was the requirement of a corporate surety bond.¹⁵ This substitute and the subsequent bill that passed were more extensive in their regulation than the bill that was initially introduced.¹⁶

The Committee substitute was amended on the House floor.¹⁷ The House floor amendment changed the notice requirement, Code section 7-1-1007 of the House Committee substitute, to limit the notice that had to be given to the Department should there be legal action brought against a licensee.¹⁸ Under the House Committee substitute, a licensee would have had to give notice to the Department of *any* judgment which may have been entered against it by any creditor or borrower.¹⁹ The House floor amendment limited this notice to those actions brought under the article, those that were brought against the bond, and those that involved a claim for damages in excess of ten percent of the tangible net worth of the licensee.²⁰ The House floor amendment also

6. *Id.*

7. HB 237 (HCS), 1993 Ga. Gen. Assem.

8. HB 237 (HFSFA), 1993 Ga. Gen. Assem.

9. Final Composite Status Sheet, Mar. 23, 1993.

10. *Id.*

11. *Id.*

12. *Id.*

13. HB 237, as introduced, 1993 Ga. Gen. Assem.

14. HB 237 (HCS), 1993 Ga. Gen. Assem. This version of HB 237 added article 13.

Id.

15. *Id.* The surety bond and its purposes are discussed further in the analysis of the final bill.

16. Compare HB 237, as passed, 1993 Ga. Gen. Assem. with HB 237 (HCS), 1993 Ga. Gen. Assem.

17. HB 237 (HFSFA), 1993 Ga. Gen. Assem.

18. *Id.*

19. HB 237 (HCS), 1993 Ga. Gen. Assem.

20. HB 237 (HFSFA), 1993 Ga. Gen. Assem.

added Code section 7-1-1013(10) which added to the list of prohibited activities the extension of credit or collection of mortgage debts by extortionate means.²¹ Once the House floor amendment was adopted, the bill went to the Senate for consideration. The Senate Committee on Banking and Finance proposed a substitute to HB 237 and the bill was finally adopted by the Senate.²²

The Senate Committee substitute, which was passed by the General Assembly and signed by the Governor, added Code section 7-1-1001(a)(12).²³ This section exempted from the Act any person who purchased mortgage loans solely as an investment.²⁴ The Senate Committee substitute also modified the amount of money that mortgage brokers had to provide for the surety bond by changing the contribution from \$100,000 to \$50,000.²⁵ The amount of the surety bond for the mortgage lenders, however, was left intact.²⁶ Under the Senate Committee substitute, licensees are also required to disclose to borrowers the consequences surrounding a failure to meet the conditions of their loan, including the possible loss of their property.²⁷ This section further requires that the borrower sign such a disclosure.²⁸ Finally, the Senate Committee substitute withdrew Code section 7-1-1016(4), which regulated the type of advertisements by licensees or registrants who were only brokers.²⁹

HB 237

The Act amends chapter 1, title 7 of the Code relating to financial institutions, by enacting article 13 to regulate mortgage lenders and mortgage brokers.³⁰ This addition is an attempt to afford some protection to poor consumers who are often vulnerable to mortgage lenders and brokers.³¹ Prior to the introduction of this legislation, mortgage lenders and brokers were not subject to any kind of regulation.³² This is evidenced by the fact that many people were

21. *Id.*

22. HB 237 (SCS), 1993 Ga. Gen. Assem.

23. *Id.*

24. O.C.G.A. § 7-1-1001(a)(12) (Supp. 1993).

25. *Id.* § 7-1-1003(c)(2) (Supp. 1993).

26. *Id.*

27. *Id.* § 7-1-1014(3) (Supp. 1993).

28. *Id.*

29. *Id.* § 7-1-1016 (Supp. 1993). This section required licensees who were only brokers to include language that they did not make loans and that the actual funds were provided by other people. HB 237 (HFSFA), 1993 Ga. Gen. Assem.

30. O.C.G.A. §§ 7-1-1000 to -1020 (Supp. 1993).

31. *Id.*

32. '93 Georgia Legislature, Mortgage Lender Bill Goes Back to House, ATLANTA CONST., Mar. 17, 1993, at D3.

losing their homes due to unjust interest rates and other unfair practices utilized by some mortgage lenders and brokers; however, these lending practices did not violate any local, state or federal law.³³ On or after July 1, 1993, individuals will not be allowed to transact business in Georgia as mortgage brokers or mortgage lenders unless they are either licensed as such by the Department or are exempted from the licensing requirements of the Act.³⁴

The Act sets forth a number of definitions. "Mortgage broker" is defined as:

any person who directly or indirectly solicits, processes, places, or negotiates mortgage loans for others, or offers to solicit, process, place, or negotiate mortgage loans for others or who closes mortgage loans which may be in the mortgage broker's own name with funds provided by others and which loans are assigned within 24 hours of the funding of the loans to the mortgage lenders providing the funding of such loans.³⁵

A "[m]ortgage lender" is defined as "any person who directly or indirectly makes, originates, or purchases mortgage loans or who services mortgage loans."³⁶ "Service a mortgage loan" means the "collection or remittance for another or the right to collect or remit for another of payments of principal, interest, trust items such as insurance and taxes, and any other payments pursuant to a mortgage loan."³⁷

Some institutions already have strict guidelines established for their lending procedures.³⁸ As such, banks, savings institutions, building and loan associations and credit unions are exempt from the Act.³⁹ Attorneys who are not principally involved in negotiating mortgage loans are also exempt from the provisions of the Act.⁴⁰ Non-profit corporations making loans to promote home ownership or improvements for the disadvantaged,⁴¹ natural persons employed by a licensed lender or broker,⁴² and government entities are also included in this exempted group.⁴³

33. Smith, *supra* note 4, at E3.

34. O.C.G.A. § 7-1-1002 (Supp. 1993).

35. *Id.* § 7-1-1000(5) (Supp. 1993).

36. *Id.* § 7-1-1000(6) (Supp. 1993).

37. *Id.* § 7-1-1000(11) (Supp. 1993).

38. Davis Interview, *supra* note 1.

39. O.C.G.A. § 7-1-1001(a)(1) (Supp. 1993).

40. *Id.* § 7-1-1001(a)(3) (Supp. 1993).

41. *Id.* § 7-1-1001(a)(10) (Supp. 1993).

42. *Id.* § 7-1-1001(a)(11) (Supp. 1993).

43. People performing any acts related to mortgage loans under order of a court

When an individual applies for a license under the Act, the application must be made in writing and under oath.⁴⁴ The application also has to include the legal name, residence, and business address of the applicant;⁴⁵ the address of the initial registered office and any other locations where the applicant plans to conduct such business;⁴⁶ and the name under which the applicant will conduct business.⁴⁷ Moreover, the application must also include the "general plan and character of the business,"⁴⁸ a "financial statement of the applicant,"⁴⁹ and such other data as the Department may require.⁵⁰

Additionally, the Act requires that the application be filed together with investigation and supervision fees which are non-refundable, unless the license is denied.⁵¹ One of the most significant aspects of the Act is that it requires a corporate surety bond to be issued by a bonding company or insurance company.⁵² Such a company has to be approved by the Department and must be authorized to do business in Georgia.⁵³ The bond for a mortgage lender must be in the principal sum of \$100,000 and the bond for a mortgage broker must be in the principal of \$50,000.⁵⁴ The amount for a broker was originally set at \$100,000,⁵⁵ but after some debate about the effect this would have on small businesses, the Georgia General Assembly reduced it to \$50,000.⁵⁶ With respect to the bond, the Act provides that any person who is damaged by the noncompliance of a licensee "may proceed on such bond against the principal or surety thereon, or both, to recover damages."⁵⁷ This provision does not apply to a mortgage lender who has a net worth of \$250,000 or to any mortgage broker who has a net worth of \$25,000.⁵⁸ The logic behind this exemption is that if an

and those subject to being examined by the Department are also exempt from the Act. *Id.* § 7-1-1001(a)(2)(5) (Supp. 1993). The United States, the State of Georgia and any other states are also exempt. *Id.* § 7-1-1001(a)(7) (Supp. 1993). Finally, individuals who purchase mortgage loans from a licensee for investment purposes are also included in this exempt category. *Id.* § 7-1-1001(a)(12) (Supp. 1993).

44. *Id.* § 7-1-1003(a) (Supp. 1993).

45. *Id.* § 7-1-1003(b)(1) (Supp. 1993).

46. *Id.* § 7-1-1003(b)(3) (Supp. 1993).

47. *Id.* § 7-1-1003(b)(2) (Supp. 1993).

48. *Id.* § 7-1-1003(b)(4) (Supp. 1993).

49. *Id.* § 7-1-1003(b)(5) (Supp. 1993).

50. *Id.* § 7-1-1003(b)(6) (Supp. 1993).

51. *Id.* § 7-1-1003(c)(1) (Supp. 1993).

52. *Id.* § 7-1-1003(c)(2) (Supp. 1993). The Department has the authority to require a greater sum. *Id.*

53. *Id.*

54. *Id.*

55. HB 237 (HCS), 1993 Ga. Gen. Assem.

56. O.C.G.A. § 7-1-1001(a)(12) (Supp. 1993); Davis Interview, *supra* note 1.

57. O.C.G.A. § 7-1-1003(c)(2) (Supp. 1993).

58. *Id.*

individual is damaged by the act of a broker or a lender who meets the tangible net worth requirement, the damaged individual could collect a judgment from the licensee irrespective of the surety bond.⁵⁹

Once the Department receives the application, it must also determine that the applicant is of good character and ethical reputation, that it has demonstrated financial responsibility, that it has reasonable policies and procedures to deal with customer complaints, and that the applicant maintains an agent for service in the state.⁶⁰ A license will not be issued unless the Department is satisfied that the applicant will conform with Georgia laws and will protect the contractual and property rights of Georgia citizens.⁶¹ An applicant must also submit an audited financial statement covering the most recent fiscal year, so that the Department may determine whether the applicant has a verifiable tangible net worth of \$250,000, of "which net worth must be continuously maintained as a condition of licensure."⁶²

The Department has some discretion in the licensing of an applicant if it finds that "the applicant, or any director, officer, partner, agent, employee, or ultimate equitable owner of 10 percent or more of the applicant, has been convicted of a felony involving moral turpitude in any jurisdiction."⁶³ The Department also may deny a license if it finds that "the applicant, or any person who is a director, officer, partner, agent, employee, or ultimate equitable owner of 10 percent or more of the applicant, has had a license denied, revoked, or suspended within one year of the date of application."⁶⁴ The Department has ninety days in which to deny or grant the request for a license.⁶⁵

The Act also sets forth the procedures for renewing licenses. A license may be renewed for the following year by filing an application substantially similar to the original application.⁶⁶ There are no fees for renewing a license, other than those which may be required for administration purposes.⁶⁷ A decision denying a license, original or renewal, will be conclusive, but it may be subject to judicial review under Code section 7-1-90.⁶⁸

The Act requires licensees to maintain in their offices the books, accounts, and records which may be necessary to determine if the person is complying with the provisions of the Act.⁶⁹ Under the Act,

59. Davis Interview, *supra* note 1.

60. O.C.G.A. § 7-1-1004(a) (Supp. 1993).

61. *Id.* § 7-1-1004(b) (Supp. 1993).

62. *Id.* § 7-1-1004(c) (Supp. 1993).

63. *Id.* § 7-1-1004(d) (Supp. 1993).

64. *Id.* § 7-1-1004(e) (Supp. 1993).

65. *Id.* § 7-1-1004(f) (Supp. 1993).

66. *Id.* § 7-1-1005 (Supp. 1993).

67. *Id.*

68. *Id.* § 7-1-1017(c) (Supp. 1993).

69. *Id.* § 7-1-1009(a) (Supp. 1993). Information obtained through investigations is

the Department has the authority to investigate and examine the affairs, business, premises, and records of any licensee.⁷⁰ Moreover, the Department is required to perform such an investigation at least once every two years.⁷¹ These investigations, however, are limited to the activities for which a license is required under the Act.⁷²

Every year on or before April 1, each licensee must submit a written report to the Department containing information concerning the business and operations during the preceding calendar year as to each licensed or registered place of business.⁷³ After the April 1 deadline, a penalty of \$100 per day will be assessed.⁷⁴ Each mortgage broker licensed under the Act must submit "at least once a year an unaudited financial statement prepared by a certified public accountant in accordance with generally accepted accounting principles and certified to be true and correct by the mortgage broker."⁷⁵ Similarly, each mortgage lender licensed under the Act must have a financial audit once a year.⁷⁶

Under the Act, it is unlawful for any person, whether licensed or exempt from licensing to "misrepresent the material facts or make false promises likely to influence, persuade, or induce an applicant for a mortgage loan, or a mortgagor to take a mortgage loan, or to pursue a course of misrepresentation through agents or otherwise."⁷⁷ The Act also prohibits the misrepresentation or omissions of "material factors, terms, or conditions of a transaction to which the licensee is a party, pertinent to an applicant for a mortgage loan or mortgagor."⁷⁸ Moreover, under the Act it is illegal for a licensee to "fail to disburse funds in accordance with a written commitment or agreement to make

confidential. *Id.* § 7-1-1009(c) (Supp. 1993).

70. *Id.* § 7-1-1009(b) (Supp. 1993).

71. *Id.*

72. *Id.*

73. *Id.* § 7-1-1010(a) (Supp. 1993). The Department may require an audit if it is deemed necessary to ascertain if the broker is complying with the Act. *Id.*

74. *Id.*

75. *Id.* § 7-1-1010(b) (Supp. 1993).

76. The Act states in relevant part:

Each mortgage lender licensed or registered under this article shall at least once a year have made by independent certified public accountants an audit of the books and affairs of the licensed or registered business except that a mortgage lender licensed or registered under this article which is a subsidiary shall comply with this provision by annually providing a consolidated audited financial statement of its parent company and a financial statement, which may be unaudited, of the licensee or registrant which is prepared in accordance with generally accepted accounting principles.

Id.

77. *Id.* § 7-1-1013(1) (Supp. 1993).

78. *Id.* § 7-1-1013(2) (Supp. 1993).

a mortgage loan,⁷⁹ and to “improperly refuse to issue a satisfaction of a mortgage loan.”⁸⁰ The Act further imposes a duty of good faith and fair dealing in connection with the making, purchase or sale of any mortgage loan.⁸¹ The Act also forbids any licensee to engage in any “fraudulent home mortgage underwriting practices,”⁸² and to “make, directly or indirectly, any residential mortgage loan with the intent to foreclose on the borrower’s property.”⁸³ Finally, the Act forbids any extortionate measures to provide an extension of credit or to collect a mortgage debt.⁸⁴

The Act also sets forth the disclosure requirements that must be made to the applicants of mortgage loans.⁸⁵ This provision was included in the Act to avoid the recurring incident of consumers entering into loan agreements without being told all the elements and ramifications of the transaction they were about to undertake.⁸⁶ The regulations require that a licensee provide an applicant for a mortgage loan a disclosure of the fees payable at the time of application and the conditions under which such fees may be refundable.⁸⁷ Prior to the time of the decision to enter into a loan agreement, the licensee must provide an applicant written disclosure of the fees to be paid in connection with the commitment of the loan, or the manner in which the fees will be refundable.⁸⁸ The lender is also required to disclose to each applicant that failure to meet every condition of the mortgage loan may result in the loss of the applicant’s property through foreclosure.⁸⁹

The manner in which mortgage loans are advertised is also regulated under the Act. Under the Act, advertisements may not be false, misleading, or deceptive, and no advertiser may indicate or imply that its interest rates or charges for loans are recommended by the state.⁹⁰ All advertisements must contain the name and an office address of the

79. *Id.* § 7-1-1013(3) (Supp. 1993).

80. *Id.* § 7-1-1013(4) (Supp. 1993).

81. *Id.* § 7-1-1013(6) (Supp. 1993).

82. *Id.* § 7-1-1013(7) (Supp. 1993).

83. *Id.* § 7-1-1013(9)(A)-(C) (Supp. 1993). For purposes of this section, “there is a presumption that a person has made a residential mortgage loan with the intent to foreclose on the borrower’s property if . . . [there is a] lack of substantial benefit to the borrower; . . . if there is a lack of probability of full payment of the loan by the borrower; . . . and if there is a significant proportion of similarly foreclosed loans by such a person.” *Id.* This section was added, partially, as a result of the Fleet Finance scandal. Davis Interview, *supra* note 1. Many of the individuals that lost their homes felt that Fleet made the loans with the intent to foreclose on their property. *Id.*

84. O.C.G.A. § 7-1-1013(10) (Supp. 1993).

85. *Id.* § 7-1-1014 (Supp. 1993).

86. Davis Interview, *supra* note 1.

87. O.C.G.A. § 7-1-1014(1) (Supp. 1993).

88. *Id.* § 7-1-1014(2) (Supp. 1993).

89. *Id.* § 7-1-1014(3) (Supp. 1993).

90. *Id.* § 7-1-1016(1) (Supp. 1993).

licensee or registrant,⁹¹ and no advertisement shall be made without the words "Georgia Residential Mortgage Licensee."⁹²

Any person who is required to be licensed under this Act who violates the terms of any order issued pursuant to this Code section will be liable for a civil penalty not to exceed \$1000.⁹³ Furthermore, any licensee or any of its officers, agents, or employees who violates any of the provisions of the Act will be guilty of a misdemeanor and will be punished by imprisonment for not more than one year or by a fine of not more than \$1000, or by both.⁹⁴

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91. *Id.* § 7-1-1016(2) (Supp. 1993).

92. *Id.* § 7-1-1016(3) (Supp. 1993).

93. *Id.* § 7-1-1018(c) (Supp. 1993).

94. *Id.* § 7-1-1019 (Supp. 1993).