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## BANKING AND FINANCE

### *Financial Institutions: Provide Amendments to Licensing Requirements of Mortgage Lenders and Mortgage Brokers*

CODE SECTIONS: O.C.G.A. §§ 7-1-1000 to -1006, -1008, -1010 to -1011, -1014, -1016 to -1018 (amended), 7-1-1021 (new)

BILL NUMBER: HB 1636

ACT NUMBER: 906

SUMMARY: The Act makes changes to improve implementation of the 1993 Georgia law regulating mortgage lenders and mortgage brokers.

EFFECTIVE DATE: March 29, 1994

#### *History*

Last year the 1993 Georgia General Assembly passed an untitled Act<sup>1</sup> which created Code sections 7-1-1000 to -1020 regulating mortgage lenders<sup>2</sup> and mortgage brokers<sup>3</sup> doing business in Georgia. This year, the 1994 Georgia General Assembly passed HB 1636 to improve the implementation of the 1993 Act.

In the late 1980s and early 1990s, predatory practices developed in Georgia among some home equity lenders.<sup>4</sup> Some unscrupulous loan companies hired door-to-door canvassers to persuade owners of modest homes to borrow money for needed repairs at outrageous rates of interest with their homes as security.<sup>5</sup> Many of the victims were

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1. 1993 Ga. Laws 543.

2. O.C.G.A. § 7-1-1000(8) defines a "mortgage lender" as "any person who directly or indirectly makes, originates, or purchases mortgage loans or who services mortgage loans." O.C.G.A. § 7-1-1000(8) (Supp. 1994).

3. *Id.* § 7-1-1000(7) defines a mortgage broker as one 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.

*Id.* § 7-1-1000(7) (Supp. 1994).

4. See generally Dwight Golann, *Consumer Financial Services Litigation: Major Judgments and ADR Responses*, 48 BUS. LAW. 1141, 1146-49 (1993); Michael Hudson, *Loan Scams That Prey on the Poor*, BUS. & SOC'Y REV., Winter 1993, at 11, 11-15; Jill Vejnaska, *The Loan Trap: Lenders Prey on Unwary 2nd Mortgages Often Put Borrowers in Poor House*, ATLANTA CONST., Oct. 11, 1992, at A1.

5. Golann, *supra* note 4, at 1146-49; Vejnaska, *supra* note 4.

unsophisticated, elderly, minority men and women.<sup>6</sup> Typically, the home repairs were incomplete or shoddily done.<sup>7</sup> Then, the cheated homeowner was obligated to make burdensome monthly payments for years, sometimes forgoing necessities such as food and shoes.<sup>8</sup> Typically, homeowners refinanced loans with the same lender at a higher rate of interest in order to avoid foreclosure and often lost their homes to foreclosure after exhausting their financial resources.<sup>9</sup>

Although some smaller loan companies made these ruinous loans, some large banks and bank holding companies were implicated as partners in the scheme for allegedly providing funds for such loans to the small loan companies, knowing the type of loans that would be made, and then purchasing the loans from the small loan companies afterwards.<sup>10</sup> Notably, after an investigation by the office of the Attorney General of Georgia, Fleet Finance Inc., a subsidiary of Fleet Financial Group, a New England bank holding company doing business in Georgia, agreed to pay up to \$115 million to settle allegations that it had taken advantage of borrowers.<sup>11</sup> Also, a number of lawsuits<sup>12</sup> were brought in state and federal courts in Georgia in unsuccessful attempts to reduce or limit the maximum legal interest rate of five percent simple interest per month in Georgia.<sup>13</sup>

The 1993 Act regulating mortgage lenders and mortgage brokers was passed by the Georgia General Assembly in reaction to this home equity lending scandal.<sup>14</sup> The 1993 Act was originally written by the Georgia Department of Banking and Finance (the Department) based on mortgage loan laws in other states.<sup>15</sup> The Act was introduced by Representative Grace Davis in the House Committee on Banks and Banking<sup>16</sup> and underwent considerable change before passage.<sup>17</sup>

The 1993 Act created Code sections 7-1-1000 to -1020 which now constitute article 13 of chapter 1 of title 7, entitled "Licensing of

6. Golann, *supra* note 4, at 1147; Vejnaska, *supra* note 4.

7. Jill Vejnaska, *Botched Repair Jobs Add Insult To Injury*, ATLANTA CONST., Oct. 11, 1992, at A11 [hereinafter Vejnaska, *Botched Repair Jobs*]; Hudson, *supra* note 4, at 11-15.

8. See, e.g., Hudson, *supra* note 4, at 11.

9. Golann, *supra* note 4; Vejnaska, *supra* note 4; Hudson, *supra* note 4; Vejnaska, *Botched Repair Jobs*, *supra* note 7.

10. Vejnaska, *supra* note 4.

11. Shelley Emling, *Fleet Agrees to Pay Up to \$115 Million in State Pact*, ATLANTA CONST., Dec. 17, 1993, at A1.

12. See, e.g., *Fleet Fin. v. Jones*, 430 S.E.2d 352 (Ga. 1993).

13. See O.C.G.A. § 7-4-18(a) (1989) (providing criminal penalties for charging excessive interest rates).

14. See *Legislative Review*, 10 GA. ST. U. L. REV. 11, 11-13 (1993).

15. Telephone Interview with Amelia Baker, Legal Counsel to the Georgia Department of Banking and Finance (Mar. 14, 1994) [hereinafter Baker Interview].

16. *Legislative Review*, *supra* note 14, at 11.

17. *Id.* at 11-13.

Mortgage Lenders and Mortgage Brokers.” The key section of article 13 is Code section 7-1-1013, which prohibits “any person” from engaging in a number of fraudulent or predatory practices associated with mortgage lending,<sup>18</sup> ranging from “misrepresent[ing] . . . material facts” in order to persuade a loan applicant to take a mortgage loan<sup>19</sup> to “directly or indirectly” making a residential mortgage loan “with the intent to foreclosure on the borrower’s property.”<sup>20</sup>

Article 13 identifies two broad classes of mortgage lenders and brokers: (1) licensees and (2) persons exempted from licensing.<sup>21</sup> Both classes are subject to the requirements of Code section 7-1-1013.<sup>22</sup> In addition, persons in the first class, licensees, must apply for an annually renewable license<sup>23</sup> and are subject to the Code sections dealing with applications for license,<sup>24</sup> investigation of applicants,<sup>25</sup> renewal of licenses,<sup>26</sup> contents and posting of licenses,<sup>27</sup> notice of actions brought against a licensee,<sup>28</sup> and suspension of licenses.<sup>29</sup> Persons in the second class, that is, persons exempted from licensing,<sup>30</sup> include: state-chartered or federally chartered banks, savings and loans, and credit unions whose deposits are federally insured;<sup>31</sup> lenders already regulated by the Department,<sup>32</sup> such as Georgia banks and bank holding companies; government agencies;<sup>33</sup> and a few other groups.<sup>34</sup> The first two groups of persons exempted from licensing must register with the Department and are therefore “registrants.”<sup>35</sup>

Both licensees and registrants are subject to further requirements regarding acquisition of entities licensed under the article,<sup>36</sup> keeping books and accounts,<sup>37</sup> submitting annual reports,<sup>38</sup> making

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18. O.C.G.A. § 7-1-1013 (Supp. 1994).
  19. *Id.* § 7-1-1013(1) (Supp. 1994).
  20. *Id.* § 7-1-1013(9) (Supp. 1994).
  21. *Id.* § 7-1-1002(1)-(2) (Supp. 1994).
  22. *See id.* § 7-1-1013 (Supp. 1994).
  23. *Id.* § 7-1-1005 (Supp. 1994).
  24. *Id.* § 7-1-1003 (Supp. 1994).
  25. *Id.* § 7-1-1004 (Supp. 1994).
  26. *Id.* § 7-1-1005 (Supp. 1994).
  27. *Id.* § 7-1-1006 (Supp. 1994).
  28. *Id.* § 7-1-1007 (Supp. 1994).
  29. *Id.* § 7-1-1017 (Supp. 1994).
  30. *Id.* § 7-1-1001(a) (Supp. 1994).
  31. *Id.* § 7-1-1001(a)(1) (Supp. 1994).
  32. *Id.* § 7-1-1001(a)(2) (Supp. 1994).
  33. *Id.* § 7-1-1001(a)(7) (Supp. 1994).
  34. *Id.* § 7-1-1001(a)(3)-(6), (8)-(13) (Supp. 1994).
  35. *Id.* §§ 7-1-1000(a)(11), -1001(b) (Supp. 1994).
  36. *Id.* § 7-1-1008 (Supp. 1994).
  37. *Id.* § 7-1-1009 (Supp. 1994).
  38. *Id.* § 7-1-1010 (Supp. 1994).

disclosures to loan applicants,<sup>39</sup> maintaining escrow accounts,<sup>40</sup> and advertising.<sup>41</sup> Other Code sections of article 13 deal with remedies<sup>42</sup> and criminal penalties.<sup>43</sup>

In the process of writing regulations to implement the 1993 Act and in response to some requests from lending industry representatives, the Department requested a number of changes to the law.<sup>44</sup> HB 1636 incorporates these changes.

### *HB 1636*

HB 1636 improves the administration of article 13 and helps achieve the intended effect of protecting consumers.<sup>45</sup> It revises some existing Code sections of article 13 and adds a new Code section 7-1-1021.<sup>46</sup>

Code section 7-1-1001(a)(2) now specifically exempts "subsidiaries and affiliates" of Georgia banks and bank holding companies from the licensing requirements of the statute.<sup>47</sup> This is a clarification of the original intent of this subsection.<sup>48</sup>

Code section 7-1-1001(a)(13) adds a de minimis exception exempting any person who makes "five or fewer mortgage loans in one calendar year" from the licensing requirements.<sup>49</sup> This provision was present in the 1993 Act but was accidentally removed as a result of an amendment.<sup>50</sup> Mortgage lending laws in other states typically contain such an exemption.<sup>51</sup>

Code section 7-1-1001(b) now makes the annual deadline for applying for a renewal of registration the same as the deadline for applying for a renewal of license: October 1.<sup>52</sup> Previously, the deadline for renewal of registration was July 1.<sup>53</sup>

Code section 7-1-1003(a) now grants to the Department the authority to make regulations defining "different classes of licenses for both mortgage brokers and mortgage lenders."<sup>54</sup> This authority allows the Department to use its discretion to charge different licensing fees based

39. *Id.* § 7-1-1014 (Supp. 1994).

40. *Id.* § 7-1-1015 (Supp. 1994).

41. *Id.* § 7-1-1016 (Supp. 1994).

42. *Id.* § 7-1-1018 (Supp. 1994).

43. *Id.* § 7-1-1019 (Supp. 1994).

44. Baker Interview, *supra* note 15.

45. *Id.*; *Legislative Review*, *supra* note 14, at 11-12.

46. *See generally* O.C.G.A. §§ 7-1-1000 to -1012 (Supp. 1994).

47. *Id.* § 7-1-1001(a)(2) (Supp. 1994); *see supra* notes 21-29 and accompanying text.

48. Baker Interview, *supra* note 15.

49. O.C.G.A. § 7-1-1001(a)(13) (Supp. 1994).

50. Baker Interview, *supra* note 15.

51. *Id.*

52. O.C.G.A. § 7-1-1001(b) (Supp. 1994).

53. 1993 Ga. Laws 548 (formerly found at O.C.G.A. § 7-1-1001(b) (Supp. 1993)).

54. O.C.G.A. § 7-1-1003(a) (Supp. 1994).

on the type or amount of mortgage lending activity.<sup>55</sup> For example, the Department could charge a smaller fee to mortgage brokers who specialize in merely closing loans rather than the general business of making and selling mortgages.<sup>56</sup>

Code section 7-1-1003(c)(2) still requires mortgage brokers applying for a license either to post a \$50,000 corporate surety bond or to provide proof of a “bona fide and verifiable tangible net worth of \$25,000.”<sup>57</sup> However, mortgage brokers who choose the second option must now provide an “audited financial statement prepared by an independent certified public accountant,” rather than a financial statement prepared by an in-house, noncertified public accountant.<sup>58</sup>

Code section 7-1-1004(c) still requires a mortgage lender applying for a license to provide an audited financial statement prepared by an independent certified public accountant and to demonstrate a net worth of \$250,000.<sup>59</sup> This Code section now also authorizes the Department to make regulations as to how net worth is measured and how the requirement of a “continuously maintained” net worth of \$250,000 is to be defined.<sup>60</sup>

Code section 7-1-1004(d) delineates a narrowly defined class of mortgage lenders with a requirement of a net worth of \$100,000 to \$250,000.<sup>61</sup> This new class, requested by industry representatives, creates a niche for mortgage lenders who cannot meet the \$250,000 net worth requirement.<sup>62</sup> The class is narrowly defined. The applicant must (1) certify that it transfers or assigns “all mortgage loans funded with . . . [its] own funds” within forty-five days; (2) demonstrate a net worth of \$100,000 by providing an audited financial statement prepared by an independent certified public accountant; (3) post a corporate surety bond for \$100,000; and (4) be approved to make loans insured by the United States Department of Housing and Urban Development (HUD).<sup>63</sup>

Code section 7-1-1004(e) authorizes the Department to deny a license to an applicant if any “director, officer, partner, agent, employee, or ultimate equitable owner of 10 percent or more . . . has been convicted of a felony involving moral turpitude.”<sup>64</sup> However, a new subsection (f) also authorizes the Department to query whether conviction data exists

55. Baker Interview, *supra* note 15.

56. *Id.*

57. O.C.G.A. § 7-1-1003(c)(2) (Supp. 1994).

58. *Id.*

59. *Id.* § 7-1-1004(c) (Supp. 1994).

60. *Id.*

61. *Id.* § 7-1-1004(d) (Supp. 1994).

62. Baker Interview, *supra* note 15.

63. O.C.G.A. § 7-1-1004(d)(1)-(2) (Supp. 1994).

64. *Id.* § 7-1-1004(e) (Supp. 1994).

for any such person by submitting two sets of fingerprints and other information to the Georgia Crime Information Center, which forwards one set of fingerprints to the Federal Bureau of Investigation (FBI).<sup>65</sup> This subsection of the law, which also makes such conviction data privileged and strictly limits its use,<sup>66</sup> was required by the FBI in order to allow a check of FBI records.<sup>67</sup> Although the Department does not require fingerprint cards from every applicant, access to FBI records allows the Department to discover whether a person who has no conviction record in Georgia has been convicted in another state.<sup>68</sup>

Code section 7-1-1005 now provides more specific requirements for renewal of licenses and registrations. First, licenses and registrations expire on December 31 and applicants for renewal must apply by October 1 of each year.<sup>69</sup> Second, if an applicant applies by October 1, and the Department has not granted renewal by January 1, the applicant for renewal may continue to operate, pending a decision by the Department.<sup>70</sup> Third, an applicant filing for renewal after October 1 may be required to pay a late fee.<sup>71</sup>

Code section 7-1-1006(a) requires the license to state the address only of the "principal place of business in Georgia"<sup>72</sup> rather than all "addresses at which business is to be conducted."<sup>73</sup> This change was prompted partly because some licensees have so many branches that the addresses will not fit on the license.<sup>74</sup> Also, an aggrieved consumer would be interested in getting the address of the principal place of business in Georgia, rather than a list of all addresses at which the licensee does business.<sup>75</sup>

In Code section 7-1-1008(c), the last sentence is now printed outside subsection (3) to show that it applies to subsections (1) through (3) instead of just to subsection (3).<sup>76</sup> Thus, all persons exempted by subsections (1) through (3) from filing an application with the Department upon acquisition of a twenty-five percent or more share of a licensed entity must notify the Department within thirty days of acquisition.<sup>77</sup>

65. *Id.* § 7-1-1004(f) (Supp. 1994).

66. *Id.*

67. Baker Interview, *supra* note 15.

68. *Id.*

69. O.C.G.A. § 7-1-1005(a) (Supp. 1994).

70. *Id.* § 7-1-1005(b) (Supp. 1994).

71. *Id.* § 7-1-1005(d) (Supp. 1994).

72. *Id.* § 7-1-1006(a) (Supp. 1994).

73. Compare *id.* § 7-1-1006(a) (Supp. 1994) with 1993 Ga. Laws 543 (formerly found at O.C.G.A. § 7-1-1006(a) (Supp. 1993)).

74. Baker Interview, *supra* note 15.

75. *Id.*

76. O.C.G.A. § 7-1-1008 (Supp. 1994).

77. *Id.*

Code section 7-1-1010(b) now requires mortgage brokers who are using net worth and not a surety bond, to qualify for licensing, as specified under Code section 7-1-1003(c)(2), discussed above,<sup>78</sup> to submit proof of net worth in the form of an "audited financial statement prepared by an independent certified public accountant."<sup>79</sup> Mortgage brokers who use a surety bond to qualify must still submit an unaudited financial statement.<sup>80</sup>

Code section 7-1-1011(a), which grants the Department authority to vary the licensing fee according to whether the licensee is a mortgage broker or a mortgage lender, now also grants authority to the Department to vary the licensing fee according to the class of mortgage broker or mortgage lender.<sup>81</sup> This addition reflects the granting of authority in Code section 7-1-1003(a)<sup>82</sup> to define different classes of licenses.

Code section 7-1-1011(b) provides statutory authority for a Department regulation imposing a fee of \$6.50 on "every mortgage loan subject to regulation under this article," to be paid by the borrower.<sup>83</sup> The figure of \$6.50 was drawn from a Virginia home-mortgage loan statute.<sup>84</sup> This change, requested by industry representatives,<sup>85</sup> shifts some of the cost of administering the statute directly to the consumer, as opposed to indirectly through the licensing, registration, and renewal fees paid by lenders. Currently, the licensing fee is \$400 for mortgage brokers and \$800 for mortgage lenders.<sup>86</sup>

Code section 7-1-1014(3) changes the timing of disclosure to borrowers that failure to meet the terms of the loan may result in foreclosure on the borrower's property.<sup>87</sup> This disclosure is now to be made to the borrower at closing, rather than to the applicant at the time of application.<sup>88</sup> Making this disclosure at closing causes the borrower to appreciate more fully the extent of the risk.<sup>89</sup>

Code section 7-1-1016 now limits the effect of two of its advertising requirements to advertisements "disseminated primarily in this state."<sup>90</sup> This limitation affects Code section 7-1-1016(2), requiring

78. See *supra* notes 57-58 and accompanying text.

79. O.C.G.A. § 7-1-1010(b) (Supp. 1994).

80. *Id.*

81. *Id.* § 7-1-1011(a) (Supp. 1994).

82. See *supra* notes 54-55 and accompanying text.

83. O.C.G.A. § 7-1-1011(b)(2) (Supp. 1994).

84. Baker Interview, *supra* note 15.

85. *Id.*

86. GA. COMP. R. & REGS. r. 80-5-1-.02 (1993).

87. O.C.G.A. § 7-1-1014(3) (Supp. 1994).

88. Compare *id.* with 1993 Ga. Laws 543 (formerly found at O.C.G.A. § 7-1-1014(3) (1993)).

89. Baker Interview, *supra* note 15.

90. O.C.G.A. § 7-1-1016(2)-(3) (Supp. 1994).



that an advertisement contain the name and an office address of the licensee,<sup>91</sup> and 7-1-1016(3), requiring that advertisements contain the phrase "Georgia Residential Mortgage Licensee."<sup>92</sup> These limits were requested by lenders who advertise in more than one state, in order to avoid having to customize part of a multi-state advertisement for use in Georgia.<sup>93</sup>

Code section 7-1-1017, concerning revocation of licenses, now specifically refers to "registrants" as well as "licensees."<sup>94</sup>

Code section 7-1-1018(f), a new subsection, increases the Department's ability to enforce the statute and the regulations based on it by authorizing the Department to make regulations that punish different types of violations with administrative fines.<sup>95</sup> The Department may still, as under the previous law, move against violators through cease-and-desist orders issued by the Department,<sup>96</sup> through judicial mandamuses applied for by the Attorney General,<sup>97</sup> and through civil penalties of \$1000 a day.<sup>98</sup> But the new administrative fines may be more effective than other methods in forcing compliance in areas where the Department has received complaints from consumers, because fines are procedurally simpler to impose on violators.<sup>99</sup> Furthermore, before a mortgage broker or mortgage lender can renew its annual license or registration, it must pay any outstanding fines.<sup>100</sup>

Finally, a new Code section 7-1-1021 authorizes the Department to make regulations concerning commitment agreements and lock-in agreements.<sup>101</sup> Section 7-1-1000 now defines these terms.<sup>102</sup> The Department had received a number of complaints from consumers about abuses of such agreements by some mortgage brokers and lenders, in which consumers paid a fee to the lender to enter into an agreement that the lender subsequently did not honor.<sup>103</sup> Most of the complaints

91. *Id.* § 7-1-1016(2) (Supp. 1994).

92. *Id.* § 7-1-1016(3) (Supp. 1994).

93. Baker Interview, *supra* note 15.

94. O.C.G.A. § 7-1-1017 (Supp. 1994).

95. *Id.* § 7-1-1018(f) (Supp. 1994).

96. *Id.* § 7-1-1018(a) (Supp. 1994).

97. *Id.* § 7-1-1018(b) (Supp. 1994).

98. *Id.* § 7-1-1018(c) (Supp. 1994).

99. Baker Interview, *supra* note 15.

100. See O.C.G.A. §§ 7-1-1001(b), -1004(b), -1005 (1993).

101. *Id.* § 7-1-1021 (Supp. 1994).

102. A "commitment agreement" is "a statement by a lender . . . that sets forth the terms and conditions upon which the lender is willing to make a particular mortgage loan to a particular borrower." *Id.* § 7-1-1000(1) (Supp. 1994). A "lock-in agreement" is an agreement by which a lender "guarantees for a specified number of days . . . the availability of a specified rate of interest for a mortgage loan." *Id.* § 7-1-1000(4) (Supp. 1994).

103. Baker Interview, *supra* note 15.

concerned lock-in agreements.<sup>104</sup> In some instances of lock-in agreements, a mortgage broker or mortgage lender made an oral, and therefore non-enforceable, commitment.<sup>105</sup> In other instances, a mortgage broker committed to an interest rate knowing that it might change, because the interest rate was set by the lender rather than the broker.<sup>106</sup> Finally, some mortgage brokers and mortgage lenders sold commitment agreements which were worthless because of unrealistically short time periods, such as fifteen days. These commitment agreements were sure to expire before the loan was processed, which might take sixty to ninety days.<sup>107</sup>

Representative Grace Davis introduced HB 1636 in the House Committee on Banks and Banking.<sup>108</sup> The Committee amended Code section 7-1-1006(a), dealing with the contents of licenses, by specifying that "the principal place of business" listed on the license should be "the principal place of business *in Georgia*."<sup>109</sup> This version passed the House and Senate. The Governor signed the bill into law on March 29, 1994.<sup>110</sup>

*William D. Gaither*

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104. *Id.*

105. *Id.*

106. *Id.*

107. *Id.*

108. HB 1636, as introduced, 1994 Ga. Gen. Assem.

109. HB 1636 (HCA), 1994 Ga. Gen. Assem. (emphasis added).

110. Memorandum from the Speaker of the House of Representatives to All Representatives (Mar. 29, 1994) (available in Georgia State University College of Law Library).