

Bill Draft

Attorney General's Predatory Mortgage Lending Proposals

DIVISION I

Sec. 1. Add New Chapter 714G

Consumer Protections in Certain Home Loans

714G.1 Definitions

As used in this chapter unless the context otherwise requires:

1. "Consumer home loan" means a loan, including a home equity line of credit as defined in section 535.10, in which the borrower is a natural person, the loan proceeds are to be used primarily for personal, family, or household purposes, and the loan is secured by a mortgage or deed of trust upon residential real property as defined in section 535B.1, subsection 8. Consumer home loan includes both a loan used to purchase residential real property and a refinancing of an existing consumer home loan but specifically excludes reverse mortgage transactions.
2. "Lender" means a person who makes a loan.
3. "Mortgage banker" means as defined in section 535B.1, subsection 4, and includes natural persons required to be registered under section 535B.4A.
4. "Mortgage broker" means as defined in section 535B.1, subsection 5, and includes natural persons required to be registered under section 535B.4A.
5. "Person" means as defined in section 535B.1, subsection 6.
6. "Reverse mortgage transaction" means a loan for a definite or indefinite term secured by a first mortgage or first deed of trust on the principal residence of the mortgagor located in Iowa, the proceeds of which are disbursed to the mortgagor in one or more lump sums, or in equal or unequal installments, either directly by the lender or the lender's agent, and that requires no repayment until a future time, upon the earliest occurrence of one or more events specified in the reverse mortgage loan contract such as the sale of the property or the death of the borrower.

714G.2 Consumer Protections

In any consumer home loan, a lender, mortgage banker, or mortgage broker, shall not:

1. Finance, directly or indirectly, any credit life, disability, or unemployment insurance, or any other life or health insurance premiums. Insurance premiums calculated and paid on a monthly basis shall not be considered financed by the lender, mortgage banker or mortgage broker.

[NC 24-10.2(b)] [Ohio 1345.031(B)(11)]

2. Knowingly engage in the act or practice of "flipping" or "churning" a consumer home loan. "Flipping" or "churning" is making a consumer home loan to a borrower which refinances an

existing consumer home loan when the new loan has no reasonable, net tangible benefit to the borrower considering all of the circumstances, including the terms of both the new and refinanced loans, the total cost of the new loan, and the borrower's circumstances.

[NC 24-10.2(c)] [Ohio 1345.031(B)(12)]

3. Recommend or encourage default on an existing loan or other debt prior to and in connection with the closing or planned closing of a consumer home loan that refinances all or any portion of such existing loan or debt.

[NC 24-10.2(d)] [Ohio 1345.031(B)(6)]

4. Advertise mortgage loans, including rates, margins, discount points, fees, commissions, or other material information, including material limitations on the loans, unless the lender, mortgage banker or mortgage broker is able to make the advertised mortgage loans available to a reasonable number of qualified applicants.

[NC 53-243.11(6)]

5. Represent to a borrower, in connection with the closing or planned closing of a consumer home loan, that the lender, mortgage banker or mortgage broker will be able to refinance the loan at a later date on more favorable terms unless the lender, mortgage banker or mortgage broker provides the borrower in writing a statement that the lender, mortgage banker or mortgage broker is contractually bound to refinance the loan at a later date and specifies the more favorable terms.

[Ameriquest settlement]

6. Misrepresent to a borrower the borrower's credit rating or credit status.

[Ameriquest settlement]

7. Misrepresent, inflate or fabricate, or encourage a borrower to misrepresent, inflate or fabricate, the source or amount of a borrower's actual income or assets in the application or underwriting process of a consumer home loan.

[Ameriquest settlement]

8. Underwrite or close a consumer home loan if any portion of a borrower's income or assets used to underwrite or close the loan is not verified through documentation and the amount of income claimed is not reasonable for the occupation and experience claimed. If the borrower's income is based in whole or in part on self-employment or a home-based business, the lender, mortgage banker or mortgage broker shall receive and review evidence and confirm the existence of the self-employment or business before using that income to underwrite any portion of the consumer home loan.

[Ameriquest settlement]

9. Impose any fee upon a borrower in connection with a consumer home loan application that fails to close. This prohibition applies regardless of how the fee is described, including but not limited to as an origination fee, application fee, mortgage broker fee, yield spread premium, processing fee, underwriting fee, or other description.

10. Misrepresent or conceal material facts or make false promises likely to influence, persuade, or induce a borrower to enter into a consumer home loan. [NC 53-243.11(1)]

11. Fail to disburse funds in accordance with a written commitment or agreement to make a consumer home loan. [NC 53-243.11(7)]

12. Engage in any transaction, practice, or course of business in connection with a consumer home loan that is not in good faith or fair dealing or that constitutes a fraud upon any person. [NC 53-243.11(8)]

13. Make, provide or arrange for a consumer home loan without verifying the borrower's reasonable ability to repay the loan being offered. In determining reasonable ability to repay, a lender, mortgage banker, or mortgage broker shall consider, but not be limited to, the borrower's income, current financial obligations, employment status, and other financial resources. A lender, mortgage banker, or mortgage broker shall not consider only the borrower's equity in the principal dwelling that would secure the consumer home loan in determining ability to repay. For loans in which the interest rate may vary, the reasonable ability to repay shall be determined based on the maximum monthly payment that could be due during the first five years of the loan term, which must be calculated according to the maximum interest rate allowable under the loan, assuming no default by the borrower and assuming a fully indexed rate and a repayment schedule which achieves full amortization over the life of the loan.

[Ohio 1345.031(B)(14) says that a lender shall not "enter[] into the consumer transaction knowing there was no reasonable probability of payment of the obligation by the consumer"]

714G.3 No Waiver

The terms of this chapter cannot be waived or modified by contract or otherwise.

714G.4 Exemption

The provisions of this chapter shall not apply to federally insured depository institutions.

714G.5 Remedies

1. A violation of this chapter is an unlawful practice pursuant to section 714.16, subsection 2, paragraph "a".

2. A borrower who suffers damage or injury as the result of a practice declared to violate this chapter may bring an action at law to recover actual damages. The court may order such equitable relief as it deems necessary to protect the public from further violations, including temporary and permanent injunctive relief. In an action in which it is found that a person has violated this chapter, the court shall award to the borrower the costs of the action and to the borrower's attorneys their reasonable fees. Reasonable attorney's fees shall be determined by the value of the time reasonably expended by the attorney and not by the amount of the recovery on behalf of the borrower. If the finder of fact finds that a practice declared to violate this chapter is willful, in addition to an award of actual damages, statutory damages of up to three times the

amount of actual damages may be awarded to a prevailing borrower. Any claim under this chapter shall be required to be proved by a preponderance of the evidence.

[NC 24-10.2(e)&(f)]

714G.6 Other Law

This chapter establishes specific consumer protections in consumer home loans that are in addition to other consumer protections that may be otherwise available by state or federal law.

Sec. 2 Amend chapter 535B by adding the following NEW SUBSECTION:

NEW SUBSECTION 535B.12A. A violation of chapter 714G is a violation of this chapter.

Sec. 3 Amend chapter 536 by adding the following NEW SUBSECTION:

NEW SUBSECTION 536.19A. A violation of chapter 714G is a violation of this chapter.

Sec. 4 Amend chapter 536A by adding the following NEW SUBSECTION:

NEW SUBSECTION 536A.15A. A violation of chapter 714G is a violation of this chapter.

DIVISION II

Additional Responsibilities of Mortgage Bankers and Mortgage Brokers

Add New Subsection 535B.4B. Mortgage Banker and Mortgage Broker Duties

1. Any mortgage banker or mortgage broker, including natural persons required to be registered under section 535B.4A, in addition to other duties imposed by other statutes or at common law, shall:

a. Act in good faith and with fair dealing in any transaction, practice, or course of business in connection with any mortgage loan on residential real property.
[Ohio 1322.081(A)(4)] [NC 53-243.11(8)]

b. Safeguard and account for any money handled for the borrower.
[NC 53-243.10(1)] [Ohio 1322.081(A)(1)]

c. Follow reasonable and lawful instructions from the borrower.
[NC 53-243-10.(2)] [Ohio 1322.081(A)(2)]

d. Act with reasonable skill, care, competence and diligence.
[NC 53-243-10(3)] [Ohio 1322.081(A)(3)]

e. Affirmatively disclose facts, without prompting or questions from the borrower, which are or should be within the mortgage broker's knowledge which materially affect the borrower's rights and interests.

2. In addition to the requirements of subsection 1 and other duties imposed by other statutes or at common law, any mortgage broker, including natural persons required to be registered under section 535B.4A, shall:

a. Make reasonable efforts, with lenders with whom the broker regularly does business, to secure a loan that is reasonably advantageous to the borrower considering all of the circumstances, including the rates, charges, and repayment terms of the loan or loans, and the loan options for which the borrower qualifies with such lenders.
[NC 53-243.10(4)] [Ohio 1322.081(A)(5)]

b. Place the borrower in a loan based on the best interests of the borrower and not the best interests of the mortgage broker.

3. The duties and standards of care established in this section cannot be waived or modified by contract or otherwise. [Ohio 1322.081(C)]

4. A borrower who suffers damage or injury as the result of a practice declared to violate this

section may bring an action at law to recover an amount equal to the greater of the borrower's actual damages or the sum of all monetary compensation paid directly or indirectly to a mortgage banker or mortgage broker from any source for the loan at issue. The court may order such equitable relief as it deems necessary to protect the public from further violations, including temporary and permanent injunctive relief. In an action in which it is found that a person has violated this section, the court shall award to the borrower the costs of the action and to the borrower's attorneys their reasonable fees. Reasonable attorney's fees shall be determined by the value of the time reasonably expended by the attorney and not by the amount of the recovery on behalf of the borrower. If the finder of fact finds that a practice declared to violate this section is willful, in addition to an award of actual damages or return of monetary compensation, statutory damages of up to three times the amount of that sum may be awarded to a prevailing borrower. Any claim under this section shall be required to be proved by a preponderance of the evidence. **[Ohio 1322.081(D)(1)&(2) and (3) which allows punitive damages]**

5. A violation of this section is an unlawful practice pursuant to section 714.16, subsection 2, paragraph "a".

Amend section 536.12 by adding the following paragraph:

No licensee shall agree to obtain or arrange a residential mortgage loan for a potential borrower from a third person, unless the licensee also has a mortgage broker license under the provisions of chapter 535B and complies with all provisions of chapter 535B.

Amend section 536A.23, subsection 1, by adding a new subparagraph e, as follows:

e. Agree to obtain or arrange a residential mortgage loan for a potential borrower from a third person, unless the industrial loan company also has a mortgage broker license and complies with all provisions of chapter 535B.

DIVISION III

Prohibiting Discount Points in Residential Mortgage Loans involving Yield Spread Premiums

Section 1. Amend section 535.8, subsection 3, as follows:

3. In this subsection:

a. “Discount point” or “interest reduction fee” means a fee that is paid by a borrower at the closing of the loan to buy down or reduce the interest rate on the loan.

b. “Par rate” means the interest rate on a loan if the borrower pays zero discount points.

c. “Yield spread premium” means an interest rate that is above the par rate for which the borrower qualified and said difference in the interest rate is paid, in whole or in part, to any party other than the lender funding the loan.

d. A lender who offers to make a loan with only those fees authorized by subsection 2 may also offer in exchange for the payment of an interest reduction fee or discount points to make a loan on all of the same terms except at a lower interest rate and with the lower payments resulting from the lower interest rate. Prior to accepting an application for a loan which includes a payment an interest reduction fee or discount points, the lender shall provide the potential borrower with a written disclosure describing in plain language the specific terms which the loan would have both with the payment interest reduction fee or discount points and without it. This disclosure shall include a good faith example showing the amount of the payment interest reduction fee or discount points and the reduction in payments which would result from the payment of this fee or discount points in a typical loan transaction. An payment interest reduction fee or discount points which complies with this subsection may be collected in connection with a loan in addition to the fees authorized by subsection 2.

e. No person shall seek, accept, offer or provide a yield spread premium on any loan that includes the payment of a discount point or an interest reduction fee.

f. A borrower shall have the right to recover the sum of the yield spread premium in an action against any persons who violated paragraph “e”. The court may order equitable relief it deems necessary to protect the public from further violations, including temporary and permanent injunctive relief. In an action in which it is found that a person has violated this subsection, the court shall award to the borrower the costs of the action and to the borrower's attorneys their reasonable fees. Reasonable attorney's fees shall be determined by the value of the time reasonably expended by the attorney and not by the amount of the recovery on behalf of the borrower. If the finder of fact finds that a practice declared to violate this subsection is willful, in addition to recovery of the unlawful fee or charge, statutory damages of up to three times the amount of the unlawful fee or charge may be awarded to a prevailing borrower. Any claim under this subsection shall be required to be proved by a preponderance of the evidence.

g. A violation of this subsection is an unlawful practice pursuant to section 714.16, subsection 2, paragraph “a”.

DIVISION IV

Mortgage Lending Fraud Prosecution Fund

1. (1) Except as provided in subsection (2), a surcharge of one dollar shall be charged by the county recorder at the time of recording each mortgage or deed of trust, which will be in addition to any other charge authorized by law. The recorder may retain up to 5% of the funds collected to administer collection. The remaining funds shall be transmitted monthly to the treasurer of state who shall deposit the funds into the mortgage lending fraud prosecution fund created in section 2.

(2) The surcharge imposed in this section does not apply to assignments or substitutions of previously recorded mortgages or deeds of trust.

2. The mortgage lending fraud prosecution fund is created as a separate fund in the state treasury and administered by the attorney general for the investigation and prosecution of frauds related to mortgage lending. Notwithstanding section 8.33, any balance in the fund on June 30 of any fiscal year shall not revert to the general fund of the state.