



H. B. 4139

(By Delegates Thompson and Staton)
[Introduced January 24, 2000; referred to the
Committee on Banking and Insurance.]

A BILL to amend and reenact sections one, two, seven, eight, nine, ten, eleven, twelve, fourteen and seventeen, article seventeen, chapter thirty-one of the code of West Virginia, one thousand nine hundred thirty-one, as amended, all relating to the regulation of residential mortgage lenders and brokers; renaming secondary mortgage to subordinate mortgage; providing that those who purchase loans are lenders for purposes of the law; providing that only one license may be required if a licensee registers the locations of all branches; requiring prior notice of any change in business location; eliminating the term restrictions on subordinate lien mortgage loans; providing for additional charges in conformity with the West Virginia Consumer Credit and Protection Act and real estate loans made by regulated consumer lenders; allowing complete compliance with federal disclosures to meet state law disclosure requirements; eliminating reporting requirements as to size, security, gross income and expenses; and allowing the commissioner to appoint a hearing examiner in contested cases.

Be it enacted by the Legislature of West Virginia:

That sections one, two, seven, eight, nine, ten, eleven, twelve, fourteen and seventeen, article seventeen, chapter thirty-one of the code of West Virginia, one thousand nine hundred thirty-one, as amended, be amended and reenacted, all to read as follows:

ARTICLE 17. SUBORDINATE MORTGAGE LOANS.

§31-17-1. Definitions and general provisions.

As used in this article:

(1) "Secondary Subordinate mortgage loan" means a loan made to an individual or partnership which is secured in whole or in part by a mortgage or deed of trust upon any interest in real property used as a dwelling with accommodations for not more than four families, which property is subject to the lien of one or more prior recorded mortgages or deeds of trust.

(2) "Person" means an individual, partnership, association, trust, corporation or any other legal entity, or any combination thereof.

(3) "Lender" means any person who makes or offers to make or accepts or offers to accept or purchases any secondary subordinate mortgage loan in the regular course of business. A person shall be deemed to be acting in the regular course of business if he or she makes or accepts, or offers to make or accept, more than five secondary subordinate mortgage loans in any one calendar year.

(4) "Broker" means any person acting in the regular course of business who, for a fee or commission or other consideration, negotiates or arranges, or who offers to negotiate or arrange, a secondary subordinate mortgage loan between a lender and a borrower. A person shall be deemed to be acting in the regular course of business if he or she negotiates or arranges, or offers to negotiate or arrange, more than five secondary subordinate mortgage loans in any one calendar year; or if he or she seeks to charge a

borrower or receive from a borrower money or other valuable consideration in any ~~second~~ subordinate mortgage transaction before completing performance of all broker services that he or she has agreed to perform for the borrower.

(5) "Brokerage fee" means the fee or commission or other consideration charged by a broker for the services described in subdivision (4) of this section.

(6) "Principal" or "principal sum" means the total of:

(a) The net amount paid to, receivable by or paid or payable for the account of the debtor;

(b) The amount of any discount excluded from the loan finance charge; and

(c) To the extent that payment is deferred:

(i) Amounts actually paid or to be paid by the lender for registration, certificate of title or license fees if not included in paragraph (a) of this subdivision; and

(ii) Additional charges permitted by this article.

(7) "Additional charges" means every type of charge arising out of the making or acceptance of a ~~secondary~~ subordinate mortgage loan, except finance charges, including, but not limited to, official fees and taxes, reasonable closing costs and certain documentary charges and insurance premiums and other charges which definition is to be read in conjunction with, and permitted by section one hundred nine, article three, chapter forty-six-a of this code.

(8) "Finance charge" means the sum of all interest and similar charges payable directly or indirectly by the debtor imposed or collected by the lender incident to the extension of credit, as coextensive with the definition of "loan finance charge" set forth in section one hundred two, article one, chapter forty-six-a of this code.

(9) "Commissioner" means the commissioner of banking of this state.

(10) "Applicant" means a person who has applied for a lender's or broker's license.

(11) "Licensee" means any person duly licensed by the commissioner under the provisions of this article as a lender or broker.

(12) "Amount financed" means the total of the following items to the extent that payment is deferred:

(a) The cash price of the goods, services or interest in land, less the amount of any down payment, whether made in cash or in property traded in;

(b) The amount actually paid or to be paid by the seller pursuant to an agreement with the buyer to discharge a security interest in or a lien on property traded in; and

(c) If not included in the cash price:

(i) Any applicable sales, use, privilege, excise or documentary stamp taxes;

(ii) Amounts actually paid or to be paid by the seller for registration, certificate of title or license fees; and

(iii) Additional charges permitted by this article.

§31-17-2. License required for lender or broker; exemptions.

(a) No person shall engage in this state in the business of lender or broker unless and until he or she shall first obtain a license to do so from the commissioner, which license remains unexpired, unsuspended and unrevoked, and no foreign corporation shall ~~notwithstanding the provisions of section seventy-nine-a, article one of this chapter,~~ engage in such business in this state unless it shall qualify to hold property and transact business in this state.

(b) The provisions of this article do not apply to loans made by federally insured depository institutions, regulated consumer lender licensees, insurance companies, or to loans made by any other lender licensed by and under the supervision of any agency of the federal government, or to loans made by, or on behalf of, any agency or instrumentality of this state or federal government or by a nonprofit community development organization which loans are subject to federal or state government supervision

and oversight. Loans made subject to this exemption may be assigned, transferred, sold or otherwise securitized to any person and shall remain exempt from the provisions of this article, except as to reporting requirements in the discretion of the commissioner where the person is a licensee under this article. A broker licensed under this article may broker subordinate mortgage loans to entities whose loans are exempt under this subsection in the same manner that those entities are permitted to originate such loans.

(c) A person or entity designated in subsection (b) of this section may take assignments of a secondary subordinate mortgage loan from a licensed lender, and the assignments of said loans that they themselves could have lawfully made as exempt from the provisions of this article under this section do not make that person or entity subject to the licensing, bonding, reporting or other provisions of this article, except as such defense or claim would be preserved pursuant to section one hundred two, article two, chapter forty-six-a of this code.

(d) The placement or sale for securitization of a second subordinate mortgage loan into a secondary market by a licensee shall not subject the secondary market holder to the provisions of this article: *Provided*, That either the trustee under such an arrangement is a licensee, or person or entity entitled to make exempt loans of that type under this section, or the loan is held with right of recourse to a licensee, or person or entity entitled to make exempt loans of that type, who also either retains the servicing rights to the loan or otherwise has the servicing done in its name by an agent or third party. **§31-17-7. Form of license; posting required; license not transferable or assignable; license may not be franchised; renewal of license.** (a) It shall be stated on the license whether it is a lender's or broker's license, the location at which the business is to be conducted and the full name of the licensee. A broker's license shall be conspicuously posted in the licensee's place of business in this state, and a lender's license shall be conspicuously posted in the licensee's place of business if in this state. No license shall be transferable or assignable. No licensee may offer a franchise under that license to another individual. Not more than one location or place of business in this state shall be maintained under the same license, but the commissioner is authorized to issue more than one license to the same licensee upon compliance with all the provisions of this article governing the original issuance of a license. The commissioner may allow licensees to have branch offices without requiring additional licenses provided the location of all branch offices are registered with the division of banking by the licensee. Whenever a licensee changes his place of business to a location other than that set forth in his license and branch registration, he shall give written notice within thirty days of prior to such change to the commissioner. (b) Every lender's or broker's license shall, unless sooner suspended or revoked, expire on December thirty-first of each year, and any such license may be renewed each year in the same manner, for the same license fee and investigation fee or fees specified above and upon the same basis as an original license is issued in accordance with the provisions of section five of this article. All applications for the renewal of licenses shall be filed with the commissioner at least ~~forty-five~~ ninety days before the expiration thereof.

§31-17-8. Maximum period of loan; maximum interest and charge or charges; other prohibitions. (a) The maximum rate of finance charges and maximum total additional charges on or in connection with any secondary subordinate mortgage loan shall be as follows: (1) The maximum rate of finance charge shall not exceed eighteen percent per year on the unpaid balance of the amount financed: *Provided*, That the borrower shall have the right to prepay his or her debt in whole or in part at any time and shall receive a rebate for any unearned finance charge, exclusive of any points, investigation fees and loan origination fees, which rebate shall be computed in accordance with section one hundred eleven, article three, chapter forty-six-a of this code: *Provided, however*, That the sum of any points, investigation fees and loan origination fees charged may not exceed five percent of the amount financed;—(2) ~~A secondary mortgage loan shall be payable over a period not to exceed sixty~~

months. This sixty-month maximum loan period is temporarily extended, as of the effective date of this section, to one hundred twenty months until the first day of July, two thousand, at which time it reverts to the sixty-month maximum loan limit time period. The commissioner shall report to the Legislature by the first day of July, one thousand nine hundred ninety-nine, on the impact of this extended loan time period upon the citizens of this state. The report shall include analysis of the impact of this loan period extension on the secondary mortgage industry in this state, impacts of this extension on various socio-economic classes of citizens of this state, statistics regarding the number of homes which have been foreclosed upon based on this extension and the effect of this extension to any other citizens of this state. The commissioner may require any licensee to provide the commissioner with any information necessary to make this report; — (3) (2) Except as provided for by section one hundred nine, article three, chapter forty-six-a of this code, no additional charges may be made; nor may any charge permitted by this section be assessed unless the loan is made. The total of additional charges as permitted by this section and by section one hundred nine, article three, chapter forty-six-a of this code, excluding official fees and taxes, and insurance, may equal, but shall not be in excess of, ten percent of the principal sum: *Provided*, That where the principal sum at the inception of the secondary mortgage loan is one thousand five hundred dollars or less, the total additional charge or charges, excluding official fees, taxes and insurance, may exceed said ten percent, but shall not be in excess of one hundred fifty dollars: *Provided, however*, That no additional charges other than official fees, taxes and hazard insurance may be required by the same or affiliated lender more often than once each twenty-four months by renewal of a secondary mortgage loan or an additional secondary mortgage loan secured by the same residential property; — (4) (3) Where loan origination fees, investigation fees or points have been charged by the licensee, such fees may not be imposed again by the same or affiliated lender in any refinancing of that loan or any additional loan on that property made within twenty-four months thereof, unless these earlier charges have been rebated by payment or credit to the consumer under the actuarial method, or the total of the earlier and current charges does not exceed the five percent amount. (b) Notwithstanding the provisions of subsection (a) of this section, a delinquent or "late charge" may be charged on any installment made ten or more days after the regularly scheduled due date in accordance with section one hundred twelve or one hundred thirteen, article three, chapter forty-six-a of this code, whichever is applicable. The charge may be made only once on any one installment during the term of the secondary subordinate mortgage loan. (c) Hazard insurance may be required by the lender of the borrower, as provided in section one hundred nine, article three, chapter forty-six-a of this code. Decreasing term life insurance, in an amount not exceeding the amount of the secondary subordinate mortgage loan and for a period not exceeding the term of the loan, and accident and health insurance in an amount sufficient to make the monthly payments due on said loan in the event of the disability of the borrower and for a period not exceeding the life of said loan, may also be offered by the lender to the borrower and the premium therefor may be financed. The charges for any insurance shall not exceed the standard rate approved by the insurance commissioner for such insurance. Proof of all insurance in connection with secondary subordinate mortgage loans subject to this article shall be furnished to the borrower within thirty days from and after the date of application therefor by said borrower. (d) No application fee may be allowed whether or not the secondary subordinate mortgage loan is consummated; however, the borrower may be required to reimburse the lender for actual expenses incurred by the lender after acceptance and approval of a secondary subordinate mortgage loan proposal made in accordance with the provisions of this article which is not consummated because of: (1) The borrower's willful failure to close said loan; or (2) The borrower's false or fraudulent representation of a material fact which prevents closing of said loan as proposed. (e) No licensee shall make, offer to make, accept or offer to accept, any secondary subordinate mortgage loan except on the terms and conditions authorized in this

article. (f) No licensee shall induce or permit any husband and wife, jointly and severally, to become obligated to the licensee under this article, directly or contingently, or both, under more than one secondary subordinate mortgage loan at the same time for the purpose or with the result of obtaining greater charges than would otherwise be permitted under the provisions of this article. (g) No instrument evidencing or securing a secondary subordinate mortgage loan shall contain: (1) Any acceleration clause under which any part or all of the unpaid balance of the obligation not yet matured may be declared due and payable because the holder deems himself to be insecure; (2) Any power of attorney to confess judgment or any other power of attorney; (3) Any provision whereby the borrower waives any rights accruing to him under the provisions of this article; (4) Any requirement that more than one installment be payable in any one installment period, or that the amount of any installment be greater or less than that of any other installment, except for the final installment which may be in a lesser amount, or unless the loan is structured as a revolving line of credit having no set final payment date; or (5) Any assignment of or order for the payment of any salary, wages, commissions or other compensation for services, or any part thereof, earned or to be earned. (h) No broker licensee shall charge a borrower or receive from a borrower money or other valuable consideration before completing performance of all services the broker has agreed to perform for the borrower, unless the licensee also registers and complies with all requirements set forth for credit service organizations in article six-c, chapter forty-six-a of this code, including all additional bonding requirements as may be established therein. (i) No lender licensee shall make revolving loans secured by a secondary subordinate mortgage lien for the retail purchase of consumer goods and services by use of a lender credit card.

§31-17-9. Disclosure; closing statements; other records required. (a) Any licensee or person making on his own behalf, or as agent, broker or in other representative capacity on behalf of any other person, a secondary subordinate mortgage loan, whether lawfully or unlawfully, shall at the time of the closing furnish to the borrower a complete and itemized closing statement which shall show in detail: (1) The amount and date of the note or secondary subordinate mortgage loan contract and the date of maturity; (2) The nature of the security; (3) The finance charge rate per annum and the itemized amount of finance charges and additional charges; (4) The amount financed and total of payments; (5) Disposition of the principal; (6) A description of the payment schedule; (7) The terms on which additional advances, if any, will be made; (8) The charge to be imposed for past-due installments; (9) A description and the cost of insurance required by the lender or purchased by the borrower in connection with the secondary subordinate mortgage loan; (10) The name and address of the borrower and of the lender; and (11) That the borrower may prepay the secondary subordinate mortgage loan in whole or in part on any installment date, and that the borrower will receive a rebate in full for any unearned finance charge. Such detailed closing statement shall be signed by the lender or his representative, and a completed and signed copy thereof shall be retained by the lender and made available at all reasonable times to the borrower, the borrower's successor in interest to the residential property, or the authorized agent of the borrower or the borrower's successor, until the time as the indebtedness shall be satisfied in full. Complete compliance with all residential mortgage disclosures required by federal law shall be deemed to meet the requirements of this subsection. The commissioner may, from time to time, by rules prescribe additional information to be included in a closing statement. (b) Upon written request from the borrower, the holder of a secondary subordinate mortgage loan instrument shall deliver to the borrower, within ten days from and after receipt of the written request, a statement of the borrower's account showing the date and amount of all payments made or credited to the account and the total unpaid balance. Charges for providing an account statement may be assessed only where permitted as set forth by subsection two, section one hundred fourteen, article two, chapter forty-six-a of this code. (c) Upon satisfaction of a secondary subordinate mortgage loan

obligation in full, the holder of the instrument evidencing or securing the obligation shall comply with the requirements of section one, article twelve, chapter thirty-eight of this code in the prompt release of the lien which had secured the secondary subordinate mortgage loan obligation. (d) Upon written request or authorization from the borrower, the holder of a secondary subordinate mortgage loan instrument shall send or otherwise provide to the borrower or his or her designee, within two business days after receipt of the written request or authorization, a payoff statement of the borrower's account. Except as provided by this subsection, no charge may be made for providing the payoff statement. Charges for the actual expenses associated with using a third-party courier delivery or expedited mail delivery service may be assessed when this type of delivery is requested and authorized by the borrower, following disclosure to the borrower of its cost. The payoff information shall be provided by mail, telephone, courier, facsimile, or other transmission as requested by the borrower or his or her designee.

§31-17-10. Advertising requirements. It shall be unlawful and an unfair trade practice for any person to cause to be placed before the public in this state, directly or indirectly, any false, misleading or deceptive advertising matter pertaining to secondary subordinate mortgage loans or the availability thereof: *Provided*, That this section shall not apply to the owner, publisher, operator or employees of any publication or radio or television station which disseminates such advertising matter without actual knowledge of the false or misleading character thereof.

§31-17-11. Records and reports; examination of records; analysis. (a) Every licensee shall maintain at his or her place of business in this state, if any, or if he or she has no place of business in this state at his or her principal place of business outside this state, such books, accounts and records relating to all transactions within this article as are necessary to enable the commissioner to enforce the provisions of this article. All the books, accounts and records shall be preserved, exhibited to the commissioner and kept available as provided herein for the reasonable period of time as the commissioner may by rules require. The commissioner is hereby authorized to prescribe by rules the minimum information to be shown in the books, accounts and records.

(b) Each licensee shall file with the commissioner on or before the fifteenth day of March of each year a report under oath or affirmation concerning his or her business and operations in this state for the preceding license year in the form prescribed by the commissioner. ~~which shall show the annual volume and outstanding amounts of secondary mortgage loans, the classification of the secondary mortgage loans by size and by security, and the gross income from, and expenses properly chargeable to, such secondary mortgage loans~~ (c) The commissioner may, at his or her discretion, make or cause to be made an examination of the books, accounts and records of every licensee pertaining to secondary subordinate mortgage loans made in this state under the provisions of this article, for the purpose of determining whether each licensee is complying with the provisions hereof and for the purpose of verifying each licensee's annual report. If the examination is made outside this state, the licensee shall pay the cost thereof in like manner as applicants are required to pay the cost of investigations outside this state.

(d) The commissioner shall publish annually an aggregate analysis of the information furnished in accordance with the provisions of subsection (b) or (c) of this section, but the individual reports shall not be public records and shall not be open to public inspection.

§31-17-12. Grounds for suspension or revocation of license; suspension and revocation generally; reinstatement or new license. (a) The commissioner may suspend or revoke any license issued hereunder if he or she finds that the licensee and/or any owner, director, officer, member, partner, stockholder, employee or agent of such licensee:

- (1) Has knowingly violated any provision of this article or any order, decision or rule of the commissioner lawfully made pursuant to the authority of this article; or
- (2) Has knowingly made any material misstatement in the application for such license; or
- (3) Does not have available the net assets required by the provisions of section four of this article; or
- (4) Has failed or refused to keep the bond required by section four of this article in full force and effect; or
- (5) In the case of a foreign

corporation, does not remain qualified to do business in this state; or (6) Has committed any fraud or engaged in any dishonest activities with respect to such secondary subordinate mortgage loan business in this state, or failed to disclose any of the material particulars of any secondary subordinate mortgage loan transaction in this state to anyone entitled to the information; or (7) Has otherwise demonstrated bad faith, dishonesty or any other quality indicating that the business of the licensee in this state has not been or will not be conducted honestly or fairly within the purpose of this article. It shall be a demonstration of bad faith and an unfair or deceptive act or practice to engage in a pattern of making loans where the consumer has insufficient sources of income to timely repay the debt, and the lender had the primary intent to acquire the property upon default rather than to derive profit from the loan. This section shall not limit any right the consumer may have to bring an action for a violation of section one hundred four, article six, chapter forty-six-a of this code in an individual case. The commissioner may also suspend or revoke the license of a licensee if he or she finds the existence of any ground upon which the license could have been refused, or any ground which would be cause for refusing a license to such licensee were he then applying for the same. The commissioner may also suspend or revoke the license of a licensee pursuant to his or her authority under section thirteen, article two, chapter thirty-one-a of this code. (b) The suspension or revocation of the license of any licensee shall not impair or affect the obligation of any preexisting lawful secondary subordinate mortgage loan between such licensee and any obligor. (c) The commissioner may reinstate a suspended license, or issue a new license to a licensee whose license has been revoked, if the grounds upon which any such license was suspended or revoked have been eliminated or corrected and the commissioner is satisfied that the grounds are not likely to recur. **§31-17-14. Hearing before commissioner; provisions pertaining to hearing.** (a) Any applicant or licensee, as the case may be, adversely affected by an order made and entered by the commissioner in accordance with the provisions of section thirteen of this article, if not previously provided the opportunity to a hearing on the matter, may in writing demand a hearing before the commissioner. The commissioner may appoint a hearing examiner to conduct the hearing and prepare a recommended decision. The written demand for a hearing must be filed with the commissioner within thirty days after the date upon which the applicant or licensee was served with a copy of such order. The timely filing of a written demand for hearing shall stay or suspend execution of the order in question, pending a final determination, except for an order suspending a license for failure of the licensee to maintain the bond required by section four of this article in full force and effect. If a written demand is timely filed as aforesaid, the aggrieved party shall be entitled to a hearing as a matter of right. (b) All of the pertinent provisions of article five, chapter twenty-nine-a of this code shall apply to and govern the hearing and the administrative procedures in connection with and following such hearing, with like effect as if the provisions of said article were set forth in extenso in this subsection. (c) For the purpose of conducting any such hearing hereunder, the commissioner or appointed hearing examiner shall have the power and authority to issue subpoenas and subpoenas duces tecum, in accordance with the provisions of section one, article five, chapter twenty-nine-a of this code. All subpoenas and subpoenas duces tecum shall be issued and served in the manner, within the time and for the fees and shall be enforced, as specified in said section, and all of the said section provisions dealing with subpoenas and subpoenas duces tecum shall apply to subpoenas and subpoenas duces tecum issued for the purpose of a hearing hereunder. (d) Any such hearing shall be held within twenty days after the date upon which the commissioner received the timely written demand therefor, unless there is a postponement or continuance. The commissioner or hearing examiner may postpone or continue any hearing on his or her own motion, or for good cause shown upon the application of the aggrieved party. At any such hearing, the aggrieved party may represent himself or herself or be represented by any attorney-at-law admitted to practice before any circuit court of this state. (e) After such hearing and consideration of all of the

testimony, evidence and record in the case, the commissioner shall make and enter an order affirming, modifying or vacating his or her earlier order, or shall make and enter such order as is deemed appropriate, meet and proper. Such order shall be accompanied by findings of fact and conclusions of law as specified in section three, article five, chapter twenty-nine-a of this code, and a copy of such order and accompanying findings and conclusions shall be served upon the aggrieved party and his attorney of record, if any, in person or by certified mail, return receipt requested, or in any other manner in which process in a civil action in this state may be served. The order of the commissioner shall be final unless vacated or modified on judicial review thereof in accordance with the provisions of section fifteen of this **article.****§31-17-17. Loans made in violation of this article void; agreements to waive article void.**

(a) If any ~~secondary~~ subordinate mortgage loan is made in violation of the provisions of this article, except as a result of a bona fide error, such loan shall be void and neither the lender nor any holder of the obligation secured by such ~~secondary~~ subordinate mortgage shall have the right to collect or receive any principal, interest or charges whatsoever, and the lender shall refund all payments on or with respect to such loan which have been made by the borrower. (b) Any agreement whereby the borrower waives the benefits of this article shall be deemed to be against public policy and void.

Strike-throughs indicate language that would be stricken from the present law, and underscoring indicates new language that would be added.

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