

ABA SUMMARY OF H.R. 1728, THE MORTGAGE REFORM AND ANTI-PREDATORY LENDING ACT

Title I – Residential Mortgage Loan Origination Standards

CREATES A DUTY OF CARE

The legislation creates a federal “Duty of Care” which requires licensing and registration of mortgage originators (under the provisions of the already passed SAFE Mortgage licensing act or applicable state statutes); ensuring borrowers have a documented ability to repay the loan and are provided with a “net tangible benefit” – which is to be defined by the bank regulatory agencies. The duty of care also requires that loans do not have “predatory characteristics” – again, to be defined by the bank regulators, and that full disclosures are made to consumers and that the originator’s unique identifier (as required under licensing and registration laws) is included on all loan documents.

DEFINES MORTGAGE ORIGINATORS as anyone who:

Takes a residential loan application; assists a consumer in obtaining or applying for a mortgage loan (including advising on rates, fees and other costs), preparing loan packages or collecting information on behalf of the consumer with regard to a loan; or offers or negotiates terms of a residential mortgage loan, for direct or indirect compensation (or the expectation thereof).

The definition also includes any person who represents to the public that they can or will provide any services or perform any of the activities described above. It does not include anyone who performs “purely administrative or clerical tasks” relating to the application for or making of the mortgage. It would however, include loan servicers who work with borrowers on potential loan modifications.

BANS YIELD SPREAD PREMIUMS ON ALL LOANS

Any compensation structure (including yield spread premiums) which could cause an originator to steer applicants toward more costly mortgages are banned for all mortgage loans. Under the bill, the total direct and indirect compensation to the originator from all sources may not vary with the terms of the mortgage loan – except for the size of the loan and the number of loans.

CREATES NEW LIABILITY

Originators who violates the “duty of care” will be liable to a borrower for the greater of actual damages or an amount equal to three times the total direct and indirect compensation received by the originator PLUS the costs of the action.

REQUIRES NEW REGULATIONS

In addition to the requirement that the regulators further define the “duty of care” as noted above, the bill requires that the federal banking agencies, in consultation with the Treasury and the Federal Trade Commission, prescribe regulations to prohibit steering of a consumer to a loan that they do not have a reasonable ability to repay or which has predatory characteristics or (in the case of a refinance) does not provide a net tangible benefit. Regulators are to define these terms. Regulators are charged with also prohibiting originators from steering any borrower from a prime to a subprime loan and from engaging in abusive or unfair lending practices that “promote disparities among consumers of equal credit worthiness but of different race, ethnicity, gender, or age.”

The legislation also requires the federal banking agencies to address, by regulation, “acts or practices relating to residential mortgage loans that the agencies find to be abusive, unfair, deceptive, predatory, inconsistent with reasonable underwriting standards” as well as “necessary or proper to effectuate the purposes” of the Act, or to “prevent circumvention or evasion thereof.”

Regulations are to be finalized within 12 months of passage of the act and must take effect not later than 18 months after passage.

Title II –Minimum Standards for All Mortgages

CREATES A ‘SAFE HARBOR’

The bill creates a very limited (and rebuttable) safe harbor for “Qualified Mortgages” against borrower remedies (detailed below) created by the bill. A “Qualified Mortgage” is one which is a fully documented, 30 year fixed rate with no negative amortization or interest-only features and which does not:

- have an APR which exceed an average prime rate offer rate, as published by the Federal Reserve, by more than 1.5 percentage points for a first lien or 3.5 percentage points for a subordinate lien;
- the underwriting is based on a fully-indexed rate;
- the income and other financial resources of the borrower are verified;
- and, the loan meets a combined debt-to-income test prescribed by the federal banking agencies.

The regulators are authorized to revise the criteria for a Qualified Mortgage when “necessary or appropriate.”

CREATES NEW LENDER LIABILITY

In addition to existing liabilities under the Truth in Lending Act, the bill provides consumers with a right to rescind a loan for violation of the ability to repay and/or net tangible benefit standards. In addition, consumers have the right to recover attorney’s fees. Lenders are give the ability to cure (within 90 days of notification of a violation), which is defined as a no-cost modification or refinancing of the loan to provide terms that would have satisfied the minimum standards upon origination of the loan – and payment of cost to the consumer incurred as a result of the violation. The right to rescind is limited by a statute of limitation of 3 years for a fixed rate loan and the earlier of 1 year after the first reset for an adjustable rate loan or 6 years in total (for loans with a longer period before reset).

CREATES NEW ASSIGNEE/SECURITIZER LIABILITY

Borrowers are given individual rights of action (no class actions) against assignees and securitizers similar to those given to borrowers against creditors. Assignees and securitizers are given the same right to cure as creditors and subject to the same rescission liability. The “path” set up by the bill is as follows: if a lender is bankrupt or ceases to exist, the borrower may maintain an action for a violation against the assignee. If the assignee is also bankrupt or ceases to exist, the borrower may maintain an action against the securitizer.

DOES NOT CREATE INVESTOR LIABILITY

Investors and purchasers of securitization vehicles holding loans, as well as the securitization vehicle, and pool of loans are all exempt from the liability imposed under the bill on securitizers and assignees.

CREATES A DEFENSE TO FORECLOSURE

The bill gives a borrower who has a right to rescind under the bill the additional right to assert a defense to foreclosure. If the rescission right has expired, the borrower may seek actual damages plus costs against the lender, assignee or securitizer.

PROVIDES TENANT PROTECTIONS

Going forward the bill would provide tenants with a bona fide lease the right to remain in a foreclosed property until the end of their existing lease. Tenants without a lease or with a terminable lease, must be given 90 days to vacate. For properties which are purchased, and the purchaser intends to occupy the property as a primary residence, tenants must be afforded 90 days notice to vacate. Renters under The tenant protection sections of the bill are not pre-emptive of state or local laws which may provide greater tenant protections.

BANS SINGLE PREMIUM CREDIT INSURANCE

The bill would prohibit the direct or indirect financing of single-premium credit insurance in connection with a mortgage loan.

PROHIBITS MANDATORY ARBITRATION

Lenders would not be allowed to require arbitration in connection with a mortgage loan.

LIMITS PREPAYMENT PENALTIES

Loans that do not fall under the safe harbor would be prevented from having any prepayment penalty. For loans falling under the safe harbor, any prepayment penalties would be limited so as not to be more than 3 percent of the outstanding balance of the loan and must be phased out within three years (i.e. 3 percent penalty in year 1, 2 percent in year 2 and 0 by the end of year 3). Loans with an initial fixed rate with a reset cannot have a prepayment penalty for more than 3 months after the reset date.

REQUIRES 'NO PENALTY' LOANS

Lenders who offer loans with pre-payment penalties are required to also offer borrowers a loan product which does not have a pre-payment penalty.

PROVIDES LIMITED PRE-EMPTION OF STATE LAWS

For violations of the ability to repay or net tangible benefit standards, the bill only pre-empts state laws applying to assignees, securitizers and securitization vehicles. It does not pre-empt state laws applying to creditors – including those who also act as assignees and securitizers.

With regard to the assignee/securitizer or securitization vehicle's own conduct, or in connection with their purchase or sale of mortgages or securities, state laws governing fraud, misrepresentation, deceptive acts and practices, false advertising or civil rights are not pre-empted.

PROVIDES A DEFENSE AGAINST BORROWER FRAUD

If a borrower is found to knowingly furnish false information with regard to a mortgage the civil liability of the lender, assignee and securitizer does not apply and the borrower's right to rescind is cancelled.

DOUBLES EXISTING CIVIL LIABILITY PROVISIONS

Existing civil liability fines under the Truth in Lending Act are doubled by this legislation.

REQUIRES CREDIT RISK RETENTION

The bill requires that for any loan that falls outside of the safe harbor, creditors must retain at least five percent of the credit risk of the loan, and may not hedge or otherwise transfer the risk.

REQUIRES SECURITIZERS TO RETAIN ACCESS TO LOANS

The bill requires securitizers to preserve an ability to identify and obtain access to loans placed in a pool and the ability to provide a remedy as required under the bill for any violation.

REQUIRES ADDITIONAL DISCLOSURES

For loans with adjustable rates, lenders/servicers are required to provide a notice 6 months before the expiration of the introductory rate explaining the rate adjustment and the borrower's alternatives.

For loans with negative amortization, lenders are required to provide borrowers with disclosures describing negative amortization and that it reduces a consumer's equity in their home.

For loans that are outside of the safe harbor made to first time homebuyers, the creditor must receive from the borrower "sufficient documentation" to demonstrate that the borrower received homeownership counseling from persons or organizations certified by the Department of Housing and Urban Development.

Servicers are required to provide at least annually, and whenever there is a change in loan ownership, a notice and contact information on who the borrower should contact for any reason concerning the borrower's right with respect to the loan.

For all loans, the creditor, assignee or servicer must include a notice with each billing cycle setting forth:

- the principal obligation
- the current interest rate
- the date on which the rate may reset
- the amount of any applicable prepayment fee
- a description of any late payment fee
- a telephone and email address to make contact regarding the mortgage

CREATES LEGAL ASSISTANCE TO BORROWERS FOR FORECLOSURE RELATED ISSUES

The bill directs HUD to make competitive grants to state and local legal organizations to provide foreclosure related assistance to low and moderate income borrowers and tenants. The bill requires HUD to give priority to organizations in the 100 metropolitan areas with the highest rate of foreclosures. Prohibits funds from being used in class action lawsuits.

REQUIRES A GAO STUDY ON AVAILABILITY OF CREDIT

The bill directs the Government Accountability Office to conduct a study determining the effects of the bill on the availability and affordability of credit and to submit a report to Congress within 1 year of enactment.

Title III-High Cost Mortgages

LOWERS HOEPA TRIGGERS

The bill lowers the HOEPA triggers in TILA and defines more mortgages as high cost mortgages. Specifically, a first mortgage is high cost if the APR exceeds by more than 8% points the yield on treasury securities having a comparable maturity. A junior or subordinate mortgage is high cost if the APR exceeds by more than 10% points the yield on treasury securities having a comparable maturity. The section also includes in the definition of high cost mortgage any mortgage where the points and fees exceed 5% in the case of transactions for \$20,000 or more, or in the case of transactions for less than \$20,000 the lesser of 8% or the transaction amount or \$1,000. High cost mortgages are also any mortgages where the creditor may charge or collect prepayment penalties more than 36 months after the transaction closing or such fees or penalties exceed 2% of the amount prepaid.

For loans considered high cost loans, the bill prohibits prepayment penalties, balloon payments and lending without due regard to the ability of the borrower to repay a high cost mortgage. It also adds a number of additional prohibitions and restrictions in the area of high cost mortgages. The bill limits late fees, prohibits a creditor from recommending or encouraging default, prohibits the acceleration of the debt, restricts the financing of points and fees, changes the disclosures required for high cost mortgages and requires pre-loan counseling. Finally the bill defines and prohibits flipping of high cost mortgages that have no net tangible benefit to the consumer. The Federal Reserve Board is given six months to write regulations implementing this title and the provisions of title III become effective within six months of the enactment.

Title IV-Office of Housing Counseling

ESTABLISHES AN OFFICE OF HOUSING COUNSELING WITHIN THE DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT

The bill establishes required procedures and activities for homeownership counseling, rental housing counseling, national public service multimedia campaigns to promote housing counseling, and education programs to be developed by the office of housing counseling. It provides grants for housing counseling assistance to states, local governments and nonprofit organizations and requires the use of HUD-certified counselors under HUD programs and grants. The HUD Secretary is required to study the root causes of default and foreclosure of home loans and is also required to update every five years and distribute a booklet to help consumers applying for federally related mortgage loans.

Title V-Mortgage Servicing

REQUIRES ESCROW ACCOUNTS FOR MORTGAGE LOANS

The bill requires creditors to establish an escrow account for the payment of taxes and hazard insurance, ground rents and any other required periodic payments or premiums associated with a mortgage loan. The section describes the limited instances when the escrow account will not be required. The section also mandates how long the escrow account will be required, how it must be administered, how interest should be paid on the funds in the account and the disclosures required in connection with such accounts. The Federal banking agencies and the Federal Trade Commission are given 180 days to write regulations implementing the section and the section will be effective one year after the publication of final regulations in the Federal Register.

REQUIRES DISCLOSURES FOR BORROWER WHO WAIVE ESCROW

This title also sets out disclosures which must be given to consumers who waive escrow services and gives the Federal banking agencies and the Federal Trade Commission 180 days to write the regulations which will take effect 180 days after publication in the Federal Register.

LIMITS FORCE PLACING OF INSURANCE

This title also prohibits servicers from obtaining force-placed hazard insurance unless there is a reasonable basis to believe the borrower has failed to comply with the loan contract's requirements to maintain property insurance. It goes on to define force-placed insurance, the requirement for its use, disclosures which must be given to the borrower if it is put in place, how the insurance can be terminated and other limitations on its use, including penalties if it is misused.

REQUIRES A STUDY ON MORTGAGE SERVICING

The title requires the HUD Secretary to conduct a study of mortgage servicing practices and their potential for fraud and abuse.

REQUIRES ESCROW AMOUNTS TO BE INCLUDED IN REPAYMENT ANALYSIS

Finally, the title requires that escrow amounts be included in any repayment analysis required by TILA, such as those required in Title II.

Title VI-Appraisal Activities

ESTABLISHES NEW APPRAISAL REQUIREMENTS FOR ALL LOANS

This title establishes property appraisal requirements for mortgage loans. First, it requires creditors to obtain an appraisal before they extend mortgage credit. Second, it describes the appraisal requirements, such as the need for a physical property visit and the need for a second appraisal in certain circumstances. The title prohibits the cost of the appraisal from being paid by the borrower and requires creditors to give borrowers one free copy of the appraisal. It defines "qualified appraiser" and requires creditors to provide consumers with a statement that any appraisal prepared for the mortgage is for the sole use of the creditor, and the consumer may choose to have a separate appraisal conducted at their own expense.

CREATES NEW LIABILITY

Failure to obtain an appraisal as required by this section may result in liability to the consumer in the amount of \$2,000.

ESTABLISHES APPRAISER COERCION AS AN UNFAIR AND DECEPTIVE PRACTICE

The bill defines as an unfair and deceptive act or practice taking any action to compensate, coerce, extort, collude, bribe, or influence an appraiser or otherwise encourage an appraiser to reach a targeted value. The title outlines a few legitimate actions which the creditor may take with respect to the appraiser and the appraisal.

CREATES NEW LIABILITY

The federal banking agencies have rule making authority under this title and it provides for penalties up to \$10,000 per day for first violations and up to \$20,000 for subsequent violations.

ESTABLISHES AN APPRAISAL SUBCOMMITTEE OF THE FFIEC

The bill establishes an appraisal subcommittee of the FFIEC, requires appraiser independence and establishes a requirement for the states to license appraisers and provide requirements for their continuing education. The FFIEC is given authority to monitor these activities of the states.

REQUIRES A STUDY BY THE COMPTROLLER GENERAL

The bill requires the Comptroller General to conduct a comprehensive study on possible improvements in the appraisal process.

REQUIRES DISCLOSURE TO CONSUMER OF APPRAISAL REPORTS

Section 705 requires a disclosure to consumers that they are entitled to a copy of all appraisal reports upon their property no later than three business days prior to the closing date of their mortgage.