

Act No. 392
Public Acts of 2002
Approved by the Governor
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**STATE OF MICHIGAN
91ST LEGISLATURE
REGULAR SESSION OF 2002**

Introduced by Senator Steil

ENROLLED SENATE BILL No. 778

AN ACT to amend 1981 PA 125, entitled "An act to regulate secondary mortgage loans; to prescribe powers and duties of certain state agencies and officials; to require certain fees; to provide for the establishment of a revolving fund; to provide for the promulgation of rules; and to prescribe civil fines and penalties," by amending sections 1, 6b, and 24 (MCL 493.51, 493.56b, and 493.74), sections 1 and 24 as amended and section 6b as added by 1997 PA 91, and by adding sections 14a, 14b, 14c, 14d, and 14e.

The People of the State of Michigan enact:

Sec. 1. (1) This act shall be known and may be cited as "the secondary mortgage loan act".

(2) As used in this act:

(a) "Broker" means a person who, directly or indirectly, does 1 or both of the following:

(i) Serves or offers to serve as an agent for a person attempting to obtain a secondary mortgage loan.

(ii) Serves or offers to serve as an agent for a person who makes or offers to make a secondary mortgage loan.

(b) "Commissioner" means the commissioner of the office of financial and insurance services of the department of consumer and industry services and any authorized representatives of the commissioner.

(c) "Control person" means a director or executive officer of a licensee or registrant or a person who has the authority to participate in the direction, directly or indirectly through 1 or more other persons, of the management or policies of a licensee or registrant.

(d) "Depository financial institution" means a state or nationally chartered bank, state or federal chartered savings and loan association, savings bank, or credit union, or any other institution whose deposits are insured by an agency of the federal government.

(e) "Exclusive broker" means a person that brokers secondary mortgage loans solely to 1 licensee or registrant, is compensated solely by that licensee or registrant, and is indemnified by the licensee or registrant as provided in section 6. The actions or practices of an exclusive broker in brokering a secondary mortgage loan are the actions or practices of the licensee or registrant.

(f) "Executive officer" means an officer, member, or partner of a licensee or registrant, including chief executive officer, president, vice president, chief financial officer, controller, compliance officer, or any other similar position.

(g) "Financial licensing act" means the consumer financial services act, 1988 PA 161, MCL 487.2051 to 487.2072, and any act listed in section 2 of the consumer financial services act, 1988 PA 161, MCL 487.2052.

(h) "Lender" means a person who, directly or indirectly, makes or offers to make secondary mortgage loans.

(i) "Licensee" means a person licensed or required to be licensed under this act. A licensee does not include a depository financial institution.

- (j) "Loan servicing customer" means a mortgagor whose secondary mortgage loan is being serviced by a servicer.
- (k) "Open-end credit" means credit extended under a plan in which both of the following apply:
 - (i) The licensee or registrant reasonably contemplates repeated transactions.
 - (ii) The amount of credit that may be extended to the borrower during the term of the plan is generally made available to the extent that any part of the outstanding balance is repaid.
- (l) "Person" means an individual, corporation, partnership, association, or other legal entity.
- (m) "Registrant" means a person registered or required to be registered under this act. A registrant does not include a depository financial institution.
- (n) "Secondary mortgage loan" means a loan that is not to be repaid within 90 days, that is made to a person for personal, family, or household purposes, and that is secured by a mortgage upon an interest in real property used as a dwelling if the property is subject to a lien of 1 or more prior mortgages. The loan may be secured by other collateral in addition to real property. Notwithstanding the place of execution, nominal or real, of a secondary mortgage loan, if the real property that secures the loan is located in this state, the secondary mortgage loan is subject to this act and all other applicable laws of this state.
- (o) "Service" means the collection or remittance for a lender, noteowner, noteholder, or the licensee's own account of 4 or more installment payments of the principal, interest, or an amount placed in escrow under a secondary mortgage loan, mortgage servicing agreement, or an agreement with the mortgagor.
- (p) "Servicer" means a person who, directly or indirectly, services or offers to service secondary mortgage loans.

Sec. 6b. (1) The commissioner shall exercise general supervision and control over brokers, lenders, and servicers doing business in this state.

- (2) In addition to the other powers granted by this act, the commissioner may do any of the following:
 - (a) Deny an application for a license or registration.
 - (b) Conduct examinations and investigations of any person, as necessary to enforce this act and the rules promulgated under this act.
 - (c) Investigate complaints filed against licensees or registrants.
 - (d) Advise the attorney general or the prosecuting attorney of the county in which the business is conducted that the commissioner believes a licensee, registrant, or person is violating this act. The attorney general or prosecuting attorney shall bring a legal action to enjoin the operation of the business or prosecute violations of this act.
 - (e) Bring an action in the Ingham county circuit court to enjoin a person from participating in, continuing to practice, or from engaging in a practice that is an unsafe or injurious practice or that violates this act or a rule promulgated under this act.
 - (f) Order a person to cease and desist from a violation of this act or a rule promulgated under this act as provided under section 14.
 - (g) Suspend, revoke, or refuse to issue a license or registration as provided under section 11.
 - (h) Assess a civil fine as provided under section 27.
 - (i) Appoint a conservator as provided under section 12a.
 - (j) Issue an order to prohibit a person from being employed by, an agent of, or control person of, a licensee or registrant as provided under section 14a.
 - (k) Censure a licensee or registrant.
- (3) In the conduct of any examination or investigation under this act, the commissioner may do any of the following:
 - (a) Issue a subpoena as provided under section 15.
 - (b) Administer oaths as provided under section 15.
 - (c) Interrogate a person under oath concerning the business and conduct of affairs of a person subject to this act, and require the production of books, records, or papers relative to the inquiry.
 - (d) Have free access during regular business hours to the offices, places of business, or other location where the licensee, registrant, or an affiliate of a licensee or registrant, maintains business-related documents, and to the books, accounts, papers, records, files, documents, safes, and vaults of a licensee or registrant. The information obtained during the examination or investigation is exempt from the freedom of information act, 1976 PA 442, MCL 15.231 to 15.246, and shall not be available for public inspection or copying or divulged to any person except as follows:
 - (i) To the attorney general.
 - (ii) To a regulatory agency.
 - (iii) In connection with an enforcement action brought under this or another applicable act.

(iv) To law enforcement officials.

(v) To persons authorized by the Ingham county circuit court to receive the information.

(e) Employ independent investigators to conduct a part or all of the investigation, in the case of an investigation other than an examination.

Sec. 14a. (1) If in the opinion of the commissioner a person has engaged in fraud, the commissioner may serve upon that person a written notice of intention to prohibit that person from being employed by, an agent of, or control person of a licensee or registrant under this act or a licensee or registrant under a financial licensing act. For purposes of this section, "fraud" shall include actionable fraud, actual or constructive fraud, criminal fraud, extrinsic or intrinsic fraud, fraud in the execution, in the inducement, in fact, or in law, or any other form of fraud.

(2) A notice issued under subsection (1) shall contain a statement of the facts supporting the prohibition and, except as provided under subsection (7), set a hearing to be held not more than 60 days after the date of the notice. If the person does not appear at the hearing, he or she is considered to have consented to the issuance of an order in accordance with the notice.

(3) If after a hearing held under subsection (2) the commissioner finds that any of the grounds specified in the notice have been established, the commissioner may issue an order of suspension or prohibition from being a licensee or registrant or from being employed by, an agent of, or control person of any licensee or registrant under this act or a licensee or registrant under a financial licensing act.

(4) An order issued under subsection (2) or (3) is effective upon service upon the person. The commissioner shall also serve a copy of the order upon the licensee or registrant of which the person is an employee, agent, or control person. The order remains in effect until it is stayed, modified, terminated, or set aside by the commissioner or a reviewing court.

(5) After 5 years from the date of an order issued under subsection (2) or (3), the person subject to the order may apply to the commissioner to terminate the order.

(6) If the commissioner considers that a person served a notice under subsection (1) poses an imminent threat of financial loss to applicants for secondary mortgage loans, the commissioner may serve upon the person an order of suspension from being employed by, an agent of, or control person of any licensee or registrant. The suspension is effective on the date the order is issued and, unless stayed by a court, remains in effect pending the completion of a review as provided under this section and the commissioner has dismissed the charges specified in the order.

(7) Unless otherwise agreed to by the commissioner and the person served with an order issued under subsection (6), the hearing required under subsection (2) to review the suspension shall be held not earlier than 5 days or later than 20 days after the date of the notice.

(8) If a person is convicted of a felony involving fraud, dishonesty, or breach of trust, the commissioner may issue an order suspending or prohibiting that person from being a licensee or registrant and from being employed by, an agent of, or control person of any licensee or registrant under this act or a licensee or registrant under a financial licensing act. After 5 years from the date of the order, the person subject to the order may apply to the commissioner to terminate the order.

(9) The commissioner shall mail a copy of any notice or order issued under this section to the licensee or registrant of which the person subject to the notice or order is an employee, agent, or control person.

Sec. 14b. (1) A hearing under section 14 or 14a shall be conducted under the administrative procedures act of 1969, 1969 PA 306, MCL 24.201 to 24.328. Within 30 days after the commissioner has notified the parties that the case has been submitted to him or her for final decision, the commissioner shall render a decision that shall include findings of fact supporting the decision and serve upon each party to the proceeding a copy of the decision and an order consistent with the decision.

(2) Except for a consent order, a party to the proceeding, or a person affected by an order issued under section 14 or 14a may obtain a judicial review of the order. A consent order may be reviewed as provided under the administrative procedures act of 1969, 1969 PA 306, MCL 24.201 to 24.328. Except for an order under judicial review, the commissioner may terminate or set aside any order. The commissioner may terminate or set aside an order under judicial review with the permission of the court.

(3) Unless ordered by the court, the commencement of proceedings for judicial review under subsection (2) does not stay the commissioner's order.

Sec. 14c. The commissioner may apply to the circuit court of Ingham county for the enforcement of any outstanding order issued under section 8, 14, or 14a.

Sec. 14d. Any current or former executive officer, director, agent, or control person who violates a final order issued under section 14a is guilty of a misdemeanor punishable by a fine of not more than \$5,000.00 or imprisonment for not more than 1 year, or both.

Sec. 14e. A control person who is subject to an order issued under section 14a and who meets all of the following requirements is not in violation of the order:

(a) The control person shall not in any manner, directly or indirectly, participate in the control of a licensee or registrant after the date the order is issued.

(b) The control person shall within 6 months after the date the order is final transfer any interest the control person owns in a licensee or registrant to an unrelated third party.

Sec. 24. (1) A licensee or registrant shall not transfer or assign a secondary mortgage loan or a security directly representing an interest in 1 or more secondary mortgage loans before the disbursement of 75% or more of the proceeds of the secondary mortgage loan to, or for the benefit of, the borrower. This subsection shall not apply to any of the following:

(a) A land contract not considered to be an equitable secondary mortgage.

(b) A loan made under a state or federal government program that allows the lender to escrow more than 25% of the proceeds for a limited period of time.

(c) A construction loan.

(d) A secondary mortgage loan that provides in writing that the loan proceeds shall be disbursed to or for the benefit of the borrower in installments or upon the request of the borrower or upon the completion of renovations or repairs to the dwelling situated on the real property subject to the secondary mortgage loan.

(2) It is a violation of this act for a licensee or registrant to do any of the following:

(a) Suppress or withhold from the commissioner any information that the licensee or registrant possesses that would make the licensee or registrant ineligible for licensing or registration under this act or would warrant the commissioner's denial of a license or registration application.

(b) Violate any provisions of 1966 PA 125, MCL 565.161 to 565.164, regulating the handling of mortgage escrow accounts by mortgagees.

(c) Until proper disbursement is made, fail to place in a trust or escrow account held by a depository financial institution in a manner approved by the commissioner any money, funds, deposits, checks, drafts, or other negotiable instruments received by a broker, lender, or servicer that is the portion of a payment on a secondary mortgage loan that the person is obligated to pay to a third party. The deposits shall include amounts paid to the holder of the secondary mortgage loan, amounts for property taxes and insurance premiums, and amounts paid under an agreement that requires, if the secondary mortgage loan is not closed, the amounts paid shall be refunded to the prospective borrower, or if the secondary mortgage loan is closed, the amounts paid shall be applied to fees and costs incurred at the time the secondary mortgage loan is closed. Fees and costs include, but are not limited to, title insurance premiums and recording fees. Fees and costs do not include amounts paid to cover costs incurred to process the secondary mortgage loan application, to obtain an appraisal, or to receive a credit report.

(d) Refuse to permit an examination or investigation by the commissioner of the books and affairs of the licensee or registrant, or refuse or fail, within a reasonable time, to furnish any information or make a report that may be required by the commissioner under this act.

(e) Be convicted of a felony, or any misdemeanor of which an essential element is fraud.

(f) Refuse or fail to pay within a reasonable time expenses assessed under this act.

(g) Fail to make restitution after having been ordered to do so by the commissioner or an administrative agency, or fail to make restitution or pay damages to persons injured by the licensee's or registrant's business transactions after having been ordered to do so by a court.

(h) Fail to make a secondary mortgage loan pursuant to, and in accordance with, a written commitment to make a secondary mortgage loan issued to, and accepted by, a person when the person has timely and completely satisfied all the conditions of the commitment prior to the expiration of the commitment.

(i) Require a prospective borrower to deal exclusively with the licensee or registrant in regard to a secondary mortgage loan application.

(j) Take a security interest in real property before closing the secondary mortgage loan to secure payment of fees assessed in connection with a secondary mortgage loan application.

(k) Except as otherwise provided under section 14e, knowingly permit a person to violate an order that has been issued under this act or any other financial licensing act that prohibits that person from being employed by, an agent of, or a control person of the licensee or registrant.

This act is ordered to take immediate effect.

Carol Morey Viventi

Secretary of the Senate.

Sam E. Randall

Clerk of the House of Representatives.

Approved _____

Governor.