

LEGISLATIVE BILL 270

Approved by the Governor March 22, 1993

Introduced by Wesely, 26

AN ACT relating to loan brokers; to amend sections 45-191 and 59-1617, Reissue Revised Statutes of Nebraska, 1943, and section 45-190, Revised Statutes Supplement, 1992; to define terms; to prohibit acts as prescribed; to eliminate provisions relating to investigations, orders, hearings, and penalties; to provide for a disclosure statement as prescribed, fees, public access to disclosure documents, penalties, a loan brokerage agreement as prescribed, rules and regulations, and voidance of the loan brokerage agreement as prescribed; to provide for investigations, orders, and hearings as prescribed; to provide powers and duties for the Director of Banking and Finance; to provide for an administrative fine, civil penalties, and exemptions; to harmonize provisions; and to repeal the original sections, and also sections 45-192 and 45-193, Reissue Revised Statutes of Nebraska, 1943.

Be it enacted by the people of the State of Nebraska,

Section 1. That section 45-190, Revised Statutes Supplement, 1992, be amended to read as follows:

45-190. For purposes of sections 45-189 to ~~45-193~~ 45-191 and sections 3 to 13 of this act, unless the context otherwise requires:

(1) Advance fee shall mean any fee, deposit, or consideration which is assessed or collected, prior to the closing of a loan, by a loan broker and shall include, but not be limited to, any money assessed or collected for processing, appraisals, credit checks, consultations, or expenses;

(2) Borrower shall mean a person obtaining or desiring to obtain a loan of money;

(3) Department shall mean the Department of Banking and Finance;

(4) Director shall mean the Director of Banking and Finance;

(5) (4) Loan broker shall mean any person, except any bank, trust company, savings and loan association or subsidiary of a savings and loan association, building and loan association, credit union, industrial loan company, securities broker-dealer, licensed or registered mortgage banker, real estate broker or salesperson, attorney, Federal Housing Administration or United States Department of Veterans Affairs approved lender as long as the loan of money made by the Federal

Housing Administration or the United States Department of Veterans Affairs approved lender is secured or covered by guarantees or commitments or agreements to purchase or take over the same by the Federal Housing Administration or the United States Department of Veterans Affairs, credit card company, installment loan licensee, or insurance company which is subject to regulation or supervision under the laws of the United States or this state, who:

(a) For or in expectation of consideration, procures, attempts to procure, arranges, or attempts to arrange a loan of money for a borrower;

(b) For or in expectation of consideration, assists, consults, or advises a borrower in obtaining or attempting to obtain a loan of money;

(c) Is employed as an agent for the purpose of soliciting borrowers as clients of the employer; or

(d) Holds himself or herself out, through advertising, signs, or other means, as a loan broker; ~~and~~

(6) Loan brokerage agreement shall mean any agreement for services between a loan broker and a borrower; and

~~(5)~~ (7) Person shall mean natural persons, corporations, trusts, unincorporated associations, joint ventures, and partnerships.

Sec. 2. That section 45-191, Reissue Revised Statutes of Nebraska, 1943, be amended to read as follows:

45-191. No loan broker shall:

(1) Assess or collect an advance fee from a borrower under a contract to provide services for the procurement of a loan of money; ~~or~~

(2) Willfully, either orally or in writing, misrepresent the terms, benefits, privileges, or provisions of any service contract issued or to be issued by the loan broker or by any lender; ~~or~~

(3) Represent or imply that the loan broker has been sponsored, recommended, or approved by the department or that the loan broker's abilities or qualifications have been passed upon by the department.

Sec. 3. (1) At least forty-eight hours before the borrower signs a loan brokerage agreement, the loan broker shall give the borrower a written disclosure statement. The cover sheet of the disclosure statement shall have printed, in at least ten-point boldface capital letters, the title DISCLOSURES REQUIRED BY NEBRASKA LAW. The following statement, printed in at least ten-point type, shall appear under the title:

THE STATE OF NEBRASKA HAS NOT REVIEWED AND DOES NOT APPROVE, RECOMMEND, ENDORSE, OR SPONSOR ANY LOAN BROKERAGE AGREEMENT. THE INFORMATION CONTAINED IN THIS DISCLOSURE DOCUMENT HAS NOT BEEN VERIFIED BY THE STATE. IF YOU HAVE QUESTIONS, SEEK LEGAL ADVICE BEFORE YOU SIGN A LOAN BROKERAGE AGREEMENT.

Only the title and the statement shall appear on the cover

sheet.

(2) The body of the disclosure statement shall contain the following information:

(a) The name and street address of the loan broker, the names under which the loan broker does, has done, or intends to do business, and the name and street address of any parent or affiliated company;

(b) A statement as to whether the loan broker does business as an individual, partnership, corporation, or other organizational form, including identification of the state of incorporation or formation;

(c) How long the loan broker has done business;

(d) The number of loan brokerage agreements the loan broker has entered into in the previous twelve months;

(e) The number of loans the loan broker has obtained for borrowers in the previous twelve months;

(f) A description of the services the loan broker agrees to perform for the borrower;

(g) The conditions under which the borrower is obligated to pay the loan broker. This disclosure shall be in boldface type;

(h) The names, titles, and principal occupations for the past five years of all officers, directors, or persons occupying similar positions responsible for the loan broker's business activities;

(i) A statement whether the loan broker or any person identified in subdivision (h) of this subsection:

(i) Has been convicted of a felony or misdemeanor or pleaded nolo contendere to a felony or misdemeanor charge if such felony or misdemeanor involved fraud, embezzlement, fraudulent conversion, or misappropriation of property;

(ii) Has been held liable in a civil action by final judgment or consented to the entry of a stipulated judgment if the civil action alleged fraud, embezzlement, fraudulent conversion, or misappropriation of property or the use of untrue or misleading representations in an attempt to sell or dispose of real or personal property or the use of unfair, unlawful, or deceptive business practices; or

(iii) Is subject to any currently effective injunction or restrictive order relating to business activity as the result of an action brought by a public agency or department including, but not limited to, action affecting any vocational license; and

(j) Any other information the director requires.

Sec. 4. (1) Before advertising or making any oral or written representation or acting as a loan broker in this state a loan broker shall file with the department one copy of the disclosure statement and one copy of any loan brokerage agreement.

(2) The loan broker shall amend these filings no less than annually and shall also file any amendment to the disclosure statement within forty-five days after any material change in information required to be disclosed in the disclosure statement.

(3) The loan broker shall pay a fifty-dollar filing fee upon

filing the initial disclosure statement. The loan broker shall pay a twenty-five-dollar filing fee for each amendment filed. All funds collected by the department under this section shall be remitted to the State Treasurer for credit to the Securities Act Cash Fund.

(4) The information contained or filed under this section may be made available to the public under such rules and regulations as the department prescribes.

Sec. 5. (1) A loan broker who fails to make accurate and timely filings as required by section 4 of this act shall be guilty of a Class I misdemeanor.

(2) A loan broker who willfully violates subdivision (1) of section 45-191 shall be guilty of:

(a) A Class IV felony if the advance fee assessed or collected is greater than three hundred dollars; or

(b) A Class I misdemeanor if the advance fee assessed or collected is three hundred dollars or less.

(3) A willful violation of any other provision of sections 45-189 to 45-191 and sections 3 to 13 of this act by a loan broker shall be a Class IV felony.

Sec. 6. A loan brokerage agreement shall be in writing and shall be signed by the loan broker and the borrower. The loan broker shall furnish the borrower a copy of such signed loan brokerage agreement at the time the borrower signs it.

Sec. 7. A waiver of sections 45-189 to 45-191 and sections 3 to 13 of this act by a borrower prior to or at the time of entering into a loan brokerage agreement is contrary to public policy and shall be void. Any attempt by a loan broker to have a borrower waive any rights pursuant to sections 45-189 to 45-191 and sections 3 to 13 of this act shall be a violation of such sections.

Sec. 8. The department may adopt, promulgate, amend, and rescind such rules and regulations as necessary or appropriate to implement the purposes of sections 45-189 to 45-191 and sections 3 to 13 of this act.

Sec. 9. (1) If a loan broker materially violates the loan brokerage agreement, the borrower may upon written notice void such loan brokerage agreement. In addition, the borrower may recover all money paid to the loan broker and any other damages, including reasonable attorney's fees. The loan broker shall be deemed to have materially violated the loan brokerage agreement if the loan broker does any of the following:

(a) Makes false or misleading statements relating to the loan brokerage agreement;

(b) Does not comply with the loan brokerage agreement or any obligations arising from the loan brokerage agreement;

(c) Does not grant the borrower a loan or diligently attempt to obtain a loan for the borrower; or

(d) Does not comply with the requirements of sections 45-189 to 45-191 and sections 3 to 13 of this act.

(2) Remedies under this section shall be in addition to any other remedies available in law or equity.

Sec. 10. (1)(a) The director in his or her discretion may make such investigations within or without this state as necessary to determine whether any person has violated or is about to violate sections 45-189 to 45-191 and sections 3 to 13 of this act or to aid in the enforcement of such sections or in the adopting or promulgating of rules, regulations, and forms under such sections. In the discretion of the director, the actual expense of any such investigation may be charged to any person who is the subject of such investigation.

(b) The department may publish information concerning any violation of such sections or any rule, regulation, or order of the department.

(c) For purposes of any investigation or proceeding under such sections, the director or any officer designated by him or her may administer oaths and affirmations, subpoena witnesses, compel their attendance, take evidence, and require the production of any books, papers, correspondence, memoranda, agreements, or other documents or records which the director deems relevant or material to the inquiry.

(2)(a) In case of contumacy by or refusal to obey a subpoena issued to any person, any court of competent jurisdiction, upon application by the director, may issue an order to that person requiring him or her to appear before the director or an officer designated by the director to produce documentary evidence or to give evidence touching on a matter under investigation or in question. Any failure to obey an order of the court may be punished by the court as a contempt of court.

(b) The request for order of compliance may be addressed to either (i) the district court of Lancaster County or the district court in the county where service may be obtained on the person refusing to testify or produce, if the person is within this state, or (ii) the appropriate district court of this state having jurisdiction over the person refusing to testify or produce, if the person is outside this state.

Sec. 11. (1) The director may summarily order a loan broker to cease and desist from acting as a loan broker or from the use of certain forms or practices relating to the loan broker's activities if the order is in the public interest and the director finds:

(a) The disclosure statement on file is incomplete in any material respect or contains any statement which was, in light of the circumstances under which it was made, false or misleading with respect to any material fact;

(b) The loan broker has willfully violated or willfully failed to comply with any provision of sections 45-189 to 45-191 and sections 3 to 13 of this act;

(c) There has been a substantial failure to comply with any of the provisions of such sections;

(d) The continued use of certain forms or practices relating to the loan broker's activity would constitute a misrepresentation, deceit, or fraud upon the consumer; or

(e) Any person identified in the required disclosure statement has been convicted of an offense described in subdivision (2)(i)(i) of section 3 of this act or is subject to an order or has had a civil judgment entered against him or her as described in subdivision (2)(i)(ii) or (2)(i)(iii) of section 3 of this act and the involvement of such person in the loan broker's business creates an unreasonable risk to prospective borrowers.

(2) If the director believes, whether or not based upon an investigation conducted under section 10 of this act, that any person or loan broker has engaged in or is about to engage in any act or practice constituting a violation of any provision of sections 45-189 to 45-191 and sections 3 to 13 of this act or any rule, regulation, or order under such sections, the director may:

(a) Issue a cease and desist order;

(b) Impose a fine not to exceed one thousand dollars per violation, in addition to costs of the investigation; or

(c) Initiate an action in any court of competent jurisdiction to enjoin such acts or practices and to enforce compliance with such sections or any order under such sections.

(3) Upon a proper showing a permanent or temporary injunction, restraining order, or writ of mandamus shall be granted. The director shall not be required to post a bond.

(4)(a) Any fine and costs imposed pursuant to this section shall be in addition to all other penalties imposed by the laws of this state and shall be collected by the department and remitted to the State Treasurer. Costs shall be credited to the Securities Act Cash Fund, and fines shall be credited to the permanent school fund.

(b) If a person fails to pay the fine or costs of the investigation referred to in this subsection, a lien in the amount of the fine and costs may be imposed upon all of the assets and property of such person in this state and may be recovered by suit by the department. Failure of the person to pay a fine and costs shall constitute a separate violation of sections 45-189 to 45-191 and sections 3 to 13 of this act.

(5) Upon entry of an order pursuant to this section, the director shall promptly notify all persons to whom such order is directed that it has been entered and of the reasons for such order and that any person to whom the order is directed may request a hearing in writing within fifteen business days of the issuance of the order. Upon receipt of a written request, the matter shall be set down for hearing to commence within fifteen business days after the receipt unless the person requesting the hearing consents to a later date. If a hearing is not requested within fifteen business days from the issuance of the order and none is ordered by the director, the order shall automatically become final and shall remain in effect until it is modified or vacated by the director. If a hearing is requested or ordered, the director, after notice and hearing, shall enter his or her written findings of fact and conclusions of law and may affirm, modify, or vacate the order.

(6) The director may vacate or modify a cease and desist

order if he or she finds that the conditions which caused its entry have changed or that it is otherwise in the public interest to do so.

(7) Any person aggrieved by a final order of the director may appeal the order. The appeal shall be in accordance with the Administrative Procedure Act.

Sec. 12. The following persons shall be exempt from sections 45-189 to 45-191 and sections 3 to 13 of this act if such person does not hold himself or herself out, through advertising, signs, or other means, as a loan broker; Securities broker-dealer, real estate broker or salesperson, attorney, or investment adviser.

Sec. 13. In any proceeding under the provisions of sections 45-189 to 45-191 and sections 3 to 13 of this act, the burden of proving an exemption or an exception from a definition shall be upon the person claiming it.

Sec. 14. That section 59-1617, Reissue Revised Statutes of Nebraska, 1943, be amended to read as follows:

59-1617. (1) Except as provided in subsection (2) of this section, the Consumer Protection Act shall not apply to actions or transactions otherwise permitted, prohibited, or regulated under laws administered by the Director of Insurance, the Public Service Commission, the Federal Energy Regulatory Commission, or any other regulatory body or officer acting under statutory authority of this state or the United States. The Consumer Protection Act and federal antitrust laws shall not extend to or apply to (a) any actions or transactions on the part of any municipality or group of municipalities while engaged in regulating natural gas rates pursuant to the Municipal Natural Gas Regulation Act or section 16-679 or 17-528.02 or as otherwise permitted by law or (b) any actions or transactions on the part of any public power and irrigation district, public power district, electric membership association, or joint authority created pursuant to the Joint Public Power Authority Act or of any agency created pursuant to the Municipal Cooperative Financing Act, cooperative, or municipality engaged in furnishing electrical service to customers at retail or wholesale if such actions or transactions are otherwise permitted by law.

(2) Actions and transactions prohibited or regulated under the laws administered by the Director of Insurance shall be subject to section 59-1602 and all statutes which provide for the implementation and enforcement of section 59-1602. Actions and transactions prohibited or regulated under the laws administered by the Board of Examiners in Embalming and Funeral Directing or administered by the Department of Agriculture and actions and transactions relating to loan brokers which are prohibited or regulated pursuant to sections 45-189 to ~~45-193~~ 45-191 and sections 3 to 13 of this act and administered by the Department of Banking and Finance shall be subject to the Consumer Protection Act.

No penalty or remedy shall result from a violation of the Consumer Protection Act except as expressly provided in such sections.

Sec. 15. That original sections 45-191 and 59-1617,

Reissue Revised Statutes of Nebraska, 1943, and section 45-190, Revised Statutes Supplement, 1992, and also sections 45-192 and 45-193, Reissue Revised Statutes of Nebraska, 1943, are repealed.