

2006 Virginia Legislation and Regulations

This letter contains my annual summary of bills passed by the Virginia General Assembly that may be of interest to creditors providing consumer financial services. Except for House Bill 698 that was effective March 31, 2006 and HB 193, part of which will be effective January 1, 2007, the bills will be effective July 1, 2006.

In addition to legislative activity, the State Corporation Commission has issued new regulations under the Virginia Mortgage Lender and Broker Act. The regulations affect only licensees under the Act, and thus banks, savings institutions and their subsidiaries and affiliates are exempt. Among other things, the proposed regulations deal with preapproval letters and advertising requirements. The new regulations are effective September 1, 2006 and are summarized at the end of this letter.

There may be other bills in which you would have an interest, but the following seem most relevant to providers of consumer credit. For the most part, the following summaries are based upon summaries prepared by the Division of Legislative Services of the General Assembly.

Mortgage Loans

HB 698 Mortgage Brokers – Dual Compensation

This bill amends §§ 6.1-58.3 and 6.1-409 to provide that a state bank or mortgage lender that, pursuant to an executed originating agreement with the Virginia Housing Development Authority (VHDA), acts as an originating agent of the VHDA in connection with a mortgage loan shall not be deemed to be acting as a mortgage broker with respect to such mortgage loan. This bill overrides the prohibition against dual compensation in the Mortgage Lender and Broker Act (the "Act"). Although banks and their subsidiaries are generally exempt from the requirements of the Act, a controlled subsidiary of a Virginia bank is subject to the prohibition in the Act regarding dual compensation.

This bill has an emergency provision and was effective when signed by the Governor on March 31, 2006.

SB 433 Mortgage Satisfaction – Provisions

This bill amends §§ 55-66.3 and 55-66.5 and adds Article 2.1 of Chapter 4 of Title 55 to add to the Virginia Code provisions of the Uniform Residential Mortgage Satisfaction Act relating to definitions, notifications, rescinding erroneously recorded certificates of satisfaction, requirements on secured creditors, and the form and effect of satisfaction. Current Code provisions relating to payoff statements, mortgage satisfaction via settlement agents and court proceedings, and penalties for errors or omissions in satisfaction procedures are retained. The bill was passed by the 2005 Session but was required to be reenacted.

Banks, Industrial Loan Associations and Credit Unions

HB 193 Deposit Accounts and Certificates of Deposit – Statute of Limitations; Tender of Check in Full Satisfaction of Debt

This bill adds § 8.3A-118.1 to establish the date from which the six-year limitations period on actions to enforce a right under a deposit account or a certificate of deposit starts to toll. This change will be effective on January 1, 2007. However, a person with a cause of action that accrued after January 1, 1997 shall have until January 1, 2013, or until the end of the six-year period specified in the measure, whichever, is longer, to bring an action to enforce the bank's obligations.

This bill also amends § 8.3A-311 to provide that a person does not act in good faith when tendering a check in full satisfaction of a loan if the check is for less than the full amount due and is tendered to a person without knowledge of a dispute concerning the loan.

HB 195 Industrial Loan Companies – Certain Provisions for Foreign Industrial Loan Companies

This bill amends §§ 6.1-232.2 and 6.1-232.3 to prohibit a foreign industrial loan company from establishing or maintaining an office in Virginia on the premises or property of the company's affiliate if the affiliate engages in commercial activities. The measure also repeals provisions regarding domestic industrial loan associations.

HB 360 Bankers' Banks – Authorized to Accept Deposits From and Make Loans to Certain Banks and Individuals

This bill amends § 6.1-6.1 to authorize bankers' banks to accept deposits from and make loans to (i) a bank in organization that has applied for insurance of deposits by a federal agency, (ii) officers, directors, and employees of such a bank in organization, (iii) persons referred to a bankers' bank by a financial institution or by a bank in organization that has applied for insurance of deposits by a federal agency, and (iv) other persons with the prior approval of the Commissioner of Financial Institutions and subject to such conditions as the Commissioner may impose.

HB 1009 Check Clearing for 21st Evidence Act

This bill creates the Check Clearing for the 21st Century Evidence Act, which allows any check created pursuant to the federal Check Clearing for the 21st Century Evidence Act (provides for an official copy of a check) to be admissible in evidence to the same extent as the original check would be.

HB 1077 Construction Loans by Banks – Removes an Obsolete Reference

This bill amends § 6.1-64 removes an obsolete reference to the maximum 40-year and two-month amortization period for loans secured by real estate. The requirement for minimum amortization periods in real estate loans was repealed in 2005.

SB 113 Banks – Allows for Deduction of Customary Fees Without First Having to Submit an Invoice

This bill amends § 16.1-69.48 to allow for the deduction of customary bank fees without first having to submit an invoice to the Executive Secretary's Office for payment. Entries reflecting the payment of these fees will still be entered into the Financial Management System.

SB 529 Credit Unions – Charges on Loans

This bill amends § 6.1-330.64 to authorize credit unions to impose finance charges and other charges and fees as agreed on open-end credit plans at such rates and in such amounts and manner when payment is not timely received.

SB 530 Credit Union Offices

This bill amends § 6.1-225.20 to provide that a credit union's notice to the Commissioner of Financial Institutions of its participation in a credit union service organization ("CUSO") satisfies the requirement that notice be given of the establishment of an office at a shared service facility, if the CUSO has notified the Commissioner of the establishment of the shared service facility.

SB 531 Credit Unions – Minors' Accounts

This bill amends § 6.1-225.45 to authorize credit unions to take actions with respect to share accounts of a minor on the order of the minor. The minor's parent or guardian will not have the power to withdraw or transfer shares in such an account unless the minor has notified the credit union to accept the signature of the parent or guardian.

Consumer Protection

HB 383 Home Protection Insurance Contracts – Extended Service Contracts

This bill amends §§ 38.2-2600, 38.2-2601, 38.2-2602, 38.2-2604, 38.2-2605, 38.2-2613 and 38.2-2615 and adds Article 2 of Chapter 26 of Title 38.2 to exempt

maintenance agreements that do not involve the repair or replacement of the consumer product from the Extended Service Contract Act. The measure also specifies that built-in household appliances, and mechanical, plumbing, and electrical systems are consumer products subject to the Act, and provides that extended service contracts include agreements under which the purchaser is indemnified against the cost of repair or replacement of consumer products that fail due to normal wear and tear. The measure allows obligors to demonstrate financial responsibility by maintaining a funded reserve account of not less than 40 percent of the gross consideration received, less claims paid, on the sale of the service contract for all in-force contracts.

HB 1103 Virginia Consumer Protection Act – Choice of Remedies

This bill amends § 59.1-204 to provide that a person who accepts a cure offer under the Virginia Consumer Protection Act may not bring another legal action that is substantially based on the same allegations of fact on which the action under the Act was based. The measure also provides that the right to trial by jury is preserved in actions for damages under the Act.

Tax Refund Anticipation Loans

HB 324 Tax Refund Anticipation Loans – Requires Facilitators to Display Their Fees and Make Disclosures

This bill amends § 59.1-200 and adds Chapter 20 of Title 6.1, consisting of §§ 6.1-474 through 6.1-479, to add a new chapter to the Money and Interest Title of the Code dealing with tax refund anticipation loans. Among other things, it requires persons who make or facilitate tax refund anticipation loans to display their fees and related information and to provide a disclosure form, to be signed by the refund loan anticipation lender and the debtor. Violators are subject to civil penalties and private actions.

Privacy; Identity Theft

HB 1141 Identity Theft – Penalty

This bill imposes a Class 6 felony for an identity theft violation if five or more persons' identifying information was obtained in the same transaction or occurrence and a Class 5 felony where 50 or more persons' identifying information was obtained in the same transaction or occurrence. The bill does not change provisions of current law that punish identity theft as a Class 1 misdemeanor unless there is a financial loss greater than \$200, in which case the penalty is a Class 6 felony. This bill is identical to SB 460.

HB 1509 Identity Theft – Reporting to Law-Enforcement Agencies

This bill amends §§ 18.2-186.3:1 and 18.2-186.5 to provide that a consumer may report a case of identity theft to the law-enforcement agency where he resides. The bill also provides that, upon receipt of a court order and upon request by such person, the Office of the Attorney General, in cooperation with the State Police, shall issue an “Identity Theft Passport” stating that such an order has been submitted.

SB 255 Confidentiality of Documents – Establishes Protections for Materials Obtained by State Corporation Commission Pursuant to Investigation

This bill amends adds § 6.1-2.27:1 to add a new section to the Consumer Real Estate Settlement Protection Act (“CRESPA”) which establishes protections for the confidentiality of documents and other materials obtained by the State Corporation Commission pursuant to an investigation of a title insurance company or agent in the course of an investigation under CRESPA.

SB 460 Identity Theft – Penalty

This bill imposes a Class 6 felony for an identity theft violation if five or more persons’ identifying information was obtained in the same transaction or occurrence and a Class 5 felony where 50 or more persons’ identifying information was obtained in the same transaction or occurrence. The bill does not change provisions of current law that punish identity theft as a Class 1 misdemeanor unless there is a financial loss greater than \$200, in which case the penalty is a Class 6 felony. This bill is identical to HB 1141.

Insurance

HB 1429 Credit Life Insurance – Interest on Proceeds

This bill exempts credit life insurance that is payable in whole or in part to a creditor that is an affiliate of the insurer and does not charge post-death interest on the indebtedness, from requirements that insurers pay interest on the proceeds of a life insurance policy.

Miscellaneous

HB 115 Garnishment Forms and Summonses – Requires Clarity in Language

This bill amends §§ 8.01-511 and 8.01-512.3 to require that garnishment summonses and forms contain language declaring if the garnishment is of wages,

salary, or other compensation or if the garnishment is of some other property of the judgment debtor.

HB 1201 Small Claims Court – Increases Ceiling of Jurisdictional Amount

This bill increases from \$2,000 to \$5,000 the ceiling of the jurisdictional amount of a small claims court.

SB 134 Towing and Recovery Operators – Regulation by Board for Towing and Recovery Operators

This bill creates and amends numerous Code sections. Among other things, it has a mechanic's lien for towing, storage and recovery; provides for written notice to the owner of the vehicle; raises the junk car threshold to \$7,500; and increases from \$25 per day to \$50 per day the amount owed for storage. The bill also revises the procedures by which towing and storage companies may seek to recover their fees and charges for towing away and storing immobilized and abandoned vehicles. The bill requires that signs used to provide notice that a trespassing vehicle will be towed include at least the non-emergency telephone number of the local law-enforcement agency or the telephone number of the towing and recovery business authorized to perform the tows. Finally, the bill establishes a new Board for Towing and Recovery Operators to license and regulate the towing and recovery industry and tow truck drivers. This bill is the same as HB 1258.

New Regulations

On February 11, 2005, the State Corporation Commission (the "Commission") proposed new and amended regulations under the Mortgage Lender and Broker Act (the "Act"). After receiving numerous comments, the Commission published on January 17, 2006, amended proposed regulations for further comment. Final regulations were published on April 25, 2006. The following paragraphs discuss the final regulations, which will be effective September 1, 2006.

Regulation 10VAC5-160-10 – Definitions. New definitions were added to this regulation, including definitions of "Advertisement", "Affiliate" and "Subsidiary". An advertisement means a commercial message in any medium that promotes, directly or indirectly, a mortgage loan, including communications soliciting business. It excludes messages on promotional items such as pens, pencils, etc., as well as rate sheets or other information distributed or made available solely to other business.

Section 6.1-411 of the Act exempts from the Act banks, savings institutions and credit unions, as well as their subsidiaries and affiliates. The proposal, for purposes of this exemption, defines both "affiliate" and "subsidiary" as an entity of which 25% or

more of the voting shares or ownership is held, directly or indirectly, by a company that also owns a bank, savings institution or credit union.

The definition of “lock-in agreement” is modified slightly to include a written agreement between a mortgage broker acting on behalf of a mortgage lender and an applicant.

Regulation 10VAC5-160-20 – Operating Rules. The existing regulation prohibits a licensee from intentionally misrepresenting qualifications for a mortgage loan or any material loan terms or for making any false promises to induce an applicant to apply for a mortgage loan or to enter into any commitment agreement or lock-in agreement. The word “intentionally” has been deleted and “misleading statements” has been substituted for “promises”.

The new regulation adds that a misrepresentation or false or misleading statement resulting directly from incorrect information furnished to a licensee by a third party is not considered a violation of this section if the licensee has supporting documentation thereof and the licensee’s reliance thereon was reasonable.

Section 2 prohibits a licensee from retaining any portion of any fees or charges upon consumers for goods or services provided by third parties.

Licensees, within 15 days of becoming aware of the occurrence of any of the following events, must file a written report with the Commissioner describing such event and its expected impact, if any, on the activities of the licensee in Virginia:

- The licensee files for bankruptcy or reorganization;
- Any governmental authority institute revocation or suspension proceedings against the licensee or revokes or suspends a mortgage related license held or formerly held by the licensee;
- Any governmental authority takes (i) formal regulatory or enforcement action against a licensee relating to its mortgage business or (ii) any other action against the licensee relating to its mortgage business where the total amount of restitution or other payment exceeds \$25,000. A licensee is not required to provide information about an event to the extent that such disclosure is prohibited by the laws of another state;
- Based on allegations by any governmental authority that the licensee violated any law or regulation applicable to the conduct of its licensed mortgage business, the licensee enters into, or otherwise agrees to the entry of, a settlement or consent order, decree, or agreement with or by such governmental authority;

- The licensee surrenders its license to engage in any mortgage related business in another state in lieu of threatened or pending license revocation, license suspension, or other regulatory or enforcement action;
- The licensee is denied a license to engage in any mortgage related business in another state;
- The licensee or any of its employees, officers, directors, or principals is indicted for a felony;
- The licensee or any of its employees, officers, directors, or principals is convicted of a felony.

As stated earlier, a licensee will be prohibited from informing a consumer that such consumer has been or will be “preapproved” or “pre-approved” for a mortgage loan unless the licensee contemporaneously provides the consumer with a separate written disclosure in at least 10-point type that:

- Explains what “preapproval” means;
- Informs the consumer that the consumer’s loan application has not yet been approved;
- States that a written commitment to make a mortgage loan has not yet been issued;
- Advises the consumer what needs to occur before the consumer’s loan application can be approved.

This amendment does not apply to advertisements subject to 10VAC5-160-60.

If the preapproval is initially communicated by telephone, the licensee must provide written disclosure to the consumer within three business days.

Regulation 10VAC5-160-30 – Commitment Agreements and Lock-in Agreements. This proposal modifies subsection B by stating that, if a lock-in agreement is issued by a licensee to a consumer, it shall be signed by a representative of the licensee.

A mortgage broker is prohibited from issuing a lock-in agreement to a consumer unless the mortgage broker has actually locked-in the loan, including the applicable interest rate, points and other terms, with a mortgage lender. A mortgage broker must maintain supporting written documentation from the mortgage lender of all lock-in information released three years from the date the lock-in expires.

Regulation 10VAC5-160-60 – Advertising. There is no existing regulation dealing with advertising. The Act itself contains at § 6.1-424 a prohibition against any licensee using or causing to be published any advertisement which contains any false, misleading or deceptive statement or representation or identifies the licensee by any name other than the name set forth on its license. The new regulation says that every advertisement used by or published on behalf of a licensee shall clearly and conspicuously disclose the following information:

- The name of the licensee as set forth on its license;
- A statement that the licensee is licensed by the “Virginia State Corporation Commission”;
- The license number assigned by the Commission to the licensee;
- If an advertisement contains a rate of interest, a statement that the stated rate may change or not be available at the time of loan commitment or lock-in;
- If an advertisement contains specific information about a consumer’s existing mortgage loan and such information was not obtained from the consumer, a statement identifying the source of such information (e.g., public court records, consumer reporting agency, etc.).

The new regulation says that no licensee shall deceptively advertise a mortgage loan, make false or misleading statements or representations, or misrepresent the terms, conditions or charges incident to obtaining a mortgage loan.

The new regulation also prohibits a licensee from using or causing to be published an advertisement that states or implies the following:

- The licensee is affiliated with, or an agent or division of, a governmental agency, depository institution or other entity with which no such relationship exists;
- A consumer has been or will be “preapproved” or “pre-approved” for a mortgage loan unless the licensee (i) discloses on the face of the advertisement in at least 14-point bold-faced type that “THIS IS NOT A LOAN APPROVAL” and (ii) clearly and conspicuously discloses the conditions and/or qualifications associated with such preapproval. The regulation says that this provision is intended to supplement the requirements of the Fair Credit Reporting Act relating to firm offers of credit;

- A licensee shall not use or cause to be published any advertisement that gives a consumer the false impression that the advertisement is being sent by the consumer's current noteholder or lienholder. If it contains the name of that entity, it shall not be more conspicuous than the name of the licensee using the advertisement;
- A licensee shall not deliver or cause to be delivered to a consumer any envelope or other written materials that gives the false impression that the mailing or written material is an official communication from a governmental entity, unless required by the United States Postal Service;
- If an advertisement states or implies that a consumer can reduce his monthly payment by refinancing his current mortgage loan, but, as a result of such refinancing, the consumer's total finance charges may be higher over the life of the loan, the licensee must clearly and conspicuously disclose that, by refinancing the existing loan, total finance charges may be higher over the life of the loan;
- Every advertisement used by or published on behalf of the licensee must comply with TILA;

For purposes of this regulation, the term "clearly and conspicuously" means that a required disclosure is reasonably understandable, prominently located, and readily noticeable by a potential borrower of ordinary intelligence.

Lastly, every licensee shall retain for at least three years after it is last published, delivered, transmitted or made available, an example of every advertisement used, including but not limited to solicitation letters, commercial scripts, and recordings of all radio and television broadcasts, but excluding copies of internet web pages.

Please let me know (at (804) 698-6225 or dbmorris@t-mlaw.com) if you have any questions regarding any of the foregoing bills, the Commission's new regulations, or other actions of the General Assembly.

The Virginia Association of Mortgage Brokers (the "VAMB") is sponsoring a seminar in Richmond on Thursday, May 18, 2006. The cost is \$65 for members and \$95 for non-members. I plan to begin speaking at 10:00 a.m. and stop at 4:00 p.m. A comprehensive outline (over 200 pages) of Virginia and federal laws affecting mortgage lenders and mortgage brokers will be provided. If you wish to attend, contact the VAMB at (804) 285-7557.