



2003 ASSEMBLY BILL 792

February 2, 2004 - Introduced by Representative MONTGOMERY, cosponsored by Senator SCHULTZ. Referred to Committee on Financial Institutions.

1 **AN ACT to amend** 138.052 (2) (a) 2., 138.052 (9), 138.056 (3) (a), chapter 428
2 (title), 428.101 (intro.), 428.101 (3), 428.102 (intro.), 428.102 (2), 428.103 (1)
3 (intro.) and 428.106; and **to create** subchapter I (title) of chapter 428 [precedes
4 428.101] and subchapter II of chapter 428 [precedes 428.202] of the statutes;
5 **relating to:** regulating certain consumer mortgage lenders, granting
6 rule-making authority, and providing a penalty.

Analysis by the Legislative Reference Bureau

This bill creates a subchapter of the statutes regulating certain consumer mortgage loans, defined as “covered loans.” Significant provisions include the following:

Scope and definitions

This bill creates several prohibitions and requirements applicable to covered loans and the lenders that make them. The bill generally defines “covered loan” as a consumer transaction that involves real property located in this state, that is secured by the consumer’s principal dwelling, and in which either: 1) the annual percentage rate at consummation will exceed, by more than eight percent for first-lien loans or by more than ten percent for subordinate-lien loans, the yield on specified U.S. Treasury securities; or 2) the total points and fees payable by the consumer at or before loan closing will exceed the greater of eight percent of the total

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loan amount or \$400. (The \$400 amount is adjusted annually on January 1 by the annual percentage change in the Consumer Price Index that was reported on the preceding June 1).

The bill defines “lender” as a person who originates a covered loan and to whom the covered loan is initially payable. “Lender” does not include an assignee of a covered loan or any person who, for at least 12 consecutive months, has failed to originate any covered loans.

Prohibitions and requirements on lenders and others

The bill imposes all of the following prohibitions and requirements:

(1) With certain exceptions, no lender may make a covered loan that requires, or that permits the lender to require, a payment that is more than twice as large as the average of all earlier scheduled payments, unless the payment becomes due at least 60 months after the date on which the loan is made.

(2) No lender may make a covered loan that permits the lender or an assignee of the loan to demand payment of the outstanding balance before the original maturity date, except in cases of default, fraud, or material misrepresentation by the consumer or any act or omission by the consumer that adversely affects the lender’s or assignee’s security for the loan or any right of the lender or assignee in that security or in certain cases where the real property that is pledged as security for the loan has been sold.

(3) With certain exceptions, no lender may make a covered loan with a payment schedule that causes the principal balance to increase.

(4) No lender may make a covered loan that imposes or permits the lender or an assignee of the loan to impose an increase in the interest rate as a result of the consumer’s default.

(5) No lender may make a covered loan that includes a payment schedule that consolidates more than two scheduled payments and pays them in advance out of the proceeds of the loan.

(6) No lender may engage in a pattern or practice of making covered loans to consumers who have collateral but who, considering their current and expected income, current obligations, and employment status, would be unable at the time of application to make the scheduled payments under the loans.

(7) With certain exceptions, no lender may make a covered loan that refinances an existing covered loan that the lender made to the same consumer, unless the refinancing takes place at least one year after the date on which the loan being refinanced was made or the refinancing is in the interest of the consumer. In addition, with certain exceptions, no assignee or servicer of a covered loan may make a covered loan that refinances the covered loan, unless the refinancing takes place at least one year after the date on which the loan being refinanced was made or the refinancing is in the interest of the consumer. No lender, assignee of a covered loan, or servicer may engage in a pattern or practice of evading these prohibitions.

(8) No lender may pay proceeds of a covered loan to a person who is under contract to make home improvements, as specified in the bill, unless the payment is made by an instrument that is payable to the consumer or jointly to the consumer and the person who is under contract or, with the consent of the consumer, the

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payment is made through a third party in accordance with a written agreement signed by the consumer, the lender, and the person under contract.

(9) No lender may knowingly contract with any person who is engaged in work as a mortgage banker or mortgage broker but who has not obtained the registration required by law.

(10) No lender, mortgage banker, mortgage broker, loan originator (a type of agent of a mortgage banker or mortgage broker), or licensed lender (a person licensed by the Department of Financial Institutions (DFI) to make certain high interest loans) may knowingly make, propose, or solicit fraudulent, false, or misleading statements on any document relating to a covered loan.

(11) No lender, mortgage banker, mortgage broker, loan originator, or licensed lender may recommend or encourage an individual to default on an existing loan or other obligation before and in connection with the making of a covered loan that refinances all or any portion of that existing loan or obligation.

Prepayment

With certain exceptions, the bill allows a consumer to prepay a covered loan at any time without penalty if the payment is made in the context of a refinancing of the covered loan and if the covered loan is held by the refinancing lender. The bill allows the servicer of a covered loan to impose a prepayment penalty, unless the servicer is also the lender that holds the loan at the time of the refinancing.

Required notice

The bill requires a lender to ensure that the consumer is given a specified notice at least three business days before the lender makes the applicable covered loan.

Municipal authority

The bill prohibits any city, village, town, or county from enacting an ordinance that regulates a matter specifically governed under the bill or under a rule promulgated pursuant to the bill. The bill also retroactively invalidates any such ordinance in existence when the bill takes effect.

Administration and penalties

The bill allows DFI to promulgate rules, perform investigations, hold contested case hearings, and issue orders to administer and enforce the provisions created under the bill. With certain exceptions, if the person required to appear at an enforcement hearing fails to appear or if upon the record made at the hearing DFI finds that a violation has been established, DFI may issue an order specifying any of the following:

(1) That the person must cease and desist from the violation or practice and make restitution for any actual damages suffered by a consumer.

(2) That the person must forfeit not more than \$1,000 per violation or, if the person willfully or knowingly violated this subchapter, not less than \$1,000 nor more than \$10,000 per violation.

(3) That the person must pay to DFI the costs of its investigation.

(4) That a license, registration, or certification issued by DFI to the person is suspended or revoked or will not be renewed.

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(5) That any individual who is responsible for the violation must be removed from working in any capacity related to the violation or related to activities regulated by DFI.

(6) Any additional conditions that DFI considers reasonable.

However, it is a defense to any alleged violation if the person alleged to have committed the violation establishes that the person acted in good faith while committing the violation and that, no later than 60 days after the discovery of the violation and before any investigation or other enforcement action by DFI, the person notified the affected consumer of the violation and either made appropriate adjustments to the loan to bring the loan into compliance or changed the terms of the loan in a manner beneficial to the consumer so that the loan is no longer a covered loan.

For further information see the *state* fiscal estimate, which will be printed as an appendix to this bill.

The people of the state of Wisconsin, represented in senate and assembly, do enact as follows:

1 **SECTION 1.** 138.052 (2) (a) 2. of the statutes is amended to read:

2 138.052 (2) (a) 2. The Except as provided in s. 428.207, the parties may agree
3 that if a prepayment is made within 5 years of the date of the loan, then the lender
4 shall receive an amount not exceeding 60 days' interest at the contract rate on the
5 amount by which the aggregate principal prepayments for a 12-month period
6 exceeds 20% of the original amount of the loan.

7 **SECTION 2.** 138.052 (9) of the statutes is amended to read:

8 138.052 (9) Chapters 421 to 428 427 and subch. I of ch. 428 do not apply to the
9 refinancing, modification, extension, renewal or assumption of a loan which had an
10 original principal balance in excess of \$25,000 if the unpaid principal balance of the
11 loan has been reduced to \$25,000 or less.

12 **SECTION 3.** 138.056 (3) (a) of the statutes is amended to read:

13 138.056 (3) (a) A variable rate loan involving a mobile home transaction or
14 using an approved index may be prepaid at any time in whole or in part without

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1 penalty. Other variable rate loans may be prepaid in whole or part without penalty
2 within 30 days after notice of an increase in the interest rate and, except as provided
3 in s. 428.207, with the prepayment penalty under s. 138.052 (2) (a) 2. and 3. if
4 prepayment is made before or after the 30-day period. This paragraph controls if
5 there is a conflict with s. 138.052 (2) (a).

6 **SECTION 4.** Chapter 428 (title) of the statutes is amended to read:

7 **CHAPTER 428**

8 **FIRST LIEN REAL ESTATE**

9 **AND OTHER MORTGAGE LOANS**

10 **SECTION 5.** Subchapter I (title) of chapter 428 [precedes 428.101] of the statutes
11 is created to read:

12 **CHAPTER 428**

13 **SUBCHAPTER I**

14 **FIRST LIEN REAL ESTATE LOANS**

15 **SECTION 6.** 428.101 (intro.) of the statutes is amended to read:

16 **428.101 Applicability.** (intro.) This ~~chapter~~ subchapter applies to:

17 **SECTION 7.** 428.101 (3) of the statutes is amended to read:

18 428.101 (3) Loans made on or after November 1, 1981, by a creditor to a
19 customer and which are secured by a first lien real estate mortgage or equivalent
20 security interest if the amount financed is \$25,000 or less and if the loan is not subject
21 to subch. II.

22 **SECTION 8.** 428.102 (intro.) of the statutes is amended to read:

23 **428.102 Definitions.** (intro.) In this ~~chapter~~ subchapter:

24 **SECTION 9.** 428.102 (2) of the statutes is amended to read:

ASSEMBLY BILL 792**SECTION 9**

1 428.102 (2) “Creditor” means a person who regularly engages in, arranges for
2 or procures from 3rd persons, loans within the scope of this ~~chapter~~ subchapter.

3 **SECTION 10.** 428.103 (1) (intro.) of the statutes is amended to read:

4 428.103 (1) (intro.) The following limitations shall apply to all loans subject to
5 this ~~chapter~~ subchapter:

6 **SECTION 11.** 428.106 of the statutes is amended to read:

7 **428.106 Remedies.** (1) Violations of this ~~chapter~~ subchapter may be enforced
8 by a customer subject to this section and ss. 425.308 to 425.311.

9 (2) With respect to a loan subject to this ~~chapter~~ subchapter, if the court as a
10 matter of law finds that any aspect of the transaction, any conduct directed against
11 the customer, by the creditor, or any result of the transaction is unconscionable, the
12 court shall, in addition to the remedies and penalties set forth in this ~~chapter~~
13 subchapter, and a penalty not to exceed that specified in s. 428.103 (2), refuse to
14 enforce the unconscionable aspect of the transaction or so limit the application of any
15 unconscionable aspect or conduct to avoid any unconscionable result.

16 (3) Notwithstanding other provisions of this ~~chapter~~ subchapter, a customer
17 shall not be entitled to recover the specific penalties provided in ss. 428.103 (2) (a)
18 and 428.104 (2) (a) if the person violating this ~~chapter~~ subchapter shows by a
19 preponderance of the evidence that the violation was not intentional and resulted
20 from a bona fide error notwithstanding the maintenance of procedures reasonably
21 adapted to avoid such error.

22 (4) Any action brought by a customer to enforce rights under sub. (1) shall be
23 commenced within one year after the date of the last violation of this ~~chapter~~
24 subchapter, 2 years after consummation of the agreement or one year after the last

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1 payment, whichever is later. But in no event shall an action be commenced more
2 than 6 years after the date of the last violation.

3 (5) The administrator specified in s. 426.103, solely through the department
4 of justice, may on behalf of any customer institute an action to enforce this ~~chapter~~
5 subchapter and to recover the damages and penalties provided for this ~~chapter~~
6 subchapter. In such action the administrator may obtain an order restraining by
7 temporary or permanent injunctions any violation of this ~~chapter~~ subchapter. This
8 subsection shall not be construed to incorporate or grant to the administrator with
9 respect to the enforcement of this ~~chapter~~ subchapter, any of the provisions of ch. 426.

10 **SECTION 12.** Subchapter II of chapter 428 [precedes 428.202] of the statutes is
11 created to read:

CHAPTER 428**SUBCHAPTER II****PREDATORY MORTGAGE LENDING**

14 **428.202 Definitions.** In this subchapter:

15 (1) "Bridge loan" means a loan with a maturity of less than 18 months which
16 requires only payments of interest until the time that the unpaid balance is due.

17 (1m) "Business day" has the meaning that is specified under 12 CFR 226.2 (a)
18 (6) for purposes of 12 CFR 226.31.

19 (2) "Covered loan" means a transaction that involves real property located in
20 this state and that is subject to 12 CFR 226.32.

21 (3) "Customer" means an individual to whom a covered loan is offered or made.
22 "Customer" does not include a surety, guarantor, cosigner, or endorser.

23 (4) "Department" means the department of financial institutions.
24

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1 (5) “Lender” means any person who originates a covered loan and to whom the
2 covered loan is initially payable, except that “lender” does not include an assignee
3 of a covered loan or any person who, for at least 12 consecutive months, has failed
4 to originate any covered loans.

5 (5m) “Licensed lender” means a person licensed under s. 138.09.

6 (6) “Loan originator” has the meaning given in s. 224.71 (1r).

7 (7) “Mortgage banker” has the meaning given in s. 224.71 (3).

8 (8) “Mortgage broker” has the meaning given in s. 224.71 (4).

9 (9) “Municipality” means a county, city, village, or town.

10 (10) “Servicer” has the meaning given in 12 USC 2605 (i) (2).

11 **428.203 Prohibitions on and requirements of lenders and assignees.**

12 (1) BALLOON PAYMENTS. Except as otherwise provided in this subsection, no lender
13 may make a covered loan to a customer that requires, or that permits the lender to
14 require, a payment that is more than twice as large as the average of all earlier
15 scheduled payments, unless the payment becomes due at least 60 months after the
16 date on which the loan is made. This subsection does not apply to a loan under which
17 the payment schedule is adjusted to account for seasonal or irregular income of the
18 customer or to a bridge loan that the customer obtains for the purpose of facilitating
19 the acquisition or construction of a dwelling as the customer’s principal dwelling.

20 (2) CALL PROVISION. No lender may make a covered loan to a customer that
21 permits the lender or an assignee of the loan to demand payment of the outstanding
22 balance before the original maturity date, except that a covered loan may permit a
23 lender or assignee to so demand as a result of any of the following:

24 (a) The customer’s failure to make payments required under the loan.

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1 (b) A provision in the loan agreement permitting the lender or assignee to make
2 such a demand after the sale of real property that is pledged as security for the loan.

3 (c) Fraud or material misrepresentation by the customer in connection with the
4 loan.

5 (d) Any act or omission by the customer that adversely affects the lender's or
6 assignee's security for the loan or any right of the lender or assignee in such security.

7 **(3) NEGATIVE AMORTIZATION.** No lender may make a covered loan to a customer
8 with a payment schedule that causes the principal balance to increase, except that
9 this subsection does not prohibit such a payment schedule as a result of a temporary
10 forbearance or loan restructuring consented to by the customer.

11 **(4) INCREASED INTEREST RATE.** No lender may make a covered loan to a customer
12 that imposes or permits the lender or an assignee of the loan to impose an increase
13 in the interest rate as a result of the customer's default.

14 **(5) ADVANCE PAYMENTS.** No lender may make a covered loan to a customer that
15 includes a payment schedule that consolidates more than 2 scheduled payments and
16 pays them in advance out of the proceeds of the loan.

17 **(6) REPAYMENT ABILITY.** No lender may engage in a pattern or practice of making
18 covered loans to customers who have collateral but who, considering their current
19 and expected income, current obligations, and employment status, would be unable
20 at the time of application to make the scheduled payments under the loans. In
21 assessing a customer's ability to make scheduled payments, a lender may consider
22 any expected income of the customer from any source, together with information
23 from the customer's credit reports, income tax returns, financial account statements,
24 wage statements, and any other source which the lender is authorized to access and

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1 which may provide the lender with information concerning the customer's income
2 and current obligations.

3 (7) REFINANCING OF EXISTING COVERED LOAN. No lender may make a covered loan
4 that refinances an existing covered loan that the lender made to the same customer,
5 unless the refinancing takes place at least one year after the date on which the loan
6 being refinanced was made or the refinancing is in the interest of the customer. No
7 assignee or servicer of a covered loan may make a covered loan that refinances the
8 covered loan, unless the refinancing takes place at least one year after the date on
9 which the loan being refinanced was made or the refinancing is in the interest of the
10 customer. No lender, assignee of a covered loan, or servicer may engage in a pattern
11 or practice of arranging for the refinancing of covered loans by affiliates or
12 unaffiliated creditors, modifying covered loans, or any other acts for the purpose of
13 evading this subsection. This subsection does not apply to bridge loans.

14 (8) PAYMENTS TO HOME IMPROVEMENT CONTRACTORS. No lender under a covered
15 loan made to a customer may pay proceeds of the loan to a person who is under
16 contract to make improvements to an existing dwelling, unless the payment is made
17 by an instrument that is payable to the customer or jointly to the customer and the
18 person who is under contract or, with the consent of the customer, the payment is
19 made through a 3rd party in accordance with a written agreement signed by the
20 customer, the lender, and the person under contract.

21 (9) UNREGISTERED MORTGAGE BANKERS AND BROKERS. No lender may knowingly
22 contract with any person for the performance of duties in violation of s. 224.72 (1m).

23 **428.204 False statements.** No lender, licensed lender, loan originator,
24 mortgage banker, or mortgage broker may knowingly make, propose, or solicit

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1 fraudulent, false, or misleading statements on any document relating to a covered
2 loan.

3 **428.206 Recommending default.** No lender, licensed lender, loan originator,
4 mortgage banker, or mortgage broker may recommend or encourage an individual
5 to default on an existing loan or other obligation before and in connection with the
6 making of a covered loan that refinances all or any portion of that existing loan or
7 obligation.

8 **428.207 Prepayment.** (1) Except as provided in sub. (2), a customer may
9 prepay a covered loan at any time without penalty if the payment is made in the
10 context of a refinancing of the covered loan and if the covered loan is held by the
11 refinancing lender.

12 (2) Subsection (1) does not prohibit the servicer of a covered loan from imposing
13 a prepayment penalty, unless the servicer is also the lender that holds the loan at the
14 time of the refinancing.

15 **428.208 Disclosure to customers.** At least 3 business days before making
16 a covered loan to a customer, a lender shall ensure that the customer has been given
17 the following notice, in writing and in a clear and conspicuous format:

18 **DISCLOSURE TO BORROWER**

19 A. If you obtain this loan, the lender will have a mortgage on your home. You
20 could lose your home and any money that you have put into it if you do not meet your
21 obligations under this loan. Mortgage loan rates and closing costs and fees vary
22 based on many factors, including your particular credit and financial circumstances,
23 your earnings history, your employment status, the loan-to-value ratio of the
24 requested loan, and the type of property that will secure your loan. The loan rate and
25 fees could also vary based on which lender you select.

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1 B. As a consumer you should shop around and compare loan rates and fees.
2 You should also consider consulting a qualified independent credit counselor or other
3 experienced financial adviser regarding the rate, fees, and provisions of this
4 mortgage loan before you proceed.

5 C. You are not required to complete this loan agreement merely because you
6 have received these disclosures or have signed a loan application. If you proceed with
7 this mortgage loan, you should also remember that you may face serious financial
8 risks if you use this loan to pay off credit card debts or other debts in connection with
9 this transaction and then subsequently incur significant new debt. If you continue
10 to accumulate debt after this loan is made and then experience financial difficulties,
11 you could lose your home and any equity that you have in it if you do not meet your
12 mortgage loan obligations.

13 D. Property taxes and homeowner's insurance are your responsibility. Some
14 lenders may require you to escrow money for these payments. However, not all
15 lenders provide escrow services for these payments. You should ask your lender
16 about these services.

17 E. Your payments on existing debts contribute to your credit ratings. You
18 should not accept any advice to ignore your regular payments to your existing
19 creditors.

20 **428.209 Municipal authority. (1) AUTHORITY LIMITED.** No municipality may
21 enact an ordinance or adopt a resolution regulating a matter specifically governed
22 by this subchapter or by a rule promulgated under this subchapter.

23 **(2) RETROACTIVE EFFECT.** If a municipality has in effect on the effective date of
24 this subsection [revisor inserts date], an ordinance or resolution that is

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1 inconsistent with sub. (1), the ordinance or resolution does not apply and may not be
2 enforced.

3 **428.210 Administration and penalties. (1) RULES.** The department may
4 promulgate rules for the administration of this subchapter.

5 **(2) INVESTIGATIONS.** (a) At any time that the department has reason to believe
6 that a person has engaged in or is about to engage in an act that violates this
7 subchapter, the department may investigate. In performing an investigation under
8 this paragraph, the department may administer oaths or affirmations, subpoena
9 witnesses, compel their attendance, adduce evidence, and require the production of
10 any matter, including the existence, description, nature, custody, condition, and
11 location of any books, documents, or other tangible things, and the identity and
12 location of persons having knowledge of relevant facts, or any other matter
13 reasonably calculated to lead to the discovery of admissible evidence. The
14 department may access and examine such books, documents, or other tangible
15 things. In any civil action brought on behalf of the department based on evidence
16 obtained in such an investigation, the department may recover the costs of
17 performing the investigation if the department prevails in the action.

18 (b) If 5 or more persons file a verified complaint with the department alleging
19 that a person has violated this subchapter, the department shall immediately
20 commence an investigation pursuant to par. (a).

21 (c) If the records of a person who is subject to an investigation pursuant to par.
22 (a) are located outside of this state, the person at the person's option shall either
23 make them available to the department at a convenient location within this state or
24 pay the reasonable and necessary expenses for the department to examine them at
25 the place where they are located. The department may designate representatives,

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1 including comparable officials of the state in which the records are located, to inspect
2 them on the department's behalf.

3 (d) At the request of the department of financial institutions and upon
4 reasonable notice to all affected persons, the department of justice may apply to any
5 court of record for an order compelling compliance if a person fails to obey a subpoena
6 or to give testimony pursuant to par. (a).

7 **(3) ENFORCEMENT AND PENALTIES.** (a) The department may serve a notice of a
8 hearing that complies with s. 227.44 (1) and (2) on a person if the department
9 reasonably suspects that the person has violated this subchapter. The department
10 may receive complaints alleging violations of this subchapter. A hearing conducted
11 pursuant to a notice under this paragraph shall be conducted in the manner specified
12 for a contested case, as defined in s. 227.01 (3), under ss. 227.44 to 227.50. Except as
13 provided in sub. (4), if the person fails to appear at the hearing or if upon the record
14 made at the hearing the department finds that a violation has been established, the
15 department may issue and serve on the person an order specifying any of the
16 following:

17 1. That the person must cease and desist from the violation or practice and
18 make restitution for any actual damages suffered by a customer.

19 2. That the person must forfeit not more than \$1,000 per violation or, if the
20 person willfully or knowingly violated this subchapter, not less than \$1,000 nor more
21 than \$10,000 per violation.

22 3. That the person must pay to the department the costs of its investigation.

23 4. That a license, registration, or certification issued by the department to the
24 person is suspended or revoked or will not be renewed.

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1 5. That any individual who is responsible for the violation must be removed
2 from working in any capacity related to the violation or related to activities regulated
3 by the department.

4 6. Any additional conditions that the department considers reasonable.

5 (b) An order under par. (a) is effective upon service on the person and may be
6 appealed under s. 220.035.

7 (c) The department of justice, at the request of the department of financial
8 institutions, may bring an action to enforce an order issued under par. (a).

9 **(4) SAFE HARBOR.** It is a defense to any alleged violation of this subchapter if
10 the person alleged to have committed the violation establishes all of the following:

11 (a) That the person acted in good faith while committing the violation.

12 (b) That, no later than 60 days after the discovery of the violation and before
13 any investigation or other enforcement action by the department under this section,
14 the person notified the affected customer of the violation and either made
15 appropriate adjustments to the loan to bring the loan into compliance with this
16 subchapter or changed the terms of the loan in a manner beneficial to the customer
17 so that the loan is no longer a covered loan.

18 **SECTION 13. Initial applicability.**

19 (1) This act first applies to loans for which applications are received by a lender,
20 as defined in section 428.202 (5) of the statutes, as created by this act, on the effective
21 date of this subsection.

22 **SECTION 14. Effective date.**

23 (1) This act takes effect on the first day of the 10th month beginning after
24 publication.

25

(END)