

By: Chavez

H.B. No. 1042

A BILL TO BE ENTITLED

AN ACT

relating to the regulation of real estate seller-financiers;
providing a penalty.

BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF TEXAS:

SECTION 1. Subtitle E, Title 3, Finance Code, is amended by
adding Chapter 158 to read as follows:

CHAPTER 158. REGULATION OF REAL ESTATE SELLER-FINANCERS

SUBCHAPTER A. GENERAL PROVISIONS

Sec. 158.001. SHORT TITLE. This chapter may be cited as the
Real Estate Seller-Financiers Registration Act.

Sec. 158.002. DEFINITIONS. In this chapter:

(1) "Commissioner" means the savings and loan
commissioner.

(2) "Executory contract for conveyance of residential
real estate" means:

(A) a lease of residential real estate for a term
of 180 days or more that includes an option to purchase allowing for
a portion of the lease payment to be applied to the purchase price
of the property; or

(B) a contract for the conveyance of real
property intended to be used as residential real estate allowing
for the purchase price of the property to be payable in four or more
installments.

(3) "Finance commission" means the Finance Commission

1 of Texas.

2 (4) "Mortgage loan" means a debt against real estate
3 secured by a first-lien security interest against residential real
4 estate created by a deed of trust, security deed, or other security
5 instrument.

6 (5) "Real estate seller-financer" means an owner of
7 residential real estate engaged in the business of extending credit
8 to, making a mortgage loan to, or entering into an executory
9 contract for conveyance of residential real estate with another
10 person for the purpose of selling the owner's residential real
11 estate.

12 (6) "Residential real estate" means a lot or parcel of
13 land located in this state that is improved or intended for
14 improvement with a one-to-four family dwelling used or occupied,
15 wholly or partly, as the residence of one or more persons, including
16 a manufactured home.

17 [Sections 158.003-158.100 reserved for expansion]

18 SUBCHAPTER B. ADMINISTRATIVE PROVISIONS

19 Sec. 158.101. ADMINISTRATION OF CHAPTER. (a) The
20 commissioner shall administer this chapter.

21 (b) The commissioner may appoint employees and support
22 staff hired to administer Chapter 156 to administer and enforce
23 this chapter in addition to their duties and responsibilities under
24 that chapter.

25 Sec. 158.102. RULEMAKING AUTHORITY. The finance commission
26 may adopt and enforce rules necessary to carry out the intent of or
27 to ensure compliance with this chapter.

1 Sec. 158.103. CERTAIN POWERS OF COMMISSIONER. The
2 commissioner may authorize specific employees to conduct hearings
3 and make recommendations for final decisions in contested cases.

4 [Sections 158.104–158.200 reserved for expansion]

5 SUBCHAPTER C. REGISTRATION AND OFFICES

6 Sec. 158.201. REGISTRATION REQUIRED. A person must hold a
7 certificate of registration under this chapter before engaging in
8 business as a real estate seller-financer in this state, unless the
9 person is exempt under Section 158.203.

10 Sec. 158.202. APPLICATION FOR CERTIFICATE OF REGISTRATION.
11 (a) A real estate seller-financer may apply for a certificate of
12 registration by filing an application with the commissioner that
13 contains:

14 (1) the legal name and business telephone number of
15 the real estate seller-financer;

16 (2) the physical street address for the location in
17 this state at which the person conducts business as a real estate
18 seller-financer;

19 (3) a list of any additional locations in this state at
20 which the person conducts business as a real estate
21 seller-financer;

22 (4) if the applicant is not a natural person:

23 (A) the name and address of each officer of the
24 applicant, in the case of a corporation;

25 (B) the name and address of each officer,
26 manager, or member of the applicant, in the case of a limited
27 liability company; or

1 (C) the name and address of each general partner
2 of the applicant, in the case of a partnership or limited liability
3 partnership; and

4 (5) any other information the commissioner may require
5 with respect to the applicant as determined by rule of the finance
6 commission.

7 (b) The application must be on a form prescribed by the
8 finance commission.

9 (c) If the applicant is a corporation, limited liability
10 company, or limited partnership not organized in this state, the
11 applicant must also provide to the commissioner:

12 (1) evidence that the applicant is qualified to engage
13 in business in this state; and

14 (2) the name and address of the applicant's registered
15 agent for service of process in this state.

16 Sec. 158.203. EXEMPTION. This chapter does not apply to:

17 (1) a person who in a consecutive 12-month period does
18 not enter into more than three transactions that are mortgage loans
19 or executory contracts for conveyance of residential real estate;

20 (2) a bank, savings bank, or savings and loan
21 association, or a subsidiary or an affiliate of a bank, savings
22 bank, or savings and loan association;

23 (3) a state or federal credit union or a subsidiary or
24 affiliate of a state or federal credit union;

25 (4) an insurance company licensed or authorized to do
26 business in this state under the Insurance Code;

27 (5) a mortgage banker registered under Chapter 157;

1 (6) a mortgage broker licensed under Chapter 156;
2 (7) a Farm Credit System institution; or
3 (8) a political subdivision of this state involved in
4 affordable home ownership programs.

5 Sec. 158.204. UPDATE OF APPLICATION INFORMATION. (a) A
6 real estate seller-financer shall update information contained in
7 the registration application not later than the 30th day after the
8 date the information changes.

9 (b) The commissioner may charge a person a reasonable fee
10 not to exceed \$50 for each change in the registration application
11 made by a real estate seller-financer.

12 Sec. 158.205. REGISTRATION AND ADMINISTRATION FEE. The
13 commissioner may charge a real estate seller-financer a reasonable
14 fee, in an amount not to exceed \$500 a year, to cover the costs of
15 filing the application for a certificate of registration and
16 administering this chapter.

17 Sec. 158.206. ISSUANCE OF CERTIFICATE. (a) The
18 commissioner shall issue a certificate of registration to an
19 applicant who meets the application and other requirements of
20 Section 158.202 and pays any application fee imposed under Section
21 158.205.

22 (b) A certificate of registration under this chapter is
23 valid for a period of two years from the date the certificate is
24 issued, unless revoked.

25 Sec. 158.207. RENEWAL OF CERTIFICATE. A certificate of
26 registration may be renewed on or before its expiration date if the
27 real estate seller-financer pays to the commissioner a renewal fee

1 in a reasonable amount as determined by the commissioner.

2 Sec. 158.208. MAINTENANCE AND LOCATION OF OFFICES. (a)
3 Each real estate seller-financer registered under this chapter
4 shall maintain a physical office in this state. The address of the
5 office shall be designated on the certificate of registration.

6 (b) A real estate seller-financer that maintains more than
7 one place of business in this state shall apply for, pay a fee of \$50
8 for, and obtain an additional certificate of registration for each
9 additional office to be maintained by the person in this state.
10 Each additional certificate of registration is considered a branch
11 office registration.

12 Sec. 158.209. DISCLOSURE REGARDING COMPLAINTS. (a) Each
13 real estate seller-financer registered under this chapter shall
14 provide the following notice to an applicant or borrower in a
15 mortgage loan transaction or shall include the notice in each
16 executory contract for conveyance of residential real estate
17 executed by the person:

18 "COMPLAINTS REGARDING REAL ESTATE SELLER-FINANCERS SHOULD BE SENT
19 TO THE SAVINGS AND LOAN DEPARTMENT,
20 _____ (street address of the Savings and
21 Loan Department). A TOLL-FREE CONSUMER HOTLINE IS AVAILABLE AT
22 _____ (telephone number of the Savings and Loan
23 Department's toll-free consumer hotline)."

24 (b) The notice to be provided in Subsection (a) must be
25 clear and conspicuous. In the case of a mortgage loan transaction,
26 the notice must be delivered to the borrower or applicant when the
27 person applies for a mortgage loan, or when an application is made,

1 before entering into or contemporaneously with the execution of a
2 mortgage loan transaction. In the case of an executory contract for
3 conveyance of residential real estate, the notice must be delivered
4 to the person before executing or contemporaneously with the
5 execution of the executory contract.

6 [Sections 158.210–158.300 reserved for expansion]

7 SUBCHAPTER D. REVOCATION AND SUSPENSION OF CERTIFICATE AND OTHER
8 ACTIONS AGAINST REGISTRATION HOLDER

9 Sec. 158.301. PROHIBITED ACTIVITIES; GROUNDS FOR
10 DISCIPLINARY ACTION. (a) In this section, "disciplinary action"
11 means an order by the commissioner that requires one or any
12 combination of the following:

13 (1) suspension or revocation of a certificate of
14 registration in accordance with Section 158.306;

15 (2) probation of a suspension or revocation of a
16 certificate of registration in accordance with Section 158.306;

17 (3) imposition of an administrative penalty as
18 provided by and in accordance with Section 158.304;

19 (4) to cease and desist from continuing a particular
20 action in accordance with Section 158.305; or

21 (5) to take affirmative action in accordance with
22 Section 158.305.

23 (b) The commissioner may order disciplinary action against
24 a person registered under this chapter if the commissioner
25 determines that the person:

26 (1) made a material misrepresentation in an
27 application for a certificate of registration under this chapter;

1 (2) published or caused to be published an
2 advertisement offering a mortgage loan or otherwise related to the
3 business of a real estate seller-financer that:

4 (A) is misleading;

5 (B) is likely to deceive the public;

6 (C) tends to create a misleading impression; or

7 (D) violates federal or state law;

8 (3) committed a false, misleading, or deceptive act or
9 otherwise engaged in improper dealing in connection with a mortgage
10 loan or an executory contract for conveyance of residential real
11 estate;

12 (4) failed within a reasonable time to honor a check
13 issued to the commissioner after the commissioner mailed a request
14 for payment by certified mail to the person's last known business
15 address as reflected by the commissioner's records;

16 (5) aided, abetted, or conspired with a person to
17 circumvent the requirements of this chapter;

18 (6) discriminated against a prospective borrower or
19 prospective party to an executory contract for conveyance of
20 residential real estate on the basis of race, color, religion, sex,
21 national origin, ancestry, familial status, or a disability;

22 (7) violated any federal or state statute or
23 regulation relating to:

24 (A) a mortgage loan or executory contract for
25 conveyance of residential real estate; or

26 (B) the sale of the property that is the subject
27 of a mortgage loan or the sale or lease of property that is the

1 subject of an executory contract for conveyance of residential real
2 estate;

3 (8) violated an ordinance or regulation of a political
4 subdivision of this state regulating:

5 (A) the sale of property that is the subject of a
6 mortgage loan; or

7 (B) the sale or lease of property that is the
8 subject of an executory contract for conveyance of residential real
9 estate; or

10 (9) failed or refused on demand to:

11 (A) produce for inspection by the commissioner or
12 the commissioner's authorized personnel or representative a
13 document, book, or record concerning a mortgage loan transaction
14 or an executory contract for conveyance of residential real estate;

15 (B) provide the commissioner or the
16 commissioner's authorized personnel or representative with free
17 access to the books or records relating to the person's business
18 kept by an officer, agent, or employee of the person or any business
19 entity, including a subsidiary or affiliate of the person, through
20 which the person conducts mortgage loan activities or activities
21 involving an executory contract for conveyance of residential real
22 estate; or

23 (C) provide information requested by the
24 commissioner as a result of a formal or informal complaint made to
25 the commissioner.

26 Sec. 158.302. INVESTIGATIONS. (a) On the signed written
27 complaint of a person, the commissioner shall investigate the

1 actions and records of a person registered under this chapter if the
2 complaint, or the complaint and documentary or other evidence
3 presented in connection with the complaint, provides reasonable
4 cause. The commissioner shall notify a person registered under this
5 chapter in writing of the complaint and that the commissioner
6 intends to investigate the matter, unless the commissioner has
7 reasonable cause to conclude that providing the notice would:

8 (1) result in the loss or destruction of evidence; or
9 (2) otherwise result in immediate harm to the public
10 or impede the conduct of the investigation.

11 (b) For reasonable cause, the commissioner at any time may
12 investigate a person registered under this chapter to determine
13 whether the person is complying with this chapter and applicable
14 rules.

15 (c) Except as provided by Subsection (d), information
16 obtained by the commissioner during an investigation is
17 confidential unless disclosure of the information is permitted or
18 required by other law.

19 (d) The commissioner may share information obtained in an
20 investigation under this section with a law enforcement agency or
21 with another state or a federal agency.

22 Sec. 158.303. SUBPOENAS. (a) During an investigation, the
23 commissioner may issue a subpoena addressed to a peace officer of
24 this state or to another person authorized by law to serve citation
25 or perfect service. The subpoena shall require a person to give a
26 deposition or produce documents, or both.

27 (b) If a person disobeys a subpoena or if a person appearing

1 in a deposition in connection with the investigation refuses to
2 testify, the commissioner may petition a district court in Travis
3 County to issue an order requiring the person to obey the subpoena,
4 testify, or produce the documents relating to the matter in issue,
5 as applicable.

6 (c) The court shall promptly set for hearing an application
7 to enforce a subpoena under Subsection (b) and shall cause notice of
8 the application and the hearing to be served on the person to whom
9 the subpoena is directed.

10 Sec. 158.304. ADMINISTRATIVE PENALTY. (a) The commissioner
11 may impose an administrative penalty on a person registered under
12 this chapter who violates this chapter, a rule adopted under this
13 chapter, or an order issued under this chapter.

14 (b) An order imposing an administrative penalty must
15 contain a reasonably detailed statement of the facts on which the
16 order is made.

17 (c) The amount of the penalty may not exceed \$10,000, and
18 each day a violation continues or occurs is a separate violation for
19 the purpose of imposing a penalty. The amount shall be based on:

20 (1) the seriousness of the violation, including the
21 nature, circumstances, extent, and gravity of the violation;

22 (2) the history of previous violations;

23 (3) the amount necessary to deter a future violation;

24 (4) efforts to correct the violation; and

25 (5) any other matter that justice may require.

26 (d) A person against whom the penalty is imposed may file a
27 written request for a hearing on the penalty not later than the 30th

1 day after the date the order is issued. If the person requests a
2 hearing, the commissioner shall set and give notice of a hearing
3 before the commissioner or a hearing officer.

4 (e) A hearing under this section is governed by the
5 procedures for a contested case hearing under Chapter 2001,
6 Government Code.

7 (f) Based on the findings of fact, conclusions of law, and
8 recommendations of the hearing officer, the commissioner by order
9 may determine that a violation occurred or did not occur.

10 (g) If the commissioner does not receive a request for a
11 hearing under Subsection (d) before the 31st day after the date the
12 commissioner issues the order imposing the penalty, the order is
13 considered final.

14 (h) The enforcement of the penalty may be stayed during the
15 time the order is under judicial review if the person pays the
16 penalty to the clerk of the court or files a supersedeas bond with
17 the court in the amount of the penalty. A person who cannot afford
18 to pay the penalty or file the bond may stay the enforcement by
19 filing an affidavit in the manner required by the Texas Rules of
20 Civil Procedure for a party who cannot afford to file security for
21 costs, subject to the right of the commissioner to contest the
22 affidavit as provided by those rules.

23 (i) The attorney general may sue to collect the penalty.

24 Sec. 158.305. ORDER TO CEASE AND DESIST OR TO TAKE
25 AFFIRMATIVE ACTION. (a) If the commissioner has reasonable cause
26 to believe that a person registered under this chapter has violated
27 or is about to violate this chapter, the commissioner may issue,

1 without notice and hearing, an order to cease and desist from
2 continuing a particular action or an order to take affirmative
3 action, or both, to enforce compliance with this chapter.

4 (b) An order to take affirmative action may include an order
5 to pay restitution to a person for any amount the person paid to a
6 real estate seller-financer registered under this chapter in
7 violation of a law or regulation applicable to the mortgage loan
8 transaction or executory contract for conveyance of residential
9 real estate.

10 (c) A cease and desist order or an order to take affirmative
11 action must contain a reasonably detailed statement of the facts on
12 which the order is made.

13 (d) A person against whom a cease and desist order or order
14 to take affirmative action is made may file a written request for a
15 hearing on the order not later than the 30th day after the date the
16 order is issued. If the person requests a hearing, the commissioner
17 shall set and give notice of a hearing before the commissioner or a
18 hearing officer. The hearing shall be governed by Chapter 2001,
19 Government Code.

20 (e) Based on the findings of fact, conclusions of law, and
21 recommendations of the hearing officer, the commissioner by order
22 may determine that a violation occurred or did not occur.

23 (f) If the commissioner does not receive a request for a
24 hearing under Subsection (d) before the 31st day after the date the
25 order is issued by the commissioner, the order is considered final.

26 (g) If a person violates a final cease and desist order or
27 final order to take affirmative action, or both, issued under this

chapter, the commissioner may impose an administrative penalty against the person in an amount not to exceed \$2,500 for each day of the violation. In addition to any other remedy provided by law, the commissioner may institute in district court a suit for injunctive relief and to collect the administrative penalty. A bond is not required of the commissioner with respect to injunctive relief granted under this subsection.

Sec. 158.306. SUSPENSION OR REVOCATION OF CERTIFICATE OF REGISTRATION. (a) After providing notice and an opportunity for hearing, the commissioner may order the suspension or revocation of a certificate of registration under this chapter if the person holding the certificate violates this chapter, a rule adopted under this chapter, or an order issued under this chapter.

(b) In lieu of suspending or revoking a person's certificate of registration, the commissioner may order, after notice and hearing, probation of a suspension or revocation of a certificate of registration on terms and conditions the commissioner determines appropriate.

(c) A disciplinary order issued under this section may contain an order to cease and desist from continuing a particular action or to take affirmative action, or both, and may impose an administrative penalty.

(d) A proceeding under this section is considered to be a contested case under Chapter 2001, Government Code.

Sec. 158.307. ADMINISTRATIVE SUSPENSION WITHOUT PRIOR HEARING. (a) In addition to any other remedy provided by law and cumulative of other remedies provided by this chapter, the

1 commissioner, on providing not less than 10 days' notice to the
2 person and without a hearing, may suspend the certificate of
3 registration of a person who:

4 (1) fails to pay an administrative penalty after the
5 commissioner's order imposing the penalty becomes final; or

6 (2) otherwise fails to comply with a final cease and
7 desist order or final order to take affirmative action, or both,
8 issued by the commissioner.

9 (b) Suspension of a certificate of registration under this
10 section continues until the person has complied with the final
11 order or has paid the administrative penalty, as applicable.
12 During the period of suspension, the real estate seller-financer
13 may not originate mortgage loans or enter into an executory
14 contract for conveyance of residential real estate with another
15 person.

16 (c) A suspension order issued under this section may be
17 appealed in the manner provided for appeal of a contested case under
18 Chapter 2001, Government Code. A hearing of the commissioner's
19 action to order the suspension of a certificate of registration
20 under this section shall be held not later than the 15th day after
21 the date on which the commissioner receives the request for appeal.
22 Notwithstanding Section 2001.051, Government Code, the
23 commissioner shall provide the appellant at least three days'
24 notice of the time and place of the hearing.

25 [Sections 158.308–158.400 reserved for expansion]

26 SUBCHAPTER E. HEARINGS; CIVIL ACTIONS; UNREGISTERED ACTIVITY

27 Sec. 158.401. BURDEN OF PROOF TO ESTABLISH EXEMPTION. The

1 burden of proving an exemption in a proceeding or action brought
2 under this chapter is on the person claiming the benefit of the
3 exemption.

4 Sec. 158.402. UNREGISTERED ACTIVITY. (a) A person commits
5 an offense if the person is not exempt under Section 158.203 and
6 engages in business as a real estate seller-financer without
7 obtaining a certificate of registration under this chapter.

8 (b) Except as provided by Subsection (c), an offense under
9 this section is a Class B misdemeanor.

10 (c) An offense under this section is a Class A misdemeanor
11 if it is shown on the trial of the offense that the defendant has
12 been previously convicted under this section.

13 (d) The commissioner may issue a cease and desist order
14 against a person who is not exempt under Section 158.203 and who is
15 engaging in the business of a real estate seller-financer without
16 holding a certificate of registration under this chapter. The
17 order may direct that the person immediately cease and desist from
18 making mortgage loans or entering into an executory contract for
19 conveyance of residential real estate with another until such time
20 as the person has complied with the certification requirements of
21 this chapter. The order may also assess an administrative penalty
22 in an amount not to exceed \$2,500 for each transaction entered into
23 in violation of this chapter.

24 (e) A person against whom a cease and desist order is
25 entered under this section may file a written request for a hearing
26 not later than the 30th day after the date the order is issued.

27 (f) A hearing under this section is governed by the

1 procedures for a contested case hearing under Chapter 2001,
2 Government Code.

3 (g) If the commissioner does not receive a request for a
4 hearing under Subsection (e) before the 31st day after the date on
5 which the cease and desist order is issued, the order is considered
6 final.

7 Sec. 158.403. PRIVATE CIVIL ACTION. (a) A borrower,
8 mortgage applicant, or person entering into an executory contract
9 for conveyance of residential real estate who is injured by a
10 violation of this chapter may bring an action to:

11 (1) enjoin a violation of this chapter; or

12 (2) recover actual monetary damages and reasonable
13 attorney's fees and court costs.

14 (b) A remedy provided by this section is in addition to any
15 other remedy provided by law.

16 Sec. 158.404. ACTION TO ENFORCE ORDER OF COMMISSIONER. (a)
17 The commissioner or attorney general may bring an action to enforce
18 a final order of the commissioner issued under this chapter.

19 (b) A remedy provided by this section is in addition to any
20 other remedy provided by law.

21 Sec. 158.405. INJUNCTIVE RELIEF. (a) In addition to any
22 other action, proceeding, or remedy authorized by law, the
23 commissioner may institute an action in the commissioner's name to
24 enjoin a violation of this chapter or a rule adopted under this
25 chapter. To sustain an action filed under this subsection, it is not
26 necessary to allege or prove that an adequate remedy at law does not
27 exist or that substantial or irreparable damage would result from a

1 continued violation of this chapter.

2 (b) The attorney general may bring an action to enjoin a
3 violation of this chapter.

4 Sec. 158.406. COMMISSIONER NOT REQUIRED TO FILE APPEAL
5 BOND. The commissioner is not required to file an appeal bond in
6 any action or proceeding to enforce this chapter.

7 SECTION 2. A person is not required to hold a certificate of
8 registration issued under Chapter 158, Finance Code, as added by
9 this Act, before January 1, 2006.

10 SECTION 3. This Act takes effect September 1, 2005.