SENATE STAFF ANALYSIS AND ECONOMIC IMPACT STATEMENT

(This document is based on the provisions contained in the legislation as of the latest date listed below.)

BILL: CS/SB 2262

SPONSOR: Banking and Insurance Committee and Senator Meek

SUBJECT: Florida Home Loan Protection Act

DATE: March 5, 2002 REVISED:

	ANALYST	STAFF DIRECTOR	REFERENCE	ACTION
1.	Deffenbaugh	Deffenbaugh	BI	Favorable/CS
2.				
3.				
4.				
5.				
6.				

I. Summary:

Since the mid-1990's, the sub-prime mortgage market has grown substantially, providing access to credit to borrowers with less than perfect credit and who are not served by prime lenders. With this increase in sub-prime lending there has also been an increase in reports of "predatory lending." This term generally refers to abusive lending practices involving fraud, deception or unfairness.

Committee Substitute for Senate Bill 2262 creates the Florida Home Loan Protection Act which imposes restrictions on home loans and high-cost home loans, which are more restrictive than the current federal Home Ownership and Equity Protection Act (HOEPA). If a high-cost home mortgage loan exceeds specified interest rate or fee thresholds (which are lower than HOEPA triggers), the following loan provisions and practices would be prohibited:

- Points or fees exceeding 3 percent of the loan amount may not be financed.
- Balloon payments are prohibited.
- Negative amortization schedules are prohibited (where interest payments do not reduce the principal).
- The interest rate may not be increased after default.
- No more than 2 payments may be consolidated and paid in advance from the loan proceeds.
- Arbitration clauses limiting the right of the borrower to seek judicial relief are prohibited.
- The borrower must receive independent counseling on the advisability of the loan.
- High-cost home loans may not be made without due regard to repayment ability.
- Payments under home improvement contracts may not be made directly to the contractor.
- Modification or deferral fees are limited.
- The lender may not call or accelerate the indebtedness, except for the borrower's failure to abide by the terms of the loan.

- "Loan flipping" is prohibited, which prohibits refinancing a current loan unless the new loan has reasonable, tangible, net benefits to the borrower.
- The lender must deliver to the borrower all loan documents and disclosures at least 72 hours before the closing.

Certain practices and loan provisions are prohibited for *all home loans*, including the financing of any credit life, credit disability, or other types of insurance; recommending or encouraging default on an existing loan in order to refinance the loan; imposing late fees of more than 5 percent of the amount past due; charging a fee for informing or transmitting the balance due to pay off the loan; and prohibiting the offering or selling of a home loan at the residence of a borrower without an appointment or invitation.

The bill requires a lender to notify the borrower 30 days prior to taking any action to foreclose a home loan and to allow a borrower to cure the default and prevent foreclosure, under certain conditions.

The Department of Banking and Finance is authorized to impose an administrative penalty of up to $2,500 for a violation of the act. Either the department or the Attorney General would be authorized to bring a civil action in the name of the people of Florida to seek up to $25,000 per violation against any person who willfully and knowingly violates a provision of the act. A borrower may be granted injunctive, declaratory and such other equitable relief as the court deems appropriate in an action to enforce compliance with the act. Any intentional violation renders the home loan agreement void and the borrower may recover any payments made.

The bill does not contain any provision that would preempt local government ordinances or rules that would regulate sub-prime lending or any other lending activities.

This bill creates undesignated sections of the Florida Statutes.

II. Present Situation:

Background: Sub-Prime Lending and "Predatory" Lending

According to the Federal Reserve Board, since the mid-1990's, the sub-prime mortgage market has grown substantially, providing access to credit to borrowers with less than perfect credit and who are not served by prime lenders. With this increase in sub-prime lending there has also been an increase in reports of "predatory lending." This term generally refers to abusive lending practices involving fraud, deception or unfairness.[1] Some abusive practices are clearly unlawful under existing laws, such as falsifying the applicant's income, forging signatures on blank documents, or charging fees that are not disclosed. Some practices, such as balloon payments, may benefit some borrowers but harm others, particularly if they are not fully aware of the consequences. Still other unfair practices are difficult (or some would argue unwise) to regulate, such as charging excessive interest or fees, or adding costly insurance premiums.

[1] Report to the Board of Governors of the Federal Reserve System from the Board's Division of Consumer and Community Affairs, "Amendments to Regulation Z addressing concerns related to predatory practices in mortgage lending," (Nov. 27, 2001).

Some of the practices that have been identified as predatory lending include: making unaffordable loans based solely on the borrower's home equity without regard to the borrower's ability to repay the loan; inducing a borrower to refinance a loan repeatedly, even though the refinancing may not be in the borrower's interest, and charging high points and fees each time the loan is refinanced ("loan flipping"); and engaging in fraud or deception to conceal the true nature of the loan obligation, such as financing credit insurance without the consumers' consent. Some consumer advocates charge that excessive interest rates and fees are themselves elements of predatory practices.

Sub-prime lending typically includes interest rates several percentage points above the prime rates reserved for borrowers with clean credit histories. Also, its typical to see points or fees equal to 5 to 7 percent of the loan, as compared to the 2 percent fees charged by mainstream mortgage lenders. According to lenders, this is necessary to compensate them for the increased risk that they incur. Sub-prime lending permits borrowers, who otherwise would not be able to borrow money for a home, access to the market. Rather than discourage the sub-prime market, the Federal Deposit Insurance Corporation (FDIC) believes safe and sound, well-managed sub-prime lending programs, with appropriate capitalization and loan pricing, provide an important source of credit for borrowers whose credit history may not permit them to qualify for the conventional "prime" loan market.[2] Some financial institutions have decided not to make loans in the sub-prime market. For example, Bank of America announced in 2001 that it was pulling out of this market.

Federal Law: Home Ownership and Equity Protection Act of 1994 (HOEPA)

In response to concerns about abusive practices in connection with sub-prime mortgage loans, in 1994 the Congress enacted the Home Ownership and Equity Protection Act (HOEPA), which amended the Truth in Lending Act. HOEPA seeks to protect homeowners from loan agreements that are likely to result in default and the loss of their homes by requiring additional disclosures and prohibiting certain loan terms, such as balloon payments for short-term loans and non-amortizing payment schedules, and restricting prepayment penalties. The act applies to home mortgage loans, but does *not* cover loans to purchase homes. That is, home-equity loans and refinancings are covered, but not the original mortgage loan to purchase the home.

Interest rate or fee trigger for covered loans - HOEPA does not limit the interest rate or points that a lender may charge, but sets triggers based on a loan's interest rate or its points and fees to determine whether a loan is a "high cost" loan that is covered under the act. The Federal Reserve Board ("Fed") is authorized to adjust these triggers within specified limits and, for all mortgage loans, to prohibit acts or practices that are unfair, deceptive, or designed to evade HOEPA. In December 2001, the Fed approved new rules (to Regulation Z) which will take effect next October. As revised by these rules, more loans will be covered. A high cost loan covered by HOPEA, for a *first* mortgage lien, has an *interest rate 8 percentage points above comparable Treasury securities* (reduced by the Fed from the 10-point trigger in the act). For *second* liens mortgages, the trigger is *10 percentage points above Treasury securities* (which was not changed by the Fed rules). For example, a 10-year loan would be considered high cost at today's rates

[2] Source: http://www2.fdic.gov/epc/predlend/Regulation/AllSections.asp?anc=ReturnHow

(about 5% for 10-year Treasury securities) if the rate is above about 13 percent for a first mortgage, or about 15 percent for a second mortgage.

Under the fee based trigger, a loan is covered by HOEPA if the total points and fees exceed 8 percent of the loan amount or $400, whichever is greater, adjusted annually based on the Consumer Price Index since 1994, which is $465 for 2001 and $480 for 2002. The Fed rules modified the trigger by including credit insurance and other debt-protection products financed through the loan.

Required disclosures - Creditors offering high cost loans that exceed the trigger must give consumers an abbreviated disclosure statement at least 3 business days before the loan is closed. These disclosures inform consumers that they are not obligated to complete the transaction and could lose their home if they take the loan and fail to make payments. It also provides a few key items of cost information including the APR. The Fed rules enhanced the disclosures to alert consumers to the total amount borrowed, which may be substantially higher than the loan amount requested by the borrower due to the financing of insurance, points, and fees. The disclosure must specify whether the total amount borrowed includes the cost of optional insurance.

Prohibited loan terms - HOEPA restricts certain loan terms for high cost loans. Prepayment penalties after 5 years are prohibited, but allowed within the 5 five years under certain conditions. Also, balloon payments are prohibited in high cost loans that have a term of less than 5 years. The act also prohibits non-amortizing payment schedules (which involve small monthly payments that cause an increase in the total debt), and higher interest rates upon default.

Consideration of Consumer's Ability to Repay - HOEPA prohibits lenders from engaging in a pattern or practice of extending credit to consumers based on the consumers' collateral without regard to the consumers' ability to repay the loans. The rules strengthened these provisions by creating a presumption that a creditor has violated this statutory prohibition, if the creditor generally does not verify and document consumers' repayment ability.

Loan Flipping - The Fed rules address "loan flipping" within the first 12 months of a HOEPA high cost loan. A creditor that has made a HOEPA loan to a borrower in the preceding 12 months is generally prohibited from refinancing another HOEPA loan to the same borrower. A creditor would be permitted to make such a loan if it is "in the borrower's interest."

Open-end loans - The Fed rules attempt to prevent evasions of HOEPA, which only covers closed-end loans, by prohibiting a creditor from wrongfully documenting them as open-end credit. For example, a high cost mortgage could not be structured as a home-secured line of credit if there is not reasonable expectation that repeat transactions will occur under a reusable line of credit.

Due-on-Demand - To ensure that lenders do not accelerate the payment of HOEPA loans without cause, the rules prohibit a creditor from exercising "due-on-demand" or "call" provisions in a HOEPA loan, unless the clause is exercised in connection with the consumer's default.

Other Federal Lending Laws

In addition to HOEPA, the Congress has enacted many Acts designed to provide standards and practices for extending credit to consumers for the purchase of residences and other consumer goods. Some acts include the Truth in Lending Act (TILA), the Home Mortgage Disclosure Act (HMDA), the Real Estate Settlement Procedures Act (RESPA), the Fair Housing Act (FHA), and the Equal Credit Opportunity Act (ECOA), and the Community Reinvestment Act (CRA).

The TILA requires creditors to disclose credit terms and the cost of consumer credit as an annual percentage rate. The act requires additional disclosures for loans secured by a consumer's home, and permits consumers to cancel certain transactions that involve their principal dwelling.

The HMDA, first enacted in 1975, requires lending institutions to report public loan data to assist the public and government agencies: in determining whether financial institutions are serving the needs of their communities, in distributing public dollars so as to attract private investment in underserved areas, and in identifying possible discriminatory lending patterns.

The RESPA was enacted in 1974 to provide consumers with disclosure about closing costs and to prohibit unearned fees (kickbacks/referral fees).

The FHA was passed as part of the Civil Rights Act of 1968, and prohibits the refusal to sell, rent, or negotiate for the sale or rental of housing for reason of race, color, religion, sex, handicap, familial status (if a household includes children), and national origin.

The ECOA prohibits discrimination in all personal and commercial credit transactions based on race, color, religion, national origin, sex, marital status, age, and other bases. The ECOA is broader than the FHA since the ECOA covers virtually all lenders while the FHA covers only real estate-related lending. Housing lenders are subject to both statutes.

The CRA requires the banking agencies to consider a depository institution’s efforts to meet the needs of its community when it applies to the banking agencies for permission to expand. As currently interpreted by the agencies, this has meant that a bank’s fair lending performance is weighed when considering such an application.

Florida Laws Regulating Lenders

The Florida Department of Banking and Finance regulates state-chartered financial institutions generally (Chapter 655, F.S.), Credit Unions (Chapter 657, F.S.), Banks and Trust Companies (Chapter 657, F.S.), Trusts (Chapter 660, F.S.), Associations (Chapter 665, F.S.) Savings Banks (Chapter 667, F.S.), Retail Installment Sales (Chapter 520), as well as those licensed for Mortgage Brokerage and Mortgage Lending (Chapter 494, F.S.), and Consumer Finance Companies (Chapter 516, F.S.). In addition to state oversight and regulation, these state-chartered institutions are required to comply with federal regulations governing their industries.

In addition, Florida law provides guidelines for Instruments Deemed Mortgages and the Nature of Mortgages (Chapter 697, F.S.), and provides protection for the consuming public and legitimate business enterprises from those who engage in unfair methods of competition, or

unconscionable, deceptive, or unfair acts or practices in the conduct of any trade or commerce (Chapter 501, F.S. – the “Little FTC” Act).

The Florida usury law prohibits mortgage interest rates exceeding an annual rate of 18 percent simple interest, with exceptions (s. 697.03, F.S.). However, consumer finance loans, capped at $25,000, may have interest rates as high as 30 percent per year for the first $2,000, 24 percent for the amount between $2,000 and $3,000, and up to 18 percent for the amount over $3,000. (s. 516.031, F.S.)

State-chartered financial institutions must comply with federal regulations as well as state laws regulating the industry. Mortgage brokers and lenders must be licensed to operate in the state and must also follow federal guidelines for lending. For instance, banks, credit unions, and mortgage companies must comply with Regulation C of the Home Mortgage Disclosure Act of 1975, providing citizens and public officials with data to help determine whether lenders are meeting the credit needs of their communities and complying with fair lending laws. In addition, Regulation Z, Truth in Lending, applies to all persons who extend consumer credit more than 25 times a year or, in the case of consumer credit secured by real estate, more than 5 times a year. However, the Department of Banking and Finance does not generally have the authority to enforce federal law, such as the requirements of HOEPA.

Other States’ Laws and Local Ordinances

Several states and cities have enacted laws restricting or prohibiting the use of certain credit provisions commonly associated with predatory lending, such as prepayment penalties and financing of up-front fees and credit insurance premiums. North Carolina and California have enacted laws that are more restrictive and have lower interest rate triggers on high cost loans than HOEPA. Other states, such as Pennsylvania, have enacted laws that essentially mirror HOEPA. The practical effect of this type law is to enable state banking regulators to enforce, as a matter of state law, current federal requirements. More importantly from the lending community’s perspective, the Pennsylvania law preempts any local ordinance (such as those proposed in Philadelphia) that impose restrictions on loans and maintains uniformity with federal law.

Various local governments have adopted ordinances declaring a moratorium on business relationships with financial institutions that originate loans with rates and terms defined as "predatory" or "high cost." These ordinances differ considerably, with percentage rate triggers that range from the current Treasury Bill rate plus 5 percent (DeKalb County, GA), to Treasury Bill rate plus 9 percent (Dayton, Ohio), and some in between. Some ordinances apply only to consumer loans that do not exceed $25,000, while others apply to open-end lines of credit but not reverse mortgages, and others apply only to loans secured by residential real estate. In December 2001, the City Commission of Miami authorized an investigation of the practice of predatory lending within the city and began the process of drafting an anti-predatory lending ordinance.

Lenders express great concern about a multitude of varying requirements that must be adhered to in different jurisdictions, and argue for a national standard such as HOEPA. Also, lenders do not wish to be officially labeled as making “predatory loans” or to be exposed to possible liability for violating laws covering high cost loans. Banks can become associated with predatory lending, inadvertently, through involvement in the mortgage and securities markets. Some banks purchase

loans from loan brokers. Others have lending subsidiaries, form joint ventures with other lenders, or provide warehouse lines of credit, liquidity facilities, and dealer or broker lines. Some banks or their subsidiaries may service loans. In addition, some banks might invest in asset-backed securities or participate in the securitization process by providing trust services or acting as an underwriter.

III. Effect of Proposed Changes:

Section 1 cites the act as the "Florida Home Loan Protection Act" ("act") and makes legislative findings. In summary, the Legislature finds that:

- Abusive mortgage lending has become a problem in this state.
- One of the most common forms of abusive lending is the making of loans that are equity-based rater than income-based.
- The financing of points and fees in these loans encourages lenders to repeatedly refinance home loans.
- As long as there is sufficient equity in the home, an abusive lender benefits even if the borrower is unable to make the payments.
- Abusive lending has threatened the viability of many communities and caused decreases in home ownership.
- Competition and self-regulation have not eliminated the abusive terms from home-secured loans.
- The act is necessary to encourage fair lending.

Section 2 provides definitions for the following terms: "benchmark rate," "bona fide discount points," "borrower," "creditor," "high-cost home loan," "home loan," "points and fees," "rate," "threshold," and "total loan amount."

Some of the act's provisions (in Section 3) apply to any "home loan," which is generally defined as a loan secured by a mortgage on real estate with a structure, or on a manufactured home, which is the borrower's principal dwelling, including both open-ended and fixed term loans.

Interest rate or fee trigger for high-cost loans - Many of the act's provisions (in Section 4) apply only to a "high-cost home loan," defined as a home loan the terms of which meet or exceed one or more "thresholds." There are two thresholds (sometimes referred to as "triggers"): one based on the interest rate, and one based on the total points and fees.

The interest rate threshold for a "high-cost home loan", for a *first* lien, is a rate that equals or exceeds *7 percentage points more than the average yield on U.S. Treasury securities of comparable maturity.* For a *second* or subordinate lien mortgage or a mortgage secured by an interest in a manufactured home, the rate equals or exceeds *9 percentage points more than the average yield on U.S. Treasury securities of comparable maturity.* For example, a 10-year loan would be considered high cost at today's rates (about 5% for 10-year Treasury securities) if the rate is above about 12 percent for a first mortgage, or about 14 percent for a second mortgage. These interest rate triggers for first and second mortgages are each 1 percentage point lower than the rate triggers under HOPEA.

The total points and fees can also classify a loan as "high-cost." For loans of *$30,000 or more*, if points and fees *exceed 3 percent* of the total loan amount, the loan is a high cost loan. For loans of *less than $30,000* the trigger is reached if points and fees exceed the *lesser of $900 or 6 percent* of the total loan amount. However, the total points and fees would *exclude* up to 2 "bona fide discount points." These are points knowingly paid by the borrower for the express purpose of getting a lower interest rate, but only if that rate does not exceed the average yield of 5-year U.S. Treasury securities plus 4 percentage points ("benchmark rate"). This fee-based trigger is lower than under HOEPA, which covers loans for which the total points and fees exceed 8 percent of the loan amount or $480 (for 2002).

The definition of "points and fees" is broad and all-inclusive, for purposes of determining whether a loan exceeds the total points and fees threshold described above. It essentially includes all charges by the lender other than interest, plus certain potential fees that may be charged over the course of the loan. It includes all compensation paid directly or indirectly to a mortgage broker, the maximum prepayment fees that may be charged, all prepayment fees charged to the borrower if a previous loan is refinanced by the same creditor, and for open-ended loans the maximum additional fees which can be charged during the term of the loan. It also includes the cost of all premiums financed by the creditor for any credit, life, or health insurance. This definition also impacts the bill's prohibition against financing points or fees that exceed 3 percent of the total loan amount, and the prohibition against "loan flipping" (in Section 3).

Section 3 prohibits acts and practices for *all* home loans (i.e., not just high-cost home loans), as follows:

Insurance and Debt Cancellation Agreements - The creditor would be prohibited from financing any credit life, credit disability, credit unemployment, or credit property insurance, or any other life or health insurance, except that insurance premiums or debt cancellation fees calculated and paid on a monthly basis are not considered financed.

Recommendation of Default - The creditor would be prohibited from recommending or encouraging default on an existing loan in connection with a loan that refinances any portion of the existing loan.

Late Payment Fees - The creditor would be prohibited from charging a late payment fee:

- in excess of 5 percent of the amount that is past due;
- for a payment that is less than 15 days past due;
- more than once for a single late payment;
- without notifying the borrower within 45 days following the date the payment was due that a late payment fee has been imposed; or
- if the borrower informs the creditor that nonpayment of an installment is in dispute and presents proof of payment within 45 days after receipt of notice.

Fee for Balance - A creditor may not charge a fee for informing or transmitting the balance due to pay off the loan or to provide a release upon prepayment. Payoff balances must be provided within 7 business days after the request.

Door-to-Door Solicitation - A creditor may not offer or sell a home loan at the residence of a potential borrower without a prearranged appointment or the expressed invitation of the potential borrower.

Section 4 prohibits acts and practices for *high-cost home loans*, as follows:

Financing of Fees or Charges - Creditors would be prohibited from financing any points or fees that exceed 3 percent of the total loan amount.

Balloon Payment - Balloon payments are prohibited. More specifically, a high-cost home loan may not have a scheduled payment that is more than twice as large as the average of earlier payments. But, this does not apply when the payment schedule is adjusted to the seasonal or irregular income of the borrower.

Negative Amortization - A high-cost loan may not provide for an increase in the outstanding principal balance at any time over the course of the loan, due to the regular payment not covering the full amount of the interest due.

Increase Interest Rate upon Default- The interest rate cannot be increased due to default.

Advance Payments - No more than 2 payments may be consolidated and paid in advance from the loan proceeds provided to the borrower.

Arbitration Clause - The high-cost loan may not include an arbitration clause that limits the right of the borrower to seek relief through the judicial process for any claims or defense against the creditor or any other party involved in the loan.

Lending without Homeownership Counseling - A creditor may not make a high-cost home loan without first receiving certification from an independent counselor approved by the regulatory agency that has jurisdiction over the creditor that the borrower has received counseling on the advisability of the loan.

Lending without Due Regard to repayment Ability - A creditor may not make a high-cost home loan without due regard to repayment ability. A creditor following debt-to-income ratios of less than 50 percent, as determined by guidelines established with regard to Veterans Administration loans and specified in cited federal rules would have a rebuttable presumption that the loan was made with due regard to repayment ability.

Home Improvement Contracts - A creditor may not pay a contractor under a home improvement contract unless the payment is made to the borrower or jointly to the borrower and the contractor, or at the election of the borrower, through a third-party escrow agent, in accordance with a signed, written agreement.

Modification or Deferral Fees - A creditor may not charge a borrower any fees to modify, renew, extend, or amend a high-cost home loan or to defer any payment due on a minimum of one modification or deferral per each 12 months of the length of the loan. For example, a creditor

would be prohibited from charging a fee for allowing a borrower to defer a loan payment, unless the borrower deferred a loan payment more than once in a 12-month period.

Loan Flipping - A creditor may not refinance an existing home loan unless the new loan has "reasonable, tangible, net benefits to the borrower." Such illegal "loan flipping" is presumed if the primary benefit to the borrower is a lower interest rate and it will take more than 4 years for the borrower to recoup the costs of the points and fees and other closing costs of the new loan. Other situations are listed for presumed loan flipping, including refinancing of a government-guaranteed loan that had a below-market interest rate when originated or certain other terms beneficial to the borrower.

Required Notice to Purchasers and Assignees - Each high-cost home loan must contain the following: "Notice: This is a mortgage subject to the provisions of the Florida Fair Lending Act. Purchasers and assignees of this mortgage could be liable for all claims and defenses with respect to the mortgage which the borrower could assert against the lender."

72-Hour Disclosure - The creditor must deliver all loan documents and disclosures to the borrower at least 72 hours before the closing, signing, or agreement to any terms of a high-cost loan.

Call provisions - A high-cost home loan may not contain a provision permitting the creditor to call or accelerate the indebtedness, except due to the borrower's failure to abide by the material terms of the loan.

Section 5 provides for the borrower's right to cure a default. This section specifies that if a creditor asserts that grounds for acceleration exist and requires payment in full, the borrower has the right up to the time title is transferred by means of foreclosure, to cure the default and reinstate the loan by tendering "the amount or performance as specified in this section."

This section prohibits a fee or penalty attributable the exercise of the right to cure a default, "other than as allowed by this section." This section does not specify an amount other than the sum of money to cure the default specified in the creditor's required notice, but Section 4 (above, for all home loans) prohibits late fees in excess of 5 percent of the amount that is past due.

Before any action may be filed to foreclose on the home, a notice of the right to cure the default must be delivered to the borrower, providing the borrower at least 30 days to tender the specified amount of money necessary to cure the default or to disagree with the creditor's assertion that a default has occurred. The notice must inform the borrower that if the default is not cured, the creditor may take steps to terminate the borrower's ownership of the property and commence a foreclosure proceeding.

No attorney's fees may be assessed against the borrower for the creditor's attorney fees prior to or during the 30-day notice period, nor for any such fees in excess of $100 incurred by the lender after the 30-day notice period but prior to the time the lender files a foreclosure action. After a foreclosure action is filed, the borrower shall only be liable for attorney fees that are reasonable and actually incurred by the lender based on a reasonable hourly rate and a reasonable number of hours.

If a default is cured prior to the initiation of foreclosure, the creditor may not institute the foreclosure proceeding. A creditor must use the judicial foreclosure procedures of the state where the property securing the loan is located. This would appear to simply refer to Florida foreclosure procedures.

Current law: Committee staff has not fully researched how this section may supplement or, possibly, change current Florida law regarding foreclosure of mortgages. However, s. 702.01, F.S., provides that a mortgage foreclosure is an action in equity. The court is required to sever all counter claims against the mortgagee for a separate trial and the foreclosure action is to be tried to the court without a jury. Also, s. 702.07, F.S., authorizes the court to rescind, vacate, and set aside any foreclosure at any time prior to the sale of the property and the court may dismiss the foreclosure proceeding when all court costs are paid. Such an action by the court will restore the lien and the debt secured by the lien to the position they were prior to the filing of the foreclosure action.

Section 6 provides for administrative and civil penalties for violations of the act and for preservation and enforcement of claims and defenses.

Subsection (1) provides that if a home loan has been made, arranged, or assigned by a person selling a manufactured home or home improvements to the dwelling of a borrower, the borrower may assert all affirmative claims and any defenses that the borrower may have against the seller or home improvement contractor against the creditor or any assignee, holder, or servicer in any capacity if the claims and defenses relate exclusively to the loan transaction.

Subsection (2) authorizes the Department of Banking and Finance to levy administrative penalties against a person who violates this act, up to $2,500 for each violation. In addition, the department or the Attorney General may bring a civil action in "any court of competent jurisdiction," (presumably circuit court) in the name of the people of the state against any person who willfully and knowingly violates any provision of this act, who would be liable for up to $25,000 for each violation.

Subsection (3) provides that a borrower in default more than 60 days or in foreclosure may assert a violation of this act by way of offset as an original action or as a defense or counter claim, or to obtain possession of the home. (This subsection is titled "Liability of Assignees in Foreclosure Actions" but the subsection does not otherwise address liability of assignees. However, subsection (1) does address this issue for certain loans, as described).

Section 7 ("Enforcement") authorizes a borrower to bring a civil action to enforce compliance, provides that intentional violations render a home loan void, and provides criminal penalties for violations of this act.

The bill authorizes a borrower to be bring an action to enforce compliance with this act and to be granted injunctive, declaratory, and such other equitable relief as the court deems appropriate.

Any intentional violation of the act renders the home loan agreement void and the creditor has no right to collect any principal, interest, or other charges whatsoever, and the borrower may recover any payments made under the agreement.

The remedies provided in this section are cumulative and are not intended to be the exclusive remedies available to a borrower, nor must the borrower exhaust any administrative remedies before proceeding under this section.

Any person who knowingly violates this act commits a misdemeanor of the first degree.

However, a creditor who, when acting in good faith, fails to comply with this act shall not be deemed to have violated this act if the creditor establishes that: 1) within 30 days after the loan closing, and prior to receiving any notice from the borrower, the creditor has made appropriate restitution to the borrower and appropriate adjustments to the loan; or 2) within 60 days after the loan closing and prior to receiving any notice from the borrower, and if the compliance failure was not intentional and resulted from a "bona fide error" notwithstanding the maintenance of procedures reasonably adapted to avoid such errors, the borrower has been notified of the compliance failure, appropriate restitution has been made to the borrower, and appropriate adjustments are made to the loan. Examples of what are, and what are not, "bona fide errors" are listed.

Section 8 requires the Department of Banking and Finance to administer and enforce the provisions of this act.
The department would be provided authority to:
- adopt rules to implement this act;
- conduct an investigation of any person when the department has reason to believe that any violation of this act has occurred;
- to bring an action on behalf of the State against any person who has violated or is about to violate any provision of this act or any rule or order issued under the act, to enjoin the person from continuing in or engaging in any act in furtherance of the violation; and
- issue an order to cease and desist and to take corrective action when the department has reason to believe the person is violating, has violated, or is about to violate any provision of this act, or any rule or order of the department issued under this act, or any written agreement between the person and the department.

Section 9 is a severability clause if any provision is invalid or preempted by federal law or regulation.

Section 12 provides that the act shall take effect October 2, 2002.

IV. Constitutional Issues:

A. Municipality/County Mandates Restrictions:

None.

B. Public Records/Open Meetings Issues:

None.

C. Trust Funds Restrictions:

None.

V. Economic Impact and Fiscal Note:

A. Tax/Fee Issues:

None.

B. Private Sector Impact:

This act is more restrictive than current federal law (HOEPA) with respect to home loans and high-cost home loans and, as such, could adversely affect sub-prime lenders and access to capital and loans in the sub-prime market. However, to the extent that sub-prime loans continue to be made, borrowers would have greater protections than under current federal and state law.

The most significant differences and restrictions relative to high-cost loans under this bill, as compared to HOEPA are: (1) a lower interest rate threshold and a lower fees-based threshold for determining whether a home loan is a "high-cost home loan" that is subject to certain restrictions; (2) a broader definition of "points and fees" that would be included in determining whether the fee-based threshold is triggered; (3) prohibiting balloon payments on all high-cost loans, not just loans that have a term of less than 5 years; (4) requiring that the borrower first receive independent counseling on the advisability of entering into a high-cost loan; (5) limitations on modification or deferral fees for high-cost loans; (6) more restrictive prohibitions on refinancing a loan without a tangible net benefit to the borrower; (7) required delivery of all loan documents 72 hours prior to closing a high-cost loan; (8) allowing the borrower to cure default and prevent disclosure under certain circumstances; (9) authorizing the borrower to file a civil action to enforce compliance; (10) authorizing the Department of Banking and Finance to impose civil penalties; and (11) authorizing the department or the Attorney General to bring a civil action against any person who willfully and knowingly violates any provision of this act. (However, certain provisions of HOPEA are *more* restrictive than the bill, related to prepayment penalties, disclosure requirements, and lending without due regard to repayment ability.)

Lenders may be reluctant to make loans that are classified as "high-cost home loans" due to these substantive restrictions and potential liability. The potential inability to sell such loans in the secondary market may also prevent such loans from being made. To be classified as a high-cost home loan, the interest rate trigger in the bill is one percentage point lower than HOEPA: for first mortgages it is 7, rather than 8, percentage points more than the rate for U.S. Treasury notes; and for second mortgages it is 9, rather than 10, percentage points above U.S. Treasury notes. The fee-based trigger is also lower than HOEAP. Under the bill, for loans of $30,000 or more, the trigger is reached if points and fees exceed 3 percent of the loan amount, and for loans of less than $30,000, if the points and fees exceed the lesser of $900 or 6 percent of the loan. Under HOEPA, the total points and fees must exceed the greater of 8 percent of the loan amount or $480 (for 2002). Plus, the definition of points and fees is broader under the bill.

If loans above such rate or fee triggers are less available, some borrowers may not be able to qualify for a loan due to their credit history and credit risk. However, borrowers who are able to

obtain high-cost loans would be protected from certain costs and unfair loan terms that can be imposed under high-cost loans today, which are not prohibited under HOEPA. It can also be argued that interest rates or fees above a certain level are inherently unfair and should be discouraged, or even prohibited, as argued for the current usury rate limit of 18 percent.

Certain loan provisions are prohibited for *all home loans*, which are not prohibited under federal law, which could possibly impact access to capital and loans in the prime market, but do not appear likely to do so. Most importantly, the bill prohibits the financing of any credit life, credit disability, or other types of insurance; prohibits late fees of more than 5 percent of the amount past due; and prohibits charging a fee for informing or transmitting the balance due to pay off the loan.

C. Government Sector Impact:

The Department of Banking and Finance reports that it would be able to administer and enforce the provisions of this bill within current resources.

VI. Technical Deficiencies:

None.

VII. Related Issues:

Certain federal laws may preempt provisions of this bill. For example, the Alternative Mortgage Transaction Parity Act of 1982 preempts state laws covering alternative mortgage financing arrangements, such as variable interest-rate loans and loans requiring balloon payments. Its purpose was to eliminate any discriminatory impact that federal regulations had on nonfederally chartered housing creditors. The Parity Act permits state-chartered housing creditors to choose between applicable federal or state law governing alternative mortgage transactions.[3] Also, the Depository Institutions Deregulation and Monetary Control Act of 1980 preempts all state usury laws on first mortgages, which may also extend to other limits on fees.

Committee Substitute for Senate Bill 2380 (by Banking and Insurance and Senator Clary) imposes requirements on high cost mortgage loans that mirror most of the requirements of the federal Home Ownership and Equity Protection Act (HOEPA).

VIII. Amendments:

None.

This Senate staff analysis does not reflect the intent or official position of the bill's sponsor or the Florida Senate.

[3] U.S. General Accounting Office, "Role of the Office of Thrift Supervision and Office of the Comptroller of the Currency in the Preemption of State Law," February 7, 2000. (Report No. B-284372).