



# FULL ANALYSIS

## I. SUBSTANTIVE ANALYSIS

### A. DOES THE BILL:

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|--------------------------------------|---|--|---|
| 1. Reduce government?                | Yes <input type="checkbox"/>            | No <input checked="" type="checkbox"/> | N/A <input type="checkbox"/>            |
| 2. Lower taxes?                      | Yes <input type="checkbox"/>            | No <input checked="" type="checkbox"/> | N/A <input type="checkbox"/>            |
| 3. Expand individual freedom?        | Yes <input type="checkbox"/>            | No <input checked="" type="checkbox"/> | N/A <input type="checkbox"/>            |
| 4. Increase personal responsibility? | Yes <input checked="" type="checkbox"/> | No <input type="checkbox"/>            | N/A <input type="checkbox"/>            |
| 5. Empower families?                 | Yes <input type="checkbox"/>            | No <input type="checkbox"/>            | N/A <input checked="" type="checkbox"/> |

For any principle that received a “no” above, please explain:

This bill increases governmental regulation by mandating that all license renewal applications be submitted electronically and authorizes the regulator to allow a third party to administer the required applicant examinations, which will likely result in a new fee for the applicant.

The bill also increases the application fee for license transfers for certain licensees; however, this increase makes licensing application fees consistent for all applicants.

### B. EFFECT OF PROPOSED CHANGES:

The Financial Services Commission and its Office of Financial Institutions and Securities Regulations (the regulator, formerly known as the Department of Banking and Finance) administer the regulation of mortgage brokers and lenders, consumer finance, retail installment sales, title loans, and securities. A number of provisions under each of these areas of its jurisdiction have been identified by the regulator for clarification and revision for more efficient governance. This analysis will address the proposed revisions by subject across the various regulatory schemes under the Commission’s and Office’s jurisdiction.

#### Mortgage Brokers and Lenders

This bill revises a number of regulatory provisions in Chapter 494, Florida Statutes, which governs mortgage brokers and lenders. These revisions include clarifying when a change in licensee control will trigger the need for a new license, authority to cancel new and renewal licenses under certain returned check conditions, exemption requirements for financial institutions, electronic filing of license renewals, testing procedures and fees, branch application license approval, accounting standards, and corrections to statutory cites.

There are three Parts to Chapter 494, F.S. Part I outlines the general powers and duties of the regulator, the Financial Services Commission and its Office of Financial Institutions and Securities Regulation (formerly the Department of Banking and Finance), lists prohibited practices, and provides penalties for violations of the act. Part II provides the regulatory framework for mortgage brokerage businesses and mortgage brokers, and Part III provides the same for mortgage lenders and correspondent mortgage lenders.<sup>1</sup>

#### Clarifications

The definitions and provisions that apply to the mortgage brokerage and mortgage lending industry in general are found in Part I of the chapter. The definition for “Associate” is two tiered. An associate is

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<sup>1</sup> The substantive difference between a mortgage lender and a correspondent mortgage lender is that the latter cannot service loans.

identified as a person who is required to be licensed as a mortgage broker under this chapter who is employed by or acts as independent contractor for a mortgage brokerage business. The definition then continues by saying “or” and then identifies a person acting as an independent contractor for a mortgage lender or correspondent mortgage lender. It is not clear in this current definition whether the “who is required to be licensed as a mortgage broker” is intended to apply only to the first “associate” identified or also to the “associate” identified after the “or.” In an attempt to clarify who is required to be licensed as a mortgage broker, this bill inserts references to those who act as associates for mortgage lenders or correspondence mortgage lenders into the section<sup>2</sup> regulating who is required to be licensed as a mortgage broker. This has the effect of requiring all persons who act as associates of mortgage lenders or correspondent mortgage lenders to be licensed as mortgage brokers.

Certain educational requirements, as conditions for licensure, are established under Parts II and III of Chapter 494, F.S., for mortgage brokers, lenders, and their related associates. All applicants for licensure renewal under this chapter must certify to the regulator that they have completed a certain number of hours of professional educational programs within the two years prior to the renewal application. Since this means that this requirement must be repeated within each two-year licensing cycle, this bill clarifies that the educational requirements are *continuing*.

### **Educational Requirements**

Under Part I, persons, schools, and other institutions may apply for a permit from the regulator to offer mortgage brokerage training courses as a condition precedent to licensure. Accredited universities, community colleges, and technical schools that offer similar courses are exempted from the permitting process. Permitted schools must comply with guidelines and rules established by under Chapter 494, F.S. Although the schools can offer the courses, there is no statutory authority for the regulator to permit an outside resource to administer and charge for the requisite tests. Currently, the regulator administers the pre-licensing mortgage brokerage and lending tests monthly through five locations statewide. Applicants are able to take up the tests up to three times without any testing fee.

Under both Parts II and III of Chapter 494, this bill provides that the regulator-approved educational test required of licensure applicants (and renewal applicants by reference) be administered by a third party. Since there is a movement to establish a national test for mortgage brokers, this bill also provides that the regulator may waive the test requirement for an individual who has passed a comparable test offered by a national group of state mortgage regulators or a similar federal government agency.

Currently, Part II requires lenders and correspondent lenders to designate a principal representative who will exercise control of the licensee’s business. Since October 1, 2001, Part II has also required each principal representative to pass a test which covers primary and subordinate mortgage financing transactions and the rules and laws of Chapter 494, F.S. If a lender designates a new principal representative, the lender must notify the regulator of the name and address of the new representative and document that the person has completed the educational and testing requirements. Unless the new principal representative has had some reason (previous licensure) to have completed the educational and testing requirements, he or she will not be in compliance with the notification requirement. This bill provides the newly designated principal representative 90 days after being designated to complete the education and testing requirements.

### **Exemptions**

In Parts II and III of Chapter 494, F.S., certain financial entities (any bank, bank holding company, trust company, savings and loan association, savings bank, credit union, or consumer finance company licensed pursuant to Chapter 516, F.S.) and certain federal associations are exempted from the licensure requirements for mortgage brokerage businesses, mortgage brokers, mortgage lenders and correspondent mortgage lenders. In general, these types of institutions are reviewed by a federal or

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<sup>2</sup> Subsection (1) of s. 494.0033, F.S.

state regulatory agency. However, the regulator indicates that certain financial institutions and their subsidiaries from other countries have claimed this exemption, and the regulator has not been able to verify that a regulatory review of the institution has taken place. This language provided in this bill in both Parts II and III of the chapter, requires regulation by a state or federal regulatory agency within the United States in order to claim the exemption from licensure by these parts.

### **Change of Control**

In several sections of Chapter 494, F.S., there is a prohibition against the transferring or assigning of licenses.<sup>3</sup> Based on these statutes, the regulator requires a new license application to be filed if there is a direct or indirect change of control for mortgage brokerage businesses, mortgage lenders, or correspondent mortgage lenders. This bill provides specific language under the licensing requirements for each of those types of licenses requiring any person who directly or indirectly seeks to own, control, or hold with power to vote, or holds proxies representing 50 percent or more of any class of equity securities or ultimate equitable ownership of the licensed entity, to apply and be approved for a new license prior to the effective date of ownership or change in ownership or controlling interest. The bill also makes this requirement for mortgage brokerage schools that are permitted under Part I of Chapter 494, F.S.

### **License Cancellations**

Under Parts II and III of the chapter, provisions are made for the cancellation of an initial license if the check written for that license is returned for non-sufficient funds. The regulator does not have the authority to cancel the license if the checks are returned due to closure of the licensee's account and does not have the authority to cancel the permits of mortgage brokerage schools, or renewed licenses if the checks of the permit holders or licensees are returned. This bill amends Parts I, II and III, providing the regulator the authority to cancel the permits of mortgage brokerage schools and the new or renewed licenses of mortgage brokerage businesses, mortgage brokers, mortgage lenders or correspondent mortgage lenders if the checks tendered for their respective permits or licenses are returned for any reason.

### **License Renewals**

The regulator accepts both paper form and electronically filed license renewals from mortgage brokerage businesses and their branch offices, mortgage brokers, mortgage lenders and their branch permit holders, and correspondent mortgage lenders, and their branch permit holders. The regulator reports that during the most recent business renewal period, 90 percent of the licensees chose to renew through the Internet. The regulator also reports that maintaining a dual system for only 10 percent of license renewal applicants is costly. This bill amends Parts II and III of Chapter 494, F.S., to require all renewals to be filed electronically.

### **Consistency**

Licensing requirements for mortgage brokers under Part II and mortgage lenders and correspondent mortgage lenders under Part III of Chapter 494, F.S., authorize the regulator to require each applicant to provide any information reasonably necessary to make a determination of the applicant's eligibility for licensure. This bill replicates that authority for the regulator in relation to mortgage brokerage business license applicants under Part II, and moves the provision towards the start of the licensing section for correspondent mortgage lenders under Part III.

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<sup>3</sup> s. 494.004(5), F.S. for Part II license issued under ss. 494.003-494.0043, F.S., and s. 494.0061(5), F.S., for Part III license issued under ss. 494.006-494.0077, F.S.

## **Revised Accounting Standards**

Mortgage lenders and correspondent mortgage lenders are required under Part III to maintain a minimum net worth. The licensee's compliance with this requirement must be verified by audited financial statements that are prepared according to generally accepted accounting principles. Since the events surrounding the demise of Enron, the accounting profession is now required to use similar, but amended language as a standard. This bill amends the auditing standards currently required in Part III to mirror the profession's new language which now holds to accounting principles generally accepted *in the United States of America*.

## **Branch Office Applications**

Under Parts II and III, mortgage brokerage businesses and mortgage lenders may acquire branch office licenses for their branch offices. The regulator indicates that there may be some discrepancy between it's and the licensee's understanding of when the branch office license is valid. The language in the current statutes directs the regulator to issue such a license "upon receipt of a completed application." The regulator maintains that the word "completed" in reference to the application indicates a certain standard for the application and consequently a review by the regulator for compliance with that standard before approval of the license is granted. This bill amends the branch office license requirements in both Parts II and III to provide that the regulator is directed to issue the branch office license once it has *determined* that the licensee has submitted a completed application.

## **Saving Clause**

In 1991, the Legislature extensively revised chapter 494, F.S., and enacted a number of new requirements for mortgage lenders applying for licensure after the effective date of that act. Previously, licensed mortgage lenders were "grandfathered" into the 1991 act through a special mortgage lender business license pursuant to a savings clause (s. 464.0065, F.S.) ratified by the Legislature. In 1998, the Legislature codified rules promulgated by the former Department of Banking and Finance that permitted the transfer or sale of the "grandfathered" licenses under certain conditions. Many of the provisions found in Chapter 494, F.S., relating to mortgage lenders and correspondent mortgage lenders are reiterated under s. 494.0065, F.S., to apply to licensees governed by that section. This bill reiterates in the Saving Clause the requirements for designation of principal representatives and the amendments it makes to Parts II and III, relating to accounting principles, educational and testing requirements, and returned checks. The bill also increases the fee licensees must pay to transfer licenses under this section from \$500 to \$575. This change makes the license transfer application fees for this section consistent with the license applications fees for mortgage brokers and lenders in Parts II and III, which were revised in 1999.

## **Miscellaneous**

Obsolete and duplicative language is removed from Chapter 494, F.S., by this bill, and the same exemption from licensure extended to natural persons acting within the scope of employment with a licensed mortgage lender is extended to natural persons acting within the scope of employment with licensed correspondent mortgage lenders.

In keeping with the regulator's acceptance of electronic filing of applications for the various licensees under its jurisdiction, the bill amends the regulatory fee deposit provision under Chapter 517, F.S., which relates to the licensure of securities dealers. Currently, under s. 517.12, F.S., the regulator has the authority to establish procedures for the depositing of such fees in the National Securities Dealer's Central Registration Depository. Recently, the national group created the *Investment Adviser Registration Depository* as its Internet depository for electronic fee submission. The bill expands the regulator's authority for establishing fee deposit procedures to encompass this electronic depository.

## Records Retention

The regulator has statutory authority to require several industries under its jurisdiction to keep records for specified periods of time:

- Section 494.0016, F.S., authorizes the regulator to specify the minimum amount of information that mortgage brokers and lenders must show in their books, records and documents for compliance verification and requires such licensees to keep those records for 3 years.
- Section 516.12, F.S., generally requires licensed consumer finance institutions to keep books, accounts, and records for regulator verification of compliance with licensing requirements for 2 years.
- Section 520.97, F.S., authorizes the regulator to specify the minimum amount of information that retail installment sellers must show in their books, records, and documents for compliance verification and requires such licensees to keep those records for 2 years.
- Section 537.009, F.S., authorizes the regulator to specify the minimum amount of information that title loan lenders must show in their books, records, and documents records for compliance verification and requires such licensees to keep those records for 2 years.

Many of these documents contain personal financial information on clients of the licensees. The proper disposal of records containing such information could help to prevent the possibility of identity theft. However, none of these sections authorize the regulator to specify how to dispose of these records once the retention period has been reached. This bill amends each of those sections to provide the regulator with such authority.

### C. SECTION DIRECTORY:

**Sections 1 and 2** amend Part I of Chapter 494, F.S., relating to the general governing provisions for mortgage brokers and lenders (ss. 494.0029 and .00295, F.S.).

**Sections 3 through 8** amend Part II of Chapter 494, F.S., relating to the licensure of mortgage brokerage businesses and mortgage brokers (ss. 494.003, .0031, .0032, .0033, .0034, and .0035, F.S.).

**Sections 9 through 12 and section 14** amend Part III of Chapter 494, F.S., relating to the licensure of mortgage lenders and correspondent mortgage lenders (ss. 494.006, .0061, .0062, .0064, and .0066, F.S.).

**Section 13** amends s. 494.0065, F.S., relating to the Saving Clause, providing licensing requirements and clarifications that correspond to the same provisions for mortgage brokers and lenders. This section also increases the fee for license transfers authorized by s. 494.0065, F.S., from \$500 to \$575.

**Section 15** amends s. 494.0067, F.S., providing a clarifying provision for continuing educational requirements for principle representatives, loan originators, or associates of mortgage lender and correspondent mortgage lender licensees.

**Sections 16 through 19** amend those sections relating to the retention of records under the regulator's jurisdiction (ss. 494.0016, 516.12, 520.997, and 537.009, F.S.).

**Section 20** amends s. 517.12, F.S., to provide authority for the regulator to establish procedures for the deposit of regulatory fees electronically by securities dealers.

**Section 21** provides that this act will take effect upon becoming law.

## II. FISCAL ANALYSIS & ECONOMIC IMPACT STATEMENT

### A. FISCAL IMPACT ON STATE GOVERNMENT:

#### 1. Revenues:

OFISR estimates that the increase in license fees from \$500 to \$575 a year will increase the office's revenues by \$525 a year. The office indicates that it receives an average of 7 transfer requests annually.

#### 2. Expenditures:

Requiring all mortgage broker and lender renewal applications to be filed electronically will allow the regulator to discontinue the dual filing process that it asserts is costly.

### B. FISCAL IMPACT ON LOCAL GOVERNMENTS:

#### 1. Revenues:

None.

#### 2. Expenditures:

None.

### C. DIRECT ECONOMIC IMPACT ON PRIVATE SECTOR:

Currently, OFISR administers the continuing education exams for free and allows applicants to retest up to three times. The tests are administered once a month at five locations in the state. The office contends that under the provisions of this bill, it could by rule authorize a third party vendor to administer the test via computer. OFISR estimates that third party examination fees for electronic testing will range from \$60-75 per test. Mortgage brokers and lenders who can now take the regulator administrated test for free will have to pay to take such exams from a third party administrator. The office contends that the increase in cost to the applicant could be offset by the convenience of being able to take the test on-line. Additionally, applicants may be able to qualify and enter the market earlier because the on-line service will give them access to more expedient retesting opportunities that now only occur once a month.

### D. FISCAL COMMENTS:

None.

## III. COMMENTS

### A. CONSTITUTIONAL ISSUES:

#### 1. Applicability of Municipality/County Mandates Provision:

This bill does not require counties or municipalities to spend funds or to take an action requiring the expenditure of funds, does not reduce a county's authority to raise revenue and does not reduce the percentage of a state tax shared with counties or municipalities.

#### 2. Other:

### B. RULE-MAKING AUTHORITY:

This bill expands the rulemaking authority of the Financial Services Commission to allow the commission to adopt specific rules for requiring information in the licensing process for mortgage brokers and lenders, to establish procedures for electronic filing of such licensing applications and fee deposits relating to securities regulations, and for establishing records destruction procedures for mortgage brokerage and lender licensees, consumer finance licensees, title loan lender licensees, and retail installment seller licensees.

C. DRAFTING ISSUES OR OTHER COMMENTS:

Recent changes to the governmental organization of the Department of Banking and Finance affected by the passage of Constitutional Amendment 8 and Chapter 2002-404, Laws of Florida, reassign the regulatory duties of the department to the Financial Services Commission and its Office of Financial Institutions and Securities Regulation. The 2002 Florida Statutes do not yet reflect the renaming of all of the references to the former department. Major conforming legislation introduced in the 2003 Regular Session addresses those changes and includes a provision, that in the event other legislation passes that also includes the sections covered by the conforming legislation; the changes made by the conforming legislation will take precedence. However, new legislation referencing the regulatory entities needs to accurately reflect the provisions of Amendment 8 and Chapter 2002-404, LOF. This new language proposed by this bill does not conform to those changes and should be amended to do so.

#### IV. AMENDMENTS/COMMITTEE SUBSTITUTE CHANGES

The Subcommittee on Banking and Securities adopted a strike everything amendment to HB 577 that is the original bill, but conforms the new language sections in the bill with the recent changes to the governmental organization of the Department of Banking and Finance affected by the passage of Constitutional Amendment 8 and Chapter 2002-404, Laws of Florida. The amendment also clarifies a reference to bank holding companies and wholly owned bank holding company subsidiaries in the sections of the statutes<sup>4</sup> that exempt such entities from licensure as mortgage brokers and lenders. The amendment inserts into these statutes a reference to these entities that are formed or regulated under the laws of the U.S., or the various states. The amendment also maintains the ability of the office to administer the required licensee exams to provide for a transition in practice from office administered exams to third party administered exams. Finally, the amendment changes the effective date from taking effect upon becoming law to taking effect on October 1, 2003, again to provide transition time.

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<sup>4</sup> ss. 494.003, and 494.006, F.S.