The Florida Senate

BILL ANALYSIS AND FISCAL IMPACT STATEMENT

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

Prepared By: The Professional Staff of the Judiciary Committee

BILL: CS/SB 1116

INTRODUCER: Community Affairs Committee, Senator Margolis and others

SUBJECT: Mortgage Fraud

DATE: March 31, 2008 REVISED: 04/02/08

	ANALYST	STAFF DIRECTOR	REFERENCE	ACTION
1.	Herrin	Yeatman	CA	**Fav/CS**
2.	Cellon	Cannon	CJ	**Favorable**
3.	Sumner	Maclure	JU	**Favorable**
4.			FT	
5.			JA	
6.				

Please see Section VIII. for Additional Information:

A. COMMITTEE SUBSTITUTE..... [X] Statement of Substantial Changes
B. AMENDMENTS........................ [ ] Technical amendments were recommended
[ ] Amendments were recommended
[ ] Significant amendments were recommended

I. Summary:

The bill requires law enforcement agencies to promptly notify the property appraiser if the agency makes a finding of probable cause of the crime of mortgage fraud or other fraud involving real property that could affect its value. Notification may be delayed if it would jeopardize or negatively affect the investigation. The property appraiser may reassess the real property considering the effect of the fraud on the property's valuation. Upon a conviction of mortgage fraud or other fraud involving real property, the property appraiser shall, if necessary, reassess the properties affected by the fraud. The bill also increases the penalty for mortgage fraud involving a loan value greater than $100,000 from a third-degree felony to a second-degree felony.

This bill creates section 193.133 and amends section 817.545 of the Florida Statutes.

II. Present Situation:

Property Appraisal

Section 193.011, F.S., requires property appraisers to consider a number of factors in arriving at just valuation, including the following: present cash value of the property, highest and best use of the property in the immediate future, present use of the property, location of the property, quantity or size of the property, cost of the property, replacement value of improvements on the property, and income from the property. Currently, Florida Statutes do not require a property appraiser to reassess any real property involved in mortgage fraud.

Mortgage Fraud

"Mortgage Fraud is one of the fastest growing white collar crimes in the United States. Mortgage Fraud is defined as a material misstatement, misrepresentation, or omission relied upon by an underwriter or lender to fund, purchase, or insure a loan."[1] Mortgage industry experts estimate that up to 10 percent of all residential loan applications have some form of material misrepresentation, both inadvertent and malicious.[2]

In 2005, Florida was ranked first or highest in the United States for mortgage loans that contained alleged fraud against the lenders.[3] The rate of mortgage fraud in this state was 2.24 times the national average amount of mortgage fraud per mortgage origination.

Mortgage fraud is divided into two types: fraud for property and fraud for profit. Fraud for property is a misrepresentation made by a borrower or other party in order to qualify for a mortgage loan.[4] The applicant may alter or falsify tax returns or misrepresent income or expenses. Generally, the buyer intends to repay the loan. The Federal Bureau of Investigation (FBI) estimates that fraud for property accounts for 20 percent of all mortgage fraud.

Fraud for profit generally involves multiple loan transactions with several financial institutions involved.[5] The FBI estimates that fraud for profit accounts for 80 percent of all mortgage fraud and involves collaboration or collusion by industry insiders.[6]

Parties to fraud for profit schemes generally perpetuate the transaction by using fictitious, forged, or altered documents, fraudulently transferring deeds, grossly inflating the value of purchased homes, and submitting fraudulent escrow letters or other documents to mortgage companies. This type of fraud may involve numerous gross misrepresentations regarding the true identity of the buyer or seller, income, assets, collateral, and employment. Documents relating to title

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[1] FEDERAL BUREAU OF INVESTIGATION, OPERATION QUICK FLIP, http://www.fbi.gov/page2/dec05/operationquickflip 121405.htm (last visited March 26, 2008).

[2] FEDERAL FINANCIAL INSTITUTIONS EXAMINATION COUNCIL, EXAMINER EDUCATION, THE DETECTION, INVESTIGATION, AND DETERRENCE OF MORTGAGE LOAN FRAUD INVOLVING THIRD PARTIES: WHITE PAPER 2 (Feb. 2005).

[3] MERELE SHARICK ET AL., MORTGAGE ASSET RESEARCH INSTITUTE, INC., EIGHTH PERIODIC MORTGAGE FRAUD CASE REPORT TO MORTGAGE BANKERS ASSOCIATION 4 (Apr. 2006), http://mbafightsfraud.mortgagebankers.org.

[4] FEDERAL BUREAU OF INVESTIGATION, *supra* note 1.

[5] *Id.*

[6] FEDERAL BUREAU OF INVESTIGATION, FINANCIAL CRIMES REPORT TO THE PUBLIC D1 (May 2005), http://www.fbi.gov/ publications/financial/fcs_report052005/fcs_report052005.pdf.

insurance that confirm the stated owner's title and right to transfer the property can be altered to change the financial institution lender or omit prior liens. Often, the borrower assumes the identity of another person (straw buyer). The following scenarios are forms of fraud for profit:

- Rapid buildup of a real estate portfolio with an inflated value to perpetrate a land flip scheme. In these scenarios, the appraised value and sales price is inflated for each transaction and the mortgage loan advances increase with each purchase until the amount of the mortgage greatly exceeds the actual value of the property. The goal of this scheme is to extract as much cash as possible from the property.
- The identity of the borrower is concealed through the use of a straw buyer who allows the borrower to use the straw buyer's name and credit history to apply for a loan. This scheme is accomplished by convincing a person to apply for credit in his own name and immediately remitting the loan proceeds to the third party who may be unable to or may never intend to make payments. Subsequently, a default occurs. The straw borrower may or may not be paid a fee for his or her involvement or know the full extent of the scheme.
- Acquisition of residential property by preying on financially distressed homeowners who are desperate to sell due to a delinquent loan or past due taxes. The perpetrator misleads the homeowners into believing that they can save their homes in exchange for a transfer of the deed and payment of up-front fees by the homeowner. The perpetrator profits by re-mortgaging the property or pocketing the fees paid by the homeowner.
- Misrepresentation of personal identity, i.e., use of illegally acquired personal financial information to illegally obtain a loan or to sell or take cash out of equity on a property with no intention of repaying the debt.
- Acquisition of property through a phantom sale occurs when a perpetrator identifies an abandoned property and records a fictitious quit claim deed to transfer the property into his or her name, applies for and receives the proceeds of a loan, then absconds with the proceeds.

Residential Mortgage Fraud in Florida

In recent years, the investigations, arrests, and prosecutions of mortgage cases have increased dramatically. According to the Miami-Dade Police, the number of reported mortgage and real estate fraud cases increased from 16 in 2005, to 78 in 2006, and 1,000 in 2007. The FBI reported 1,191 cases of real estate and mortgage fraud in Miami, making it the fourth highest location for fraud for the quarter ending September 30, 2006. Los Angeles was ranked first with 2,293 reported cases.

The following is a summary of a recent case in Florida. According to the Florida Department of Law Enforcement (FDLE), 24 straw buyers were recruited from Miami and Naples to purchase houses in the Ocala area. Most of the straw buyers did not speak, read, or write English or had very limited English vocabulary. They were recruited by a third party who purportedly told them that no down payment was required and that they would not have to occupy the house because the builder would rent the house for them and make the mortgage payments for several years. Then, the buyer could move into the house or sell it for a profit and increase their credit ratings for future purchases. The straw buyers were told that the developer/seller of the properties would pay the first month's mortgage and then use subsequent monies received from the buyers to pay its bank loans, free its credit line, and qualify for purchases of lots in a new project. Ultimately, the straw buyers were left with bank mortgages after the builder received its money. Many of the buyers had to file for bankruptcy and suffered severe damage to their credit.

In February 2006, the Office of the Statewide Prosecution in the Department of Legal Affairs and the FDLE arrested several persons for allegedly conducting this mortgage fraud. The mortgage broker completed the loan applications, which included false credit information of the borrowers. A title company approved the transactions with knowledge of false information being filed. These activities resulted in fraud against mortgage lenders in an amount exceeding mortgage lenders in an amount exceeding $3.7 million. Six persons were charged under ch. 895, F.S., with participation in an enterprise through a pattern of racketeering activity in violation of the Racketeer Influenced and Corrupt Organization (RICO) Act and conspiracy to commit RICO violations, both first-degree felonies.

Regulation of Mortgage Brokerage and Lender Transactions

The Office of Financial Regulation (OFR) is responsible for all activities of the Financial Services Commission relating to the regulation of financial institutions, mortgage brokers and lenders, finance companies, securities industries, and money transmitters.[7] Mortgage brokers, lenders, and transactions are regulated by the OFR pursuant to ch. 494, F.S., the Mortgage Brokerage and Lending Act.

Section 494.0025(4), F.S., addresses mortgage fraud. It provides that it is unlawful for a person to: (1) knowingly or willingly employ any device, scheme, or artifice to defraud; (2) engage in any transaction or practice that operates as a fraud in connection with the purchase or sale of a mortgage loan; or (3) obtain property by fraud, willful misrepresentation of a future act, or false promise. Section 494.0025(5), F.S., provides that it is unlawful for a person to knowingly and willfully falsify, conceal, or cover up a material fact by a trick, scheme or device, or to either make a false or fraudulent statement or representation, or make or use any false writing or document, knowing of the false or fraudulent statement or entry. These offenses are third-degree felonies, elevated to a first-degree felony if the value of the land and property exceeds $50,000 and there were five or more victims.[8]

Section 655.0322(5) and (6), F.S., provides criminal penalties for fraudulent transactions involving land or property for the purpose of obtaining a loan. Willfully making a false statement or overvaluing any land, property, or security for the purpose of influencing the action of a financial institution or other entity authorized to extend credit is a second-degree felony. Knowingly executing or attempting to execute a scheme to defraud a financial institution or other entity authorized to extend credit by means of false or fraudulent pretenses, representations, or promises is also a second-degree felony.

The Bureau of Financial Investigations in the Office of Financial Regulation routinely investigates cases involving alleged fraud in mortgage transactions. These investigations involve various forms of fraud. In general, however, the OFR's investigations focus on persons licensed or subject to licensure by the OFR. If the OFR has reason to believe that any state criminal law

[7] Section 20.121(3), F.S.
[8] Section 494.0018, F.S.

has been violated, it will refer the case to the appropriate law enforcement or prosecutorial agency, and provide investigative assistance to that agency pursuant to s. 20.121(3)(a)2, F.S.

Prosecution of Residential Mortgage Fraud in Florida

According to prosecutors in South Florida, various criminal provisions are used to prosecute residential mortgage fraud, including ss. 494.0018 (discussed above), 812.014 (theft), 817.03 (making false statement to obtain property or credit), 817.034(4)(a) (organized fraud), 817.54 (obtaining of mortgage, etc., by false representation), and ch. 895 (RICO), F.S.

Section 812.014, F.S., provides that:

> (1) A person commits theft if he or she knowingly obtains or uses, or endeavors to obtain or to use, the property of another with intent to, either temporarily or permanently:
> (a) Deprive the other person of a right to the property or a benefit from the property.
> (b) Appropriate the property to his or her own use or to the use of any person not entitled to the use of the property.

The punishment for theft can depend upon various factors, including the value of the stolen property. It is grand theft in the first degree, punishable as a first-degree felony, to steal property valued at $100,000 or more.

Under s. 817.03, F.S., it is a first-degree misdemeanor for a person to make or cause the making of a written false statement relating to his or her financial condition, assets, or liabilities with a fraudulent intent of obtaining credit, goods, property, or money. Venue for prosecution may be in the county where the statement was written.[9]

Section 817.034(4)(a), F.S., provides that a person who obtains property by engaging in a scheme to defraud is guilty of organized fraud and is subject to penalties based on the aggregate value of the property obtained. It is a first-degree felony if the value of the property is $50,000 or more, a second-degree felony if the value is from $20,000 up to $50,000, and a third-degree felony if the value is less than $20,000.

Section 817.54, F.S., addresses criminal penalties for obtaining a mortgage, promissory note, or other instrument by false or fraudulent representation. It is a third-degree felony to: (1) obtain a mortgage or other instrument evidencing a debt from any person with intent to defraud; (2) obtain the signature of any person to a mortgage or other instrument evidencing a debt by fraudulent or false representations or pretenses; or (3) obtain the signature of another person evidencing debt in circumstances that would be chargeable as forgery.

Under the RICO Act, ch. 895, F.S., "racketeering activity" means to commit, attempt to commit, conspire to commit, or solicit, coerce, or intimidate another person to commit any of a number of crimes that are delineated in s. 895.02, F.S. This list includes offenses under chs. 812 (theft,

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[9] Section 817.031, F.S.

robbery, and related crimes) and 817 (fraudulent practices), F.S. Section 895.03, F.S., provides that it is unlawful for any person who has criminal intent to receive any proceeds derived from a pattern of racketeering activity. Engaging in racketeering activity is a first-degree felony.[10]

According to the Miami-Dade Police Department, it is not appropriate to charge use of a false quit claim deed to obtain property as theft under s. 812.014, F.S., because the house remains intact on the property even though the equity has been taken and mortgaged. With regard to the fraud or falsification of information during the application process, s. 817.54, F.S., applies only to the person who obtains the loan and does not cover other parties involved in the lending process, such as a notary public who notarizes a false quit claim deed or an appraiser who artificially inflates the property value.

2007 Legislation

In 2007, the Legislature created the offense of mortgage fraud in s. 817.545, F.S., if a person, with the intent to defraud, knowingly:

- Makes any material misstatement, misrepresentation, or omission during the mortgage lending process with the intent that such information would be relied upon by a party to the mortgage lending process;
- Uses or facilitates the use of any material misstatement, misrepresentation, or omission, with the intention that the misstatement, misrepresentation, or omission will be relied on by a party to the mortgage lending process;
- Receives any proceeds or other funds in connection with a mortgage lending process that the person knew resulted from such a misstatement, misrepresentation, or omission; or
- Files with the clerk of the court for any county in Florida a document related to a mortgage lending process which contains a material misstatement, misrepresentation, or omission.

Under s. 817.545, F.S., the offense of mortgage fraud may not be predicated solely upon information lawfully disclosed under federal laws, regulations, or interpretations related to the mortgage lending process. Any person who violates s. 817.545, F.S., commits an unranked third-degree felony, punishable by imprisonment for no more than five years, a fine of no more than $5,000, and any applicable enhanced penalties as a habitual felony offender. Also, the proceeds of fraudulent mortgage activities may be subject to civil forfeiture under ch. 895, F.S., because mortgage fraud is a criminal violation of ch. 817, F.S., which is also a racketeering activity under ch. 895, F.S.

III. Effect of Proposed Changes:

Section 193.133, F.S., is created to require law enforcement agencies to promptly notify the property appraiser when the agency finds probable cause that mortgage fraud or other fraud has inflated or could artificially inflate the value of real property. The law enforcement agency must inform the property appraiser of the nature of the fraud and the real property that is affected. However, the notification may be delayed if it would jeopardize or negatively affect a continuing

[10] Section 895.04, F.S.

investigation. The property appraiser may adjust the assessment of any affected real property. Based upon a conviction of mortgage fraud or other fraud affecting the value of real property, the property appraiser shall, if necessary, reassess the properties affected by the fraud.

Section 817.545, F.S., is amended to increase the penalty for mortgage fraud involving a loan value, as stated on documents used in the lending process, that is greater than $100,000 from a third-degree felony to a second-degree felony. (Such violation of s. 817.545, F.S., would constitute an unranked second-degree felony punishable by imprisonment for no more than 15 years, a fine of no more than $10,000, and any applicable enhanced penalties as a habitual felony offender.)

The bill takes effect July 1, 2008.

IV. Constitutional Issues:

A. Municipality/County Mandates Restrictions:

None.

B. Public Records/Open Meetings Issues:

None.

C. Trust Funds Restrictions:

None.

V. Fiscal Impact Statement:

A. Tax/Fee Issues:

None.

B. Private Sector Impact:

A reduction in fraudulent mortgage loans, as a result of the increased penalty in this bill, could reduce the number of mortgage loan defaults.

C. Government Sector Impact:

The Criminal Justice Impact Conference discussed this bill on March 14, 2008. Since the bill would change mortgage fraud (if the value of the loan is greater than $100,000) from an unranked third degree felony to an unranked second degree felony, the incarceration rates for these felonies were reviewed. For third degree felonies, there is an incarceration rate of 10.3 percent and for second felonies the rate is 25.3 percent.

The information from the Criminal Code Database in FY 06-07 was also checked and revealed that there were no offenders sentenced for the s. 817.545, F.S., third degree felony. This information and the low incarceration rates for unranked second and third degree felonies led to a recommendation that the bill's effect on the prison population would be insignificant.

VI. Technical Deficiencies:

None.

VII. Related Issues:

None.

VIII. Additional Information:

A. Committee Substitute – Statement of Substantial Changes:

(Summarizing differences between the Committee Substitute and the prior version of the bill.)

CS by Community Affairs on March 6, 2008:
The committee substitute revises the language requiring law enforcement agencies to notify the property appraiser of mortgage fraud so that the notification is made promptly after a finding of probable cause. Notification may be delayed if it would jeopardize or negatively affect the investigation. The property appraiser may reassess the affected real property based on the notification, but is required to reassess, if necessary, the affected real property after a conviction of mortgage fraud or other fraud that could inflate the property value.

The committee substitute deletes a requirement for the property appraiser to reassess property affected by mortgage fraud retroactive to the date when the fraud began. It also deletes language prescribing a form for and limiting the use of quitclaim deeds. The committee substitute removes the increased criminal penalty for mortgage fraud involving two or more parcels. Finally, it deletes language that would have created a Statewide Mortgage Fraud Council.

B. Amendments:

None.

This Senate Bill Analysis does not reflect the intent or official position of the bill's introducer or the Florida Senate.