

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 Finance and Tax Committee

BILL: SB 1940

INTRODUCER: Senator Fasano

SUBJECT: Mortgage Guaranty Trust Fund

DATE: April 15, 2009

REVISED: _____

	ANALYST	STAFF DIRECTOR	REFERENCE	ACTION
1.	<u>Knudson</u>	<u>Burgess</u>	<u>BI</u>	Favorable
2.	<u>Fournier</u>	<u>McKee</u>	<u>FT</u>	Favorable
3.	_____	_____	<u>GA</u>	_____
4.	_____	_____	<u>WPSC</u>	_____
5.	_____	_____	_____	_____
6.	_____	_____	_____	_____

I. Summary:

Senate Bill 1940 creates the Mortgage Guaranty Trust Fund within the Office of Financial Regulation (OFR). Funds credited to the trust fund must be used to pay claims against loan originators, mortgage brokers, and mortgage lenders pursuant to s. 494.00172, F.S. The trust fund’s assets consist of an annual fee imposed on Florida-licensed loan originators, mortgage brokers, and mortgage lenders. Any balance in the trust fund at the end of fiscal year shall remain in the trust fund and be available for the payment of claims. The trust fund shall be terminated on July 1, 2013 pursuant to s. 19(f)(2), Article III of the Florida Constitution. Prior to its termination, the trust fund must be reviewed pursuant to s. 215.3206(1) and (2), F.S. The OFR is the administrator of the trust fund. This bill is effective upon the passage of SB 2226, or the adoption of similar legislation in this legislative session or any subsequent special sessions.

This bill has no fiscal impact.

This bill creates an unspecified section of the Florida Statutes.

II. Present Situation:

Florida’s Mortgage Broker and Mortgage Lender Licensing Requirements

In Florida, the Office of Financial Regulation (OFR) is responsible for regulating mortgage brokers and mortgage lenders, and other specified financial entities.¹ Generally, mortgage brokers and mortgage lenders must comply with federal as well as state laws regulating the

¹ The OFR is organized under the Financial Services Commission. The commission is composed of the Governor and Cabinet. [Section 20.121(3), F.S.]

industry unless they are exempt from such laws. State and federally chartered depository institutions and other entities are exempt from state licensure as a mortgage broker and as a mortgage lender under ch. 494, F.S. Florida requires licensure of individual mortgage brokers, mortgage broker businesses, mortgage broker schools, and non-depository mortgage lenders. Loan originators employed by licensed lenders are exempt from individual licensure requirements.

Florida licenses three types of mortgage lender businesses: mortgage lender, correspondent mortgage lender, and savings clause mortgage lender. A mortgage lender business closes a mortgage loan in its name or advance funds to an applicant for a mortgage and may also service mortgage loans for another without limitation and sell the loan to a non-institutional lender. A correspondent mortgage lender may perform the same function; however, it may only service a loan for a maximum of four months after closing. The remaining license type, a savings clause mortgage lender, was created in 1991 because of changes in ch. 494, F.S., which required a mortgage lender to apply for the new correspondent mortgage lender or mortgage lender license and provide a surety bond of \$25,000. The mortgage lender license also requires a net worth of \$250,000. Existing mortgage broker businesses that were acting as a lender were allowed to be “grandfathered” under the old licensure requirements and were exempt from the surety bond requirement, yet subject to a \$25,000 net worth requirement.

Chapter 494, F.S., provides general guidance regarding grounds for denial of licensure if the applicant has committed any violation specified in ss. 494.001-494.008, F.S., or has pending against him or her in any jurisdiction any criminal prosecution or administrative enforcement action that involves fraud, dishonest dealing, or any other act of moral turpitude. Ch. 494, F.S., authorizes, but does not require, the OFR to deny a license if the applicant has had his or her license revoked by a licensing agency in any state for the following acts: fraud, dishonest dealing, or any other act of moral turpitude. The law authorizes, but does not require, the OFR to deny a license if the applicant has committed any violation specified in ss. 494.001-494.0077, F.S. (includes fraud, dishonest dealing, embezzlement, misrepresentation, an act of moral turpitude). The OFR may place an applicant or licensee on probation for such violations. As an alternative, the OFR may impose revocation or suspension of a license for such violations.²

Last year, the Governor and Cabinet raised concerns related to the licensure of mortgage brokers and mortgage lenders who had certain criminal convictions. In response, the Chief Inspector General of the Executive Office of the Governor conducted an examination of the OFR in August 2008 to determine if the regulation of the mortgage industry adequately protects the state particularly in the area of licensing. The results of the examination included several findings, including a finding that the OFR had not sent fingerprint cards to the FDLE for federal criminal screening, as required by law, until March 24, 2008. The OFR issued licenses without the required federal criminal background checks from October 2006 to March 2008.³

To address concerns regarding the adequacy of the OFR’s licensure of mortgage brokers and mortgage lenders, the Financial Services Commission adopted emergency rules in August 2008.

² Sections 494.0033(4), 494.0041(2)(q), and 494.0041(2) (t), F.S.

³ Chief Inspector General’s Office, Executive Office of the Governor, September 15, 2008.

The rules address the processing of ch. 494, F.S., license applications for persons found guilty of, or who have pled guilty or nolo contendere to, certain crimes, such as a felony involving fraud, dishonesty, breach of trust, or money laundering. The comprehensive rules, adopted August 12, 2008, provide that such license applicants are not eligible for licensure. Until the adoption of the emergency rules, the OFR did not have written guidelines to ensure consistency in the determination of disqualifying criminal offenses, such as moral turpitude. These rules are more comprehensive and restrictive than the S.A.F.E. requirements.

The Secure and Fair Enforcement for Mortgage Licensing Act of 2008

In response to the recent turmoil in the housing market and reports of abusive lending practices in Florida as well other states, the federal Housing and Economic Recovery Act was enacted on July 30, 2008.⁴ Title V of this act is entitled, “The Secure and Fair Enforcement for Mortgage Licensing Act of 2008” (“S.A.F.E.”). The intent of S.A.F.E. is to provide greater accountability and regulation of individual loan originators (mortgage brokers and mortgage lenders) and enhance consumer protections by establishing minimum licensure and registration requirements for loan originators and a national database for consumers to inquire about the credentials and disciplinary history of their brokers and lenders.

Senate Bill 2226, which is the companion legislation to this bill, implements the minimum standards of S.A.F.E. and provides increased licensure and enforcement authority for the Office of Financial Regulation (OFR) to regulate loan originators, mortgage broker businesses, and non-depository, mortgage lender businesses. The bill provides the following significant changes in the licensure and regulation of mortgage brokers and mortgage lenders:

- Requires state licensure and annual renewal of an individual who is an employee of, or contracts with a mortgage broker business or non-depository, mortgage lender business. Currently, the OFR renews all licensees biennially and employees of non-depository lenders are not subject to licensure.
- Requires applicants to provide fingerprints to the OFR for submission to the Federal Bureau of Investigation and any governmental entity authorized for a state and national criminal history background check on an annual basis. Under current law, the OFR conducts background checks at the time of application.
- Requires the OFR to obtain a credit report of the applicant from a consumer-reporting agency. Currently, the OFR does not have the authority to request or use credit reports.
- Prohibits the licensure of an individual as a loan originator who has had his or her loan originator license revoked. Under the current law, the OFR has the discretion to use a prior revocation as grounds for denial.
- Prohibits the licensure of a loan originator who has a felony conviction during the 7-year period preceding the date of the application (or at any time preceding such date of application, if such felony involved an act of fraud, dishonesty, or a breach of trust or money laundering). Florida has adopted emergency rules, which provide more restrictive eligibility requirements than S.A.F.E. These rules require rather than authorize the OFR to deny a license if an applicant has had a criminal conviction. Senate Bill 2226 codifies these rules.

⁴ H.R. 3221, Public Law 110-289.

- Requires an applicant to meet pre-licensing educational and testing requirements and annual continuing education requirements. The registry, rather than the OFR, is responsible for approving providers of education and testing services.
- Requires a loan originator to meet either a net worth or surety bond requirement, or pay into a state guaranty fund. Currently, Florida mortgage broker businesses are not subject to any net worth, surety bond, or guaranty fund requirement. However, non-depository mortgage lenders are subject to net worth and surety bond requirements. The bill creates a guaranty fund.
- Provides that a loan originator must continue to meet minimum standards of S.A.F.E. (which includes the requirements summarized above) after the issuance of the initial license.
- Requires loan originator to register through the National Mortgage Licensing System and Registry (“registry”) for state licensure and renewal of the license. Currently, applicants for licensure and renewal submit applications and fees to the OFR.

The bill creates licensure and annual renewal fees for loan originators, mortgage brokers, and mortgage lenders; requires applicants to submit a one-time fee for costs associated with implementing the national registry; and requires applicants and licensees to submit an annual fee for funding the mortgage guaranty trust fund until the fund balance reaches \$5 million. Thereafter, licensees and applicants would be subject to an assessment when the fund balance drops below \$1 million. As a condition of using the licensure and renewal functions of the registry, an applicant must pay processing fees to the registry.

Compensation for Consumers

Currently, states use a surety bond, net worth requirements, or a guaranty fund (or combination thereof) to establish financial responsibility for licensees and provide some level of compensation for consumers defrauded by mortgage brokers and mortgage lenders. Senate professional staff conducted a limited review of the bonding, net worth, or guaranty fund requirements in other states and noted that the majority of the states have net worth and bonding requirements. A few states, such as California, Oklahoma, Texas, and Utah have a guaranty fund. Based on preliminary research, most states require a surety bond or fidelity bond for mortgage brokers, ranging in an amount from \$10,000 to \$500,000. S.A.F.E. requires loan originators, which include mortgage brokers and lenders, to meet minimum net worth, surety bond, or applicable guaranty fund requirements.

Currently, Florida law requires licensed mortgage lenders to maintain a \$250,000 net worth and a \$10,000 surety bond. However, there is no net worth or surety bond requirement for an individual mortgage broker or mortgage broker business.

Prior to 1992, Florida had a guaranty fund that compensated consumers who had suffered monetary losses as a result of any violation of ch. 494, F.S., committed by a licensed entity, as adjudged by a court of competent jurisdiction in Florida. The law limited the total recovery for all persons defrauded by one licensee to \$100,000 and to \$20,000 per claimant. Revenues derived from mortgage broker and lender license and renewal fees funded the payment of claims.

As part of a sunset review of ch. 494, F.S., the Comptroller's Mortgage Brokerage and Mortgage Lending Sunset Review Task Force reviewed the guaranty fund.⁵ The Task Force Report noted that recovery from the prior guaranty fund took at least 2 years after the judgment, with 3 to 4 years as the average recovery time. In almost all cases, a claimant retained an attorney and incurred that expense. Concerning the compensation limits of the guaranty fund, the Task Force Report noted that a guaranty fund "...may provide an illusory protection" since many mortgage schemes involve millions of dollars. Payouts from this fund reached almost \$4 million during the period of 1978-1993. The funding mechanism did not adequately or timely fund all approved claims, which resulted in delays in compensating victims. In 1991, the Legislature abolished the fund.

State Trust Funds

Pursuant to section 19(f), Article III of the Florida Constitution a trust fund of the State of Florida or other public body may only be created or re-created by law in a separate bill. The bill creating or re-creating the trust fund must pass with a three-fifths vote of the membership of each house of the legislature. A state trust fund generally terminates not more than four years after the effective date of the act authorizing the initial creation of the trust fund.

III. Effect of Proposed Changes:

Section 1. Creates the Mortgage Guaranty Trust Fund within the Office of Financial Regulation. Funds credited to the trust fund must be used to pay claims against loan originators, mortgage brokers, and mortgage lenders pursuant to s. 494.00172, F.S. The trust fund's assets consist of an annual fee imposed on Florida-licensed loan originators, mortgage brokers, and mortgage lenders. Any balance in the trust fund at the end of fiscal year shall remain in the trust fund and be available for the payment of claims, notwithstanding the provisions of s. 216.301, F.S., and s. 216.351, F.S. The trust fund shall be terminated on July 1, 2013 pursuant to s. 19(f)(2), Article III of the Florida Constitution. Prior to its termination, the trust fund must be reviewed pursuant to s. 215.3206(1) and (2), F.S. The OFR is charged with administering the trust fund.

The Office of Financial Regulation intends for the coverage limits of the fund to be \$50,000 per borrower with a maximum recovery of \$250,000 per licensee. The OFR will require firms and individuals to pay a fee each year until the balance in the new fund reaches \$5 million. The fee will be \$20 for individuals and \$100 for businesses. The fees will be discontinued until the balance falls below \$1 million, at which time the fee will be resumed. Anticipated cost to the industry would be \$20 per year for licensed individuals and \$100 per year for businesses.

Section 2. The act takes effect on the same date as Senate Bill 2226 or similar legislation takes effect, if such legislation is adopted in the same legislative session or an extension thereof and becomes law.

⁵ Department of Banking and Finance, December 1990. This task force was required pursuant to ch. 90-353, L.O.F. The law directed the Comptroller to create a task force to review ch. 494, F.S. and make recommendations to the Legislature.

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:

The OFR indicates that borrowers will be able to recover up to \$50,000 from the guaranty fund. Licensed mortgage originators will be required to pay a yearly fee of \$20 for individuals and \$100 for businesses.

C. Government Sector Impact:

The Office of Financial Regulation provided the following estimated revenue the guaranty fund is likely to collect:

	(FY 09-10)	(FY 10-11)	(FY 11-12)
Recurring – Mortgage Guaranty Fund			
Individuals: \$20 x 49,000 persons	\$ 980,000	\$ 750,600	
Firms: \$100 x 7,000 firms	\$ 700,000	\$ 579,000	
Total Revenue – Mortgage Guaranty Fund	\$ 1,680,000	\$ 1,329,600	

Fees will be paid until the balance reaches \$5 million, and will cease until the fund falls below \$1 million. When the fund falls below \$1 million, the fees will resume.

The Office of Financial Regulation anticipates that the costs of administering the fund will be negligible.

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.)

None.

B. **Amendments:**

None.

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