

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/CS/SB 2226

INTRODUCER: Judiciary Committee, Banking and Insurance Committee, Banking and Insurance Committee, and Senator Fasano

SUBJECT: Mortgage Brokering and Lending

DATE: April 17, 2009

REVISED: _____

	ANALYST	STAFF DIRECTOR	REFERENCE	ACTION
1.	Johnson	Burgess	BI	Fav/CS
2.	Sumner	Maclure	JU	Fav/CS
3.			FT	
4.			GA	
5.				
6.				

Please see Section VIII. for Additional Information:

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

I. Summary:

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, 2008.¹ Title V of this act is titled “The Secure and Fair Enforcement for Mortgage Licensing Act of 2008” (“S.A.F.E.”).² 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 brokers and lenders.

The 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

¹ Public L. 110-289 (codified as amended in scattered sections of 12 U.S.C.A.)

² 12 U.S.C.A. ss. 5101-5116.

the following significant changes in the licensure and regulation of loan originators, mortgage brokers and mortgage lenders:

- Greater accountability and regulation of loan originators and enhances consumer protections.
- Regulatory requirements for individuals that work for mortgage brokers or mortgage lenders.
- A state licensure system meeting federal minimum standards by August 1, 2009, which can be extended through 2010 if HUD determines a state is proceeding in good faith.
- A regulatory system for all mortgage loan originators in that state if HUD determines a state is not in compliance.
- States participation in a national licensing registry.
- Consumers access to a national registry that will contain employment history, as well as disciplinary and enforcement actions against loan originators.

S.A.F.E. requires more stringent licensure and renewal requirements than current Florida law. These include requiring:

- State licensure and annual rather than biennial renewal of individual loan originators, including employees of mortgage broker and mortgage lender businesses;
- Submission of fingerprints to OFR and the Registry for state and federal background checks;
- Submission of an independent annual credit report to be reviewed by OFR. The applicant is provided an opportunity to provide further information to mitigate adverse items contained in the credit report;
- The restructuring of fees; and
- A guaranty or recovery fund paid into by the loan originators.

The bill also provides for a transition from the current licensure system and categories of licensees to a system meeting minimum federal requirements.

This bill substantially amends the following sections of the Florida Statutes: 494.001, 494.0011, 494.0014, 494.0165, 494.0018, 494.0019, 494.002, 494.0023, 494.0025, 494.0028, 494.0295, 494.003, 494.00331, 494.0035, 494.0036, 494.0038, 494.0039, 494.004, 494.0042, 494.00421, 494.0043, 494.0063, 494.0066, 494.0067, 494.0068, 494.0069, 494.007, 494.0071, 494.0072, 494.00721, 494.0073, 494.0075, 494.0077, and 501.1377.

This bill creates the following sections of the Florida Statutes: 494.00115, 494.00121, 494.00135, 494.00172, 494.255, 494.00296, 494.00312, 494.313, 494.00321, 494.00322, 494.00323, 494.00324, 494.00385, 494.00611, 494.00612, and 494.00665.

This bill repeals the following sections of the Florida Statutes: 494.0017, 494.0029, 494.00295, 494.0031, 494.0032, 494.0033, 494.0034, 494.0041, 494.006, 494.0061, 494.0062, 494.0064, 494.0065, and 494.0072.

II. Present Situation:

In Florida, the Office of Financial Regulation (OFR) is responsible for regulating mortgage brokers and mortgage lenders, and other specified financial entities.³ Generally, mortgage brokers and mortgage lenders must comply with federal and state laws regulating the 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 lender businesses.⁴ Loan originators employed by licensed lenders are exempt from individual licensure requirements.⁵

Florida licenses three types of mortgage lender businesses: mortgage lenders,⁶ correspondent mortgage lenders,⁷ and savings clause mortgage lenders.⁸ A mortgage lender business closes a mortgage loan in its name or advances 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 functions; 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. However, the 1991 law required a mortgage lender to have 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 lower net worth requirement of \$25,000.

The S.A.F.E. act, in contrast, establishes regulatory requirements for individuals, rather than businesses, licensed or registered as mortgage brokers and lenders, collectively known as loan originators. The federal act generally defines the term “loan originator” to mean an individual who takes loan applications and offers or negotiates terms of a loan for compensation. These activities would include advising on loan terms, preparing loan packages, and collecting information on behalf of a consumer. The S.A.F.E. act makes a distinction for the purpose of regulating loan originators based on whether or not they are employees of a depository institution or its subsidiaries. Loan originators who are not employees of a depository institution or its subsidiaries, that is, mortgage brokers or non-depository mortgage lenders, are subject to the minimum state licensure requirements of S.A.F.E. and registration with the national registry as a “state-licensed loan originator.” A loan originator who is an employee of a depository institution or its subsidiary, that is, a loan officer or lender, is subject to certain S.A.F.E. provisions and registration requirements by the primary federal regulator as a “registered loan originator.”

The S.A.F.E. act also requires states to participate in a national licensing registry, the National Mortgage Licensing System and Registry (“registry”). The registry, which will also be accessible

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

⁴ See Parts II and III of ch. 494, F.S.

⁵ Sections 494.003 and 494.006, F.S.

⁶ Section 494.0061, F.S.

⁷ Section 494.0062, F.S.

⁸ Section 494.0065, F.S.

to consumers, will provide employment history and disciplinary and enforcement actions against loan originators.

Florida's Licensing Requirements

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.⁹

Chapter 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.¹⁰

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 2008.¹¹

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. 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 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.

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

⁹ Section 494.0041, F.S.

¹⁰ Sections 494.0033(4), 494.0041(2)(q), and 494.0041(2)(t), F.S.

¹¹ Chief Inspector General's Office, Executive Office of the Governor, September 15, 2008.

requirements in other states and noted that the majority of the states have net worth and bonding requirements. The S.A.F.E. act requires loan originators, which include mortgage brokers and lenders, to meet minimum net worth, surety bond, or applicable guaranty fund requirements.

Generally, 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 were intended to fund 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.¹² 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.

Foreclosure Rescue Consultants

In 2008, the Florida Legislature enacted additional protections for homeowners facing foreclosure and seeking the services of foreclosure rescue consultants or equity purchasers.¹³ A foreclosure-rescue consultant solicits, represents, or offers to a homeowner to provide or perform, in return for payment of money or other valuable consideration, foreclosure related rescue services.¹⁴ These services may include modification of an existing mortgage loan, which falls within the scope of services provided by a loan originator under S.A.F.E. A foreclosure rescue consultant is prohibited from soliciting, charging, or receiving fees for such services until all services contained in a signed, written agreement have been completely performed.

III. Effect of Proposed Changes:

Licensure

The S.A.F.E. act requires state licensure and annual renewal of individual loan originators (mortgage brokers and mortgage lenders). Currently, Florida requires licensure of individual

¹² 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.

¹³ Chapter 2008-79.

¹⁴ Section 501.1377, F.S.

mortgage brokers, mortgage broker businesses, mortgage broker schools, and mortgage lender (non-depository) businesses. Florida will continue to license mortgage broker and mortgage lender businesses. However, individuals who solicit mortgage loans, offer or accept an application, or negotiate the terms of a new or existing mortgage loan would be subject to licensure as a loan originator. The correspondent mortgage lender license and savings clause lender license would be eliminated and replaced with the mortgage lender license. All mortgage lenders who service a loan for less than 4 months would be required to maintain a net worth of \$63,000. Mortgage lenders servicing a loan for greater than 4 months would be subject to the current \$250,000 net worth.

A comparison of the current Florida statutory requirements of an applicant for a mortgage broker license and a license under the requirements of S.A.F.E. indicates the following key changes, which the bill addresses. An applicant or licensee must meet the following requirements:

- Have no felony convictions 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). Currently, 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 in any state for the following acts: fraud, dishonest dealing, or any other act of moral turpitude.¹⁵
- Have never had a license as a loan originator revoked. Currently, the law authorizes, but does not require, the OFR to use a revocation as grounds for denial for licensure or renewal of a license.
- Submit fingerprints to the FBI and any governmental entity authorized for a state and national criminal history background check annually. Presently, a person submits fingerprints at the time of the initial application rather than annually.¹⁶
- Authorize the OFR to obtain access to and use a credit report of an applicant or licensee as part of the initial licensure and renewal process.
- Complete a 20-hour pre-licensing course and a pre-licensing examination provided by an entity approved by the registry. The bill also requires a licensee to obtain 14 hours of continuing education per year. Presently, an applicant is required to complete a 24-hour pre-licensing course, pass a written test prior to licensure, and obtain 14 hours of continuing education every 2 years.¹⁷

Since the scope of the OFR's jurisdiction within ch. 494, F.S., will include the regulation of loan modification transactions, the provisions relating to foreclosure rescue consultants currently codified in s. 501.1377, F.S., are transferred to ch. 494, F.S., to provide the OFR with the authority to enforce.

Enforcement Authority

The bill authorizes the OFR to impose an administrative fine of \$1,000 per day, or \$25,000 cumulatively, on unlicensed persons acting as a loan originator, mortgage broker business, or mortgage lender business. Currently, ch. 494, F.S., does not have such an administrative fine.

¹⁵ Sections 494.0033(4) and 494.0041(2)(i), F.S.

¹⁶ Section 494.033(2)(d), F.S.

¹⁷ Sections 494.0033(2)(b) and 494.00295, F.S.

The bill also increases administrative fines the OFR may impose for each separate violation of any provision of ss. 494.001-494.0077, F.S., from \$5,000 to \$25,000. The S.A.F.E. act authorizes U.S. Department of Housing and Urban Development (HUD) to impose a \$25,000 fine per violation in states that HUD is the enforcer of S.A.F.E. This would occur in a state that does not implement the minimum standards of S.A.F.E.

Mortgage Guaranty Trust Fund

The bill authorizes a recovery fund for compensating persons who have suffered monetary damages because of a violation of ch. 494, F.S., by a licensed individual or business. The recovery fund would allow payments of up to \$50,000 per borrower with a maximum recovery of \$250,000 against a licensee. The trust fund is authorized to provide payment for actual or compensatory damages and attorney fees. However, the attorney fees are capped at 20 percent of the award or \$5,000, whichever is less. (See Private Sector Impact.)

Other Potential Implications:

The S.A.F.E. act provides that, if a state does not enact minimum regulatory standards that comply with S.A.F.E. within two years after the enactment of this act, the U.S. Department of Housing and Urban Development (HUD) will enforce the minimum standards for loan originators operating in Florida as state-licensed loan originators. The act authorizes the Secretary of HUD to extend this deadline for no more than 24 months in any state if the Secretary determines that the state is making a good faith effort to establish a state licensing law that meets the minimum requirements.

Recently, HUD issued an interpretative letter, which authorizes states to delay implementation of the licensure requirements until July 1, 2010, for individuals who do not possess a valid loan originator license. Considering the education, testing, and background check standards that an applicant must meet, HUD views this as a reasonable delay to ensure an orderly transition in the marketplace. For individuals who possess a license prior to the enactment of S.A.F.E., HUD views a reasonable delay for current licensees as a date that does not extend past December 31, 2010.

IV. Constitutional Issues:

A. Municipality/County Mandates Restrictions:

None.

B. Public Records/Open Meetings Issues:

The bill requires the OFR to determine licensure eligibility based on S.A.F.E.'s standards. The S.A.F.E. act requires state regulators to evaluate the financial responsibility of the applicant, which would include an analysis of his or her credit report.

Currently, ch. 494, F.S., does not provide an exemption from public records for credit reports. Senate Bill 2652 creates a public record exemption. Without a public records exemption, the release of such financial information could lead to the fraudulent use of such information, such as identity theft.

C. Trust Funds Restrictions:

The bill authorizes a Mortgage Guaranty Trust Fund for compensating persons who have suffered monetary damages because of a violation of ch. 494, F.S., by a licensed individual or business. A linked bill, Senate Bill 1940, establishes this trust fund.

V. Fiscal Impact Statement:

A. Tax/Fee Issues:

See Private Sector Impact, below.

B. Private Sector Impact:

Currently, all licenses of mortgage broker businesses, mortgage lenders, and branch offices are valid from the date of issuance until August 31 of each “even” year. An individual mortgage broker license is valid from the date of issuance until August 31 of every “odd” year, and a renewal license is valid until August 31 of the next “odd” year.

The bill eliminates the exemption for non-depository loan originators (individuals), effective January 1, 2010, and requires these loan originators to become licensed as a mortgage broker by that date. Currently licensed mortgage brokers (individuals) are required to renew their license by August 31, 2009, and their licenses will be valid until December 31, 2010, rather than a 2-year period. Currently licensed mortgage brokers (individuals) will be required to obtain licensure renewals through the registry, effective January 1, 2011.

Currently licensed mortgage broker and mortgage lender businesses and branches that are subject to renewal by August 31, 2010, will have their renewal deadline extended until December 31, 2010. Effective January 1, 2011, they will be subject to licensure through the registry.

The following table summarizes the current and proposed fee schedule for ch. 494, F.S. licensees:

Licensure/Permit Fee Category	Current State Fee New/Renewal Biannually	Proposed State Fee New/Renewal Annually
Mortgage Broker Individual--Loan Originators	\$195/150	\$195/150
Mortgage Broker Business	425/375	425/375
Mortgage Lender	575/475	500/475
Correspondent Lender	500/475	(all lenders)
Broker Business Branch Office	225/225	225/225
Lender Business Branch Office	325/325	(all branch offices)
Mortgage Broker Schools	900	900
Mortgage Broker Guaranty Fund (Annual assessment by the OFR until fund reaches \$5 million). The assessment is effective 10/1/10.		
Individual	None.	\$20
Business	None.	100

In addition to the fees imposed by the OFR, the national registry will assess the following processing fees:

- Initial set-up fee charged each time a company (\$100), branch (\$20), or loan officer (\$30) applies to a state through the registry for a license.
- Annual processing fee charged annually, typically at the time of renewal (company \$100, branch \$20, and loan officer \$30).
- Loan officer sponsorship transfer fee (\$30) charged each time the registry processes a company request to establish a relationship with a loan officer and sponsor that loan officer's existing license.

Also, an applicant will incur costs associated with the submission of the fingerprints and credit report.

The guaranty fund provides a mechanism whereby some persons defrauded by a ch. 494, F.S., licensee can be compensated. Funding for the guaranty fund is provided by an assessment on applicants and licensees. The recovery for a borrower is limited to \$50,000 per claim and an aggregate limit of \$250,000 against any licensee. Some consumer advocates have expressed concerns regarding the monetary limit of the guaranty fund and the lengthy processing time to recover the claim amount.

C. Government Sector Impact:

Staffing

The OFR has requested seven additional full-time-equivalent positions and three OPS positions for fiscal year 2009-2010 to implement licensure requirements of S.A.F.E.

Mortgage Guaranty Trust Fund

The OFR estimates that the guaranty fund fees will generate \$5 million in 3 years. However, given the current downturn in the financial services industry, the actual revenues could be considerably different.

The OFR has not requested any additional positions to administer the guaranty fund for fiscal year 2009-2010 due to the delayed effective of the fund. Borrowers will be eligible to seek recovery from the fund for acts that occurred on or after January 1, 2011. As a condition of seeking recovery from the fund, the borrower must have recorded a final judgment issued by a state court, wherein the cause of action against a licensee was based on a violation of ch. 494, F.S., and the actual or compensatory damages were the result of that violation.

VI. Technical Deficiencies:

None.

VII. Related Issues:

The Legislature may want to consider additional changes to strengthen and clarify the enforcement authority of the OFR by requiring the Financial Services Commission, on behalf of the OFR, to adopt by rule disciplinary guidelines concerning violations of ch. 494, F.S.

VIII. Additional Information:**A. Committee Substitute – Statement of Substantial Changes:**

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

CS/CS by Judiciary on April 15, 2009:

The committee substitute makes three substantive changes along with technical and conforming changes.

The first substantive change addresses the use of credit reports for licensure. The committee substitute:

- Revises the provisions relating to the evaluation of those credit reports by the regulator to determine an applicant's financial responsibility;
- Requires that the applicant be provided the opportunity to explain the items so that the information may be looked at in context;
- Provides that when the Office of Financial Regulation is evaluating adverse information contained in the applicant's credit report, this information must be based on the totality of the circumstances; and
- Clarifies that an applicant's lack of credit history may not be used for purposes of determining an applicant's financial responsibility.

The second substantive change addresses net worth requirements. The committee substitute provides that:

- Lenders that hold licenses under the savings clause will have their licenses expire on September 30, 2010. These “grandfathered” lenders currently are required to maintain a net worth of \$25,000, which was the requirement in 1991 when Chapter 494 was revised to reflect new license types and higher net worth requirements;
- Effective October 1, 2010, lenders will need to comply with current net worth requirements for non-grandfathered lenders, which is \$250,000;
- There will be a transition period to allow the grandfathered lenders to come into compliance with the new net worth requirements;
- Between October 1, 2010, and September 30, 2011, the minimum net worth will be \$63,000;
- For the following year, the minimum net worth will be increase to \$125,000 (October 1, 2011, through September 30, 2012); and
- After September 30, 2012, these lenders will be required to maintain a net worth of \$250,000.

The third substantive change addresses exemptions. The committee substitute exempts persons involved solely in the extension of credit relating to the purchase of a timeshare plan from licensure requirements. This change will conform to S.A.F.E.

CS by Banking and Insurance on March 25, 2009:

Authorizes the Office of Financial Regulation, which administers the Mortgage Guaranty Trust Fund, to provide payments for attorney fees in addition to actual or compensatory damages. The Trust Fund compensates persons that have suffered damages as a result of a violation of ch. 494, F.S., by a person licensed individual or business. (The Mortgage Guaranty Trust Fund is funded by assessments on loan originators and mortgage brokers and lenders.)

Provides that the attorney's fees may not exceed \$5,000 or 20 percent of the actual or compensatory damages, whichever is less. If actual or compensatory damages plus attorney's fees exceed \$50,000, which is the recovery cap per claimant, actual or compensatory damages must be paid first.

B. Amendments:

None.

IX. Related Issues:

None.