

HOUSE OF REPRESENTATIVES STAFF ANALYSIS

BILL #: CS/CS/HB 747 Mortgage Brokering
SPONSOR(S): Insurance & Banking Subcommittee; Stark
TIED BILLS: IDEN./SIM. **BILLS:** CS/SB 830

REFERENCE	ACTION	ANALYST	STAFF DIRECTOR or BUDGET/POLICY CHIEF
1) Insurance & Banking Subcommittee	11 Y, 1 N, As CS	Hinshelwood	Luczynski
2) Commerce Committee	24 Y, 0 N, As CS	Hinshelwood	Hamon

SUMMARY ANALYSIS

The Office of Financial Regulation (OFR) licenses and regulates various aspects of the non-depository financial services industries, including individuals and businesses engaged in the mortgage business pursuant to ch. 494, F.S. The OFR also oversees the Securities and Investor Protection Act, ch. 517, F.S., which regulates the offer and sale of securities in, to, or from Florida by firms, branch offices, and individuals affiliated with these firms.

In August 2016, the OFR issued a declaratory statement that determined the petitioner would be in violation of ch. 494, F.S., if it were to start compensating its financial advisors for certain mortgage loan originator activities that are purely incidental to the otherwise authorized securities and investment activities of petitioner and its financial advisors, unless such persons were dually licensed under ch. 494, F.S. The declaratory statement concluded that both the compensation and the referral aspect of the facts presented required that the petitioner be licensed as either a mortgage broker or mortgage lender and that its financial advisor be licensed as mortgage loan originators.

The bill exempts a securities dealer, investment advisor, or associated person registered under ch. 517, F.S., from regulation under ch. 494, F.S., if such person, in the normal course of conducting securities business with a corporate or individual client:

- 1) Solicits or offers to solicit a mortgage loan from a securities client or refers a securities client to a depository institution, certain regulated subsidiaries that are owned and controlled by a depository institution, institutions regulated by the Farm Credit Administration, a licensed mortgage broker, a licensed mortgage lender, or a registered loan originator; and
- 2) Does not accept or offer to accept an application for a mortgage loan, negotiate or offer to negotiate the terms or conditions of a new or existing mortgage loan on behalf of a borrower or lender, or negotiate or offer to negotiate the sale of an existing mortgage loan to a noninstitutional investor for compensation or gain.

Any solicitation or referral made pursuant to the exemption must be made in compliance with ch. 517, F.S.; the federal Real Estate Settlement Procedures Act; and any applicable federal law or general law of this state.

The bill has no impact on local governments. The bill has an indeterminate fiscal impact on the private sector and the state. The OFR believes that any loss of licensure revenues will be insignificant.

The bill provides an effective date of July 1, 2017.

FULL ANALYSIS

I. SUBSTANTIVE ANALYSIS

A. EFFECT OF PROPOSED CHANGES:

Background

State Regulation of Non-Depository Mortgage Business

The Office of Financial Regulation (OFR) regulates banks, credit unions, other financial institutions, finance companies, and the securities industry.¹ The OFR's Division of Consumer Finance licenses and regulates various aspects of the non-depository financial services industries, including individuals and businesses engaged in the mortgage business.

Under ch. 494, F.S., the OFR licenses and regulates the following individuals and businesses:

- *Loan originator*² – An individual who, directly or indirectly, solicits or offers to solicit a mortgage loan, accepts or offers to accept an application for a mortgage loan, negotiates or offers to negotiate the terms or conditions of a new or existing mortgage loan on behalf of a borrower or lender, or negotiates or offers to negotiate the sale of an existing mortgage loan to a noninstitutional investor for compensation or gain. The term includes an individual who is required to be licensed as a loan originator under the S.A.F.E. Mortgage Licensing Act of 2008. The term does not include an employee of a mortgage broker or mortgage lender whose duties are limited to physically handling a completed application form or transmitting a completed application form to a lender on behalf of a prospective borrower.
- *Mortgage broker*³ – A person conducting loan originator activities through one or more licensed loan originators employed by the mortgage broker or as independent contractors to the mortgage broker.
- *Mortgage lender*⁴ – A person making a mortgage loan or servicing a mortgage loan for others, or, for compensation or gain, directly or indirectly, selling or offering to sell a mortgage loan to a noninstitutional investor. A mortgage lender may act as a mortgage broker.⁵

Each ch. 494, F.S., licensee is subject to:

- Certain requirements for the maintenance of books and records relating to the licensee's compliance with the chapter, with regard to expenses paid by the licensee on behalf of the borrower, and relating to its advertisements.⁶
- The OFR's investigation and examination authority.⁷
- The OFR's enforcement authority such as injunctions, cease and desist orders, suspension or revocation of licensure, and administrative fines.⁸

In order to obtain licensure as a mortgage *loan originator*, an individual must:⁹

- Complete a 20-hour prelicensing class;¹⁰
- Pass a written test (cost: \$110);¹¹

¹ s. 20.121(3)(a)2., F.S.

² s. 494.001(17), F.S.

³ s. 494.001(22), F.S.

⁴ s. 494.001(23), F.S.

⁵ s. 494.0073, F.S.

⁶ ss. 494.0016 and 494.00165(2), F.S.

⁷ s. 494.0012, F.S.

⁸ ss. 494.0013, 494.0014, and 494.00255, F.S.

⁹ s. 494.00312, F.S.

¹⁰ The cost of prelicensing courses may vary by course provider, but one such course provider charges \$349 for the required 20-hour course. See MortgageEducation.com, *Mortgage Loan Originator Courses*, <https://www.mortgage-education.com/StatePage.aspx?StateCode=FL> (last visited Mar. 25, 2017).

- Submit an application form;
- Submit a nonrefundable application fee of \$215;
- Submit fingerprints, the cost of which is borne by the applicant; and
- Authorize access to his or her credit report, the cost of which is borne by the applicant.

In order to obtain licensure as a *mortgage broker*, a person must:¹²

- Submit an application form, which must designate a qualified principal loan originator;
- Submit a nonrefundable application fee of \$525;
- Submit fingerprints for each of the applicant's control persons, the cost of which is borne by the person subject to the background check; and
- Authorize access to the credit reports of each of the applicant's control persons, the cost of which is borne by the applicant.

In order to obtain licensure as a *mortgage lender*, a person must:¹³

- Submit an application form, which must designate a qualified principal loan originator;
- Submit a nonrefundable application fee of \$600;
- Submit fingerprints for each of the applicant's control persons, the cost of which is borne by the person subject to the background check;
- Submit a copy of the applicant's financial audit report for the most recent fiscal year, which must document that the applicant has a net worth of at least \$63,000 if the applicant is not seeking a servicing endorsement, or at least \$250,000 if the applicant is seeking a servicing endorsement; and
- Authorize access to the credit reports of each of the applicant's control persons, the cost of which is borne by the applicant.

All of the above licenses must be renewed annually by December 31.¹⁴ In order to renew:

- A *mortgage loan originator* license, an individual must submit a renewal form and a nonrefundable renewal fee of \$170; provide documentation of completion of at least 8 hours of continuing education courses;¹⁵ and authorize access to his or her credit report, the cost of which is borne by the licensee.¹⁶
- A *mortgage broker* license, a person must submit a renewal form and a nonrefundable renewal fee of \$475; submit fingerprints for any new control persons who have not been screened; and authorize access to the credit reports of each of the mortgage broker's control persons, the cost of which is borne by the licensee.¹⁷
- A *mortgage lender* license, a person must submit a renewal form and a nonrefundable renewal fee of \$575; submit fingerprints for any new control persons who have not been screened; submit proof that the mortgage lender continues to meet the applicable net worth requirement; and authorize access to the credit reports of each of the mortgage lender's control persons, the cost of which is borne by the licensee.¹⁸

¹¹ Nationwide Multistate Licensing System & Registry, *Uniform State Test (UST) Implementation Information*, <http://mortgage.nationwidelicensingsystem.org/profreq/testing/Pages/UniformStateTest.aspx> (last visited Mar. 25, 2017).

¹² s. 494.00321, F.S.

¹³ s. 494.00611, F.S.

¹⁴ ss. 494.00312(7), 494.00321(7), and 494.00611, F.S.

¹⁵ The cost of continuing education courses may vary by course provider, but one such course provider charges \$129 for the required 8-hour course. See MortgageEducation.com, *Mortgage Loan Originator Courses*, <https://www.mortgage-education.com/StatePage.aspx?StateCode=FL> (last visited Mar. 25, 2017).

¹⁶ s. 494.00313, F.S.

¹⁷ s. 494.00322, F.S.

¹⁸ s. 494.00612, F.S.

The following persons are currently exempt from regulation under ch. 494, F.S.:¹⁹

- a) Any person operating exclusively as a registered loan originator²⁰ in accordance with the S.A.F.E. Mortgage Licensing Act of 2008.
- b) A depository institution; certain regulated subsidiaries that are owned and controlled by a depository institution; or institutions regulated by the Farm Credit Administration.
- c) The Federal National Mortgage Association; the Federal Home Loan Mortgage Corporation; any agency of the Federal Government; any state, county, or municipal government; or any quasi-governmental agency that acts in such capacity under the specific authority of the laws of any state or the United States.
- d) An attorney licensed in this state who negotiates the terms of a mortgage loan on behalf of a client as an ancillary matter to the attorney's representation of the client.
- e) A person involved solely in the extension of credit relating to the purchase of a timeshare plan.
- f) A person who performs only real estate brokerage activities and is licensed or registered in this state under part I of chapter 475, F.S., unless the person is compensated by a lender, a mortgage broker, or other loan originator or by an agent of such lender, mortgage broker, or other loan originator.

The following persons are currently exempt from the mortgage lender licensing requirements of ch. 494, F.S.:

- a) A person acting in a fiduciary capacity conferred by the authority of a court.
- b) A person who, as a seller of his or her own real property, receives one or more mortgages in a purchase money transaction.
- c) A person who acts solely under contract and as an agent for federal, state, or municipal agencies for the purpose of servicing mortgage loans.
- d) A person who makes only nonresidential mortgage loans and sells loans only to institutional investors.
- e) An individual making or acquiring a mortgage loan using his or her own funds for his or her own investment, and who does not hold himself or herself out to the public as being in the mortgage lending business.
- f) An individual selling a mortgage that was made or purchased with that individual's funds for his or her own investment, and who does not hold himself or herself out to the public as being in the mortgage lending business.

Federal Securities Regulation

The federal Securities Exchange Act of 1934 ('34 Act) requires registration of securities market participants like broker-dealers and exchanges.²¹ Generally, any person acting as "broker" or "dealer" as defined in the '34 Act must be registered with the United States Securities and Exchange Commission (SEC) and join a self-regulatory organization (SRO), like the Financial Industry Regulatory Authority (FINRA) or a national securities exchange. The '34 Act broadly defines "broker" as "any person engaged in the business of effecting transactions in securities for the account of others," which the SEC has interpreted to include involvement in any of the key aspects of a securities transaction, including solicitation, negotiation, and execution.²² A "dealer" is "any person engaged in the business of buying and selling securities . . . for such person's own account through a broker or otherwise."²³ Certain entities in the securities industry are often referred to as "broker-dealers" because the institution

¹⁹ s. 494.00115(1), F.S.

²⁰ A "registered loan originator" is "a loan originator who is employed by a depository institution, by a subsidiary that is owned and controlled by a depository institution and regulated by a federal banking agency, or by an institution regulated by the Farm Credit Administration, and who is registered with and maintains a unique identifier through the [Nationwide Mortgage Licensing System and Registry]." A registered loan originator must comply with federal registration requirements rather than the loan originator licensing requirements under ch. 494, F.S.

²¹ *Id.*

²² 15 U.S.C. §§ 78c(4) and 78o. U.S. SECURITIES AND EXCHANGE COMMISSION, *Guide to Broker-Dealer Registration*, <http://www.sec.gov/divisions/marketreg/bdguide.htm#I> (last visited Mar. 24, 2017).

²³ 15 U.S.C. §§ 78c(5).

is a “broker” when executing trades on behalf of a customer, but is a “dealer” when executing trades for its own account. In addition to being registered with the SEC, broker-dealers must comply with state registration requirements.

State Securities Regulation

In addition to federal securities laws, “Blue Sky Laws” are state laws designed to protect investors against fraudulent sales practices and activities by requiring companies making offerings of securities to register their offerings before they can be sold in that state and by requiring licensure for brokerage firms, their brokers, and investment adviser representatives.²⁴

In Florida, OFR’s Division of Securities oversees the Securities and Investor Protection Act, ch. 517, F.S. (“the Act”), which regulates the offer and sale of securities in, to, or from Florida by firms, branch offices, and individuals affiliated with these firms.

The Act requires the following individuals or businesses to be registered with the OFR under s. 517.12, F.S., in order for such persons to sell or offer to sell any securities in or from offices in this state, or to sell securities to persons in this state from offices outside this state:²⁵

- “Dealers,” which include:²⁶
 - Any person, other than an associated person registered under ch. 517, F.S., who engages, either for all or part of her or his time, directly or indirectly, as broker or principal in the business of offering, buying, selling, or otherwise dealing or trading in securities issued by another person.
 - Any issuer who through persons directly compensated or controlled by the issuer engages, either for all or part of her or his time, directly or indirectly, in the business of offering or selling securities which are issued or are proposed to be issued by the issuer.
- “Investment advisors,” which:²⁷
 - Includes any person who receives compensation, directly or indirectly, and engages for all or part of her or his time, directly or indirectly, or through publications or writings, in the business of advising others as to the value of securities or as to the advisability of investments in, purchasing of, or selling of securities, except a dealer whose performance of these services is solely incidental to the conduct of her or his business as a dealer and who receives no special compensation for such services.
 - But does not include a “federal covered advisor.”²⁸
- “Associated persons,” which include:²⁹
 - With respect to a dealer or investment adviser, any of the following:
 - Any partner, officer, director, or branch manager of a dealer or investment adviser or any person occupying a similar status or performing similar functions;
 - Any natural person directly or indirectly controlling or controlled by such dealer or investment adviser, other than an employee whose function is only clerical or ministerial; or
 - Any natural person, other than a dealer, employed, appointed, or authorized by a dealer, investment adviser, or issuer to sell securities in any manner or act as an investment adviser as defined in this section.
 - With respect to a federal covered adviser, any person who is an investment adviser representative and who has a place of business in this state.

²⁴ U.S. SECURITIES AND EXCHANGE COMMISSION, *Blue Sky Laws*, <http://www.sec.gov/answers/bluesky.htm> (last visited Mar. 24, 2017).

²⁵ s. 517.12(1), F.S.

²⁶ s. 517.021(6)(a), F.S. The term “dealer”, as defined under Florida law, encompasses the definitions of “broker” and “dealer” under federal law.

²⁷ s. 517.021(14)(a), F.S.

²⁸ s. 517.021(9) and (14)(b)9., F.S. A federal covered advisor must be registered under federal law and must provide a notice-filing to the OFR. ss. 517.021 and s. 517.1201, F.S.

²⁹ s. 517.021(2)(a), F.S.

Wells Fargo Declaratory Statement

In May 2016, Wells Fargo Advisors, LLC (Wells Fargo), filed a petition for a declaratory statement³⁰ with the OFR to determine whether it would be in compliance with ch. 494, F.S., if it were to start compensating its financial advisors for certain mortgage loan originator activities that are purely incidental to the otherwise authorized securities and investment activities for Wells Fargo and its financial advisors.³¹

Wells Fargo is a full-service broker-dealer firm subject to supervision by the SEC and the OFR.³² Wells Fargo is indirectly owned by Wells Fargo & Co., a bank holding company that also owns certain national banks.³³ Therefore, Wells Fargo is affiliated with such banks through common ownership.³⁴

Despite the fact that Wells Fargo holds a mortgage broker license and many of its financial advisors hold a mortgage loan originator license, Wells Fargo and its financial advisors do not:³⁵

- Solicit the general public for mortgage loans;
- Solicit lenders on behalf of borrowers;
- Take, complete, accept, or assist in preparing applications for any mortgage loans;
- Negotiate the interest rate, terms or conditions for new or existing mortgage loans; or
- Offer any mortgage loans to borrowers.

Securities clients may raise issues about other financial matters, such as a business need or a residential mortgage.³⁶ If such questions are presented, the financial advisors may inform securities clients that the affiliated banks make mortgage loans, and they may provide bank-approved material.³⁷

If a securities client does contact an affiliated bank regarding a mortgage loan and ultimately obtain mortgage financing, Wells Fargo provides additional compensation to the financial advisor who interacted with the particular client.³⁸ Neither Wells Fargo nor its financial advisor, however, receive a fee of any kind from either the securities client obtaining the mortgage loan, or the affiliated bank making the mortgage loan.³⁹ Wells Fargo and its financial advisor do not have any additional involvement with the affiliated banks' mortgage loan origination process.⁴⁰

The declaratory statement concluded that both the compensation and the referral aspect of the above set of facts require that Wells Fargo be licensed as either a mortgage broker or mortgage lender and that its financial advisor be licensed as mortgage loan originators.⁴¹

³⁰ "Any substantially affected person may seek a declaratory statement regarding an agency's opinion as to the applicability of a statutory provision, or of any rule or order of the agency, as it applies to the petitioner's particular set of circumstances." s. 120.565(1), F.S.

³¹ *In Re Petition for Declaratory Statement, Wells Fargo Advisors, LLC*, Case No. 66425, p. 1 & 4-6 (Fla. OFR Aug. 15, 2016).

³² *Id.* at 2.

³³ *Id.* at 3.

³⁴ *Id.*

³⁵ *Id.* at 3 & 5.

³⁶ *Id.* at 3.

³⁷ *Id.* at 3-4.

³⁸ *Id.* at 4.

³⁹ *Id.*

⁴⁰ *Id.*

⁴¹ *Id.* at 8.

Effect of Proposed Changes

The bill exempts a securities dealer, investment advisor, or associated person registered under ch. 517, F.S., from regulation under ch. 494, F.S., if such person, in the normal course of conducting securities business with a corporate or individual client:

- 1) Solicits or offers to solicit a mortgage loan from a securities client or refers a securities client to a depository institution, certain regulated subsidiaries that are owned and controlled by a depository institution, institutions regulated by the Farm Credit Administration, a licensed mortgage broker, a licensed mortgage lender, or a registered loan originator; and
- 2) Does not accept or offer to accept an application for a mortgage loan, negotiate or offer to negotiate the terms or conditions of a new or existing mortgage loan on behalf of a borrower or lender, or negotiate or offer to negotiate the sale of an existing mortgage loan to a noninstitutional investor for compensation or gain.

Any solicitation or referral made pursuant to the exemption must be made in compliance with ch. 517, F.S.; the federal Real Estate Settlement Procedures Act; and any applicable federal law or general law of this state.

B. SECTION DIRECTORY:

Section 1. Amends s. 494.00115, F.S., relating to exemptions.

Section 2. Provides an effective date of July 1, 2017.

II. FISCAL ANALYSIS & ECONOMIC IMPACT STATEMENT

A. FISCAL IMPACT ON STATE GOVERNMENT:

1. Revenues:

See Fiscal Comments.

2. Expenditures:

None.

B. FISCAL IMPACT ON LOCAL GOVERNMENTS:

1. Revenues:

The bill does not appear to have an impact on local government revenues.

2. Expenditures:

None.

C. DIRECT ECONOMIC IMPACT ON PRIVATE SECTOR:

See Fiscal Comments.

D. FISCAL COMMENTS:

The bill provides an exemption from the loan originator and mortgage broker license requirements for certain individuals and businesses in the securities industry. This exemption would result in those individuals and businesses no longer needing to maintain a license as a mortgage loan originator or mortgage broker, which would decrease licensing costs for the affected individuals and businesses. Correspondingly, the OFR would not collect such licensing fees or incur costs of regulatory oversight for those individuals and businesses. It is unknown how many individuals and businesses will forego

the currently required dual licensure. Therefore, the impact to the private sector and the state is indeterminate. However, the OFR believes that any loss of licensure revenues will be insignificant.⁴²

III. COMMENTS

A. CONSTITUTIONAL ISSUES:

1. Applicability of Municipality/County Mandates Provision:

Not applicable. This bill does not appear to affect county or municipal governments

2. Other:

None.

B. RULE-MAKING AUTHORITY:

The bill does not appear to create a need for rulemaking or rulemaking authority.

C. DRAFTING ISSUES OR OTHER COMMENTS:

None.

IV. AMENDMENTS/ COMMITTEE SUBSTITUTE CHANGES

On March 27, 2017, the Insurance & Banking Subcommittee considered one strike-all amendment, which was adopted, and reported the bill favorably as a committee substitute. The committee substitute clarifies and narrows the scope of the exemption created in ch. 494, F.S., for certain securities professionals regulated under ch. 517, F.S.

On April 6, 2017, the Commerce Committee considered one amendment, which was adopted, and reported the bill favorably as a committee substitute. The committee substitute clarifies that any solicitation or referral made pursuant to the exemption must be made in compliance with ch. 517, F.S.; the federal Real Estate Settlement Procedures Act; and any applicable federal law or general law of this state.

The staff analysis has been updated to reflect the committee substitute.

⁴² Office of Financial Regulation, Agency Analysis of 2017 House Bill 747 (Feb. 22, 2017).
STORAGE NAME: h0747c.COM
DATE: 4/7/2017