

**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.)

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Prepared By: The Professional Staff of the Committee on Regulated Industries

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BILL: SB 314

INTRODUCER: Senator Baxley

SUBJECT: Mortgage Brokering

DATE: December 6, 2017

REVISED: \_\_\_\_\_

	ANALYST	STAFF DIRECTOR	REFERENCE	ACTION
1.	<u>Oxamendi</u>	<u>McSwain</u>	<u>RI</u>	<u>Pre-meeting</u>
2.	_____	_____	<u>BI</u>	_____
3.	_____	_____	<u>RC</u>	_____

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**I. Summary:**

SB 314 exempts a securities dealer, investment advisor, or associated person registered under ch. 517, F.S., from regulation as a loan originator or mortgage broker under ch. 494, F.S., if the person in the normal course of conducting securities business with corporate or individual clients:

- Solicits or offers to solicit a mortgage loan from a securities client, or refers a securities client to an entity exempt from regulation under parts I or II of ch. 494, F.S., pursuant to s. 494.00115, F.S., a licensed mortgage broker, a licensed mortgage lender, or a registered loan originator; and
- Does not accept or offer to accept a mortgage loan application, 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 referral or solicitation made under this exemption must comply with the provisions of ch. 517, F.S., the federal Real Estate Settlement Procedures Act, and any applicable federal law or general law of this state.

The bill may have an insignificant, negative fiscal impact to state government. *See* Section V, Fiscal Impact Statement.

The bill provides an effective date of July 1, 2018.

## II. Present Situation:

### State Regulation of Non-Depository Mortgage Business

The Office of Financial Regulation (OFR) regulates state-chartered banks, credit unions, other financial institutions, as well as finance companies, and the securities industry.<sup>1</sup> 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**, 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.<sup>2</sup> 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.<sup>3</sup>
- **Mortgage broker**, who conducts loan originator activities through one or more licensed loan originators employed by the mortgage broker or as independent contractors to the mortgage broker.<sup>4</sup>
- **Mortgage lender**, who makes a mortgage loan or services a mortgage loan for others, or, for compensation or gain, directly or indirectly, sells or offers to sell a mortgage loan to a noninstitutional investor.<sup>5</sup> A mortgage lender may act as a mortgage broker.<sup>6</sup>

Under ch. 494, F.S., these licensees are subject to:

- 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.<sup>7</sup>
- The OFR's investigation and examination authority.<sup>8</sup>
- The OFR's enforcement authority, such as injunctions, cease and desist orders, suspension or revocation of licensure, and administrative fines.<sup>9</sup>

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<sup>1</sup> Section 20.121(3)(a)2. and (d), F.S. The OFR is housed within the Financial Services Commission (commission). The commission is a separate budget entity under the Department of Financial Services (DFS), and is not subject to the control or supervision by the DFS. The commission, comprised of the Governor and Cabinet, appoints the OFR Commissioner.

<sup>2</sup> The Secure and Fair Enforcement for Mortgage Licensing Act of 2008 (S.A.F.E. Act) (12 U.S.C. s. 5101-5116), enacted on July 30, 2008, establishes minimum standards for the licensing and registration of state-licensed mortgage loan originators, and mandates a nationwide licensing and registration system for residential mortgage loan originators.

<sup>3</sup> Section 494.001(17), F.S.

<sup>4</sup> Section 494.001(22), F.S.

<sup>5</sup> Section 494.001(23), F.S.

<sup>6</sup> Section 494.0073, F.S.

<sup>7</sup> Sections 494.0016 and 494.00165(2), F.S.

<sup>8</sup> Section 494.0012, F.S.

<sup>9</sup> Sections 494.0013, 494.0014, and 494.00255, F.S.

In order to obtain a license as a mortgage loan originator, an individual must:<sup>10</sup>

- Be at least 18 years of age and have a high school diploma or its equivalent;
- Complete a 20-hour prelicensing class;<sup>11</sup>
- Pass a written test;<sup>12</sup>
- Submit an application form;
- Submit nonrefundable application fees totaling \$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 a license as a mortgage broker, a person must:<sup>13</sup>

- Submit an application form, which must designate a qualified principal loan originator;
- Submit nonrefundable application fees totaling \$525;
- Submit fingerprints for each of the applicant's control persons,<sup>14</sup> the cost of which is borne by the person subject to the background check; and
- Authorize access to the credit reports on 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:<sup>15</sup>

- Submit an application form, which must designate a qualified principal loan originator;
- Submit nonrefundable application fees totaling \$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.

A mortgage loan originator, broker, and lender license must be annually renewed by December 31.<sup>16</sup> In order to renew:

- A mortgage loan originator license, an individual must submit a renewal form and nonrefundable renewal fees totaling \$170; provide documentation of completion of at least

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<sup>10</sup> Section 494.00312, F.S.

<sup>11</sup> 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 November 1, 2017).

<sup>12</sup> The cost of written test is \$110. See Nationwide Multistate Licensing System & Registry, Uniform State Test (UST) Implementation Information, <http://mortgage.nationwidelicingsystem.org/profreq/testing/Pages/UniformStateTest.aspx> (last visited November 1, 2017).

<sup>13</sup> Section 494.00321, F.S.

<sup>14</sup> "Control persons" is defined in s. 494.001(6), F.S., to mean, in part, "an individual, partnership, corporation, trust, or other organization that possesses the power, directly or indirectly, to direct the management or policies of a company, whether through ownership of securities, by contract, or otherwise."

<sup>15</sup> Section 494.00611, F.S.

<sup>16</sup> Sections 494.00312(7), 494.00321(7), and 494.00611, F.S.

eight hours of continuing education courses;<sup>17</sup> and authorize access to his or her credit report, the cost of which is borne by the licensee.<sup>18</sup>

- A mortgage broker license, a person must submit a renewal form and nonrefundable renewal fees totaling \$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.<sup>19</sup>
- A mortgage lender license, a person must submit a renewal form and nonrefundable renewal fees totaling \$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.<sup>20</sup>

The following persons are exempt from mortgage broker and mortgage lender regulation under ch. 494, F.S.:<sup>21</sup>

- Any person operating exclusively as a registered loan originator<sup>22</sup> in accordance with the S.A.F.E. Act.
- A depository institution; certain regulated subsidiaries owned and controlled by a depository institution; or institutions regulated by the Farm Credit Administration.
- 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.
- 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.
- A person involved solely in the extension of credit relating to the purchase of a timeshare plan.
- A person who performs only real estate brokerage activities and is licensed or registered in this state under part I of ch. 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 exempt from the mortgage lender licensing requirements of ch. 494, F.S.:<sup>23</sup>

- A person acting in a fiduciary capacity conferred by the authority of a court.
- A person who, as a seller of his or her own real property, receives one or more mortgages in a purchase money transaction.

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<sup>17</sup> See note 11.

<sup>18</sup> Section 494.00313, F.S.

<sup>19</sup> Section 494.00322, F.S.

<sup>20</sup> Section 494.00612, F.S.

<sup>21</sup> Section 494.00115(1), F.S.

<sup>22</sup> Section 494.001(31), F.S., defines a "registered loan originator" as "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.

<sup>23</sup> Section 494.00115(2), F.S.

- A person who acts solely under contract and as an agent for federal, state, or municipal agencies for the purpose of servicing mortgage loans.
- A person who makes only nonresidential mortgage loans and sells loans only to institutional investors.
- 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.
- 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 Real Estate Settlement Procedures Act of 1974**

The federal Real Estate Settlement Procedures Act<sup>24</sup> (the Act) became effective on June 20, 1975.<sup>25</sup> The Act requires lenders, mortgage brokers, or servicers of home loans to provide borrowers with pertinent and timely disclosures regarding the nature and costs of the real estate settlement process. In addition, the Act prohibits specific practices, such as kickbacks,<sup>26</sup> and places limitations upon compensation and fees.<sup>27</sup>

### **Federal Securities Regulation**

The federal Securities Exchange Act of 1934 ('34 Act) requires registration of securities market participants like broker-dealers and exchanges.<sup>28</sup> Generally, any person acting as “broker” or “dealer” as defined in the '34 Act must be registered with the 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.<sup>29</sup> 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.”<sup>30</sup>

### **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

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<sup>24</sup> 12 U.S.C. ss. 2601 et seq.

<sup>25</sup> 12 CFR Part 1024 (Regulation X) implements RESPA.

<sup>26</sup> 12 CFR s. 1024.14.

<sup>27</sup> *Id.*

<sup>28</sup> See 15 U.S.C. s. 78l, relating to registration requirements for securities.

<sup>29</sup> 15 U.S.C. ss. 78c(4) and 78o. U.S. Securities and Exchange Commission, Guide to Broker-Dealer Registration, <https://www.sec.gov/reportspubs/investor-publications/divisionsmarketregbdguidehtm.html> (last visited November 1, 2017).

<sup>30</sup> 15 U.S.C. s. 78c(5).

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.<sup>31</sup>

In Florida, the OFR's Division of Securities oversees the Securities and Investor Protection Act, ch. 517, F.S. (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.<sup>32</sup>

- **Dealers**, which include:<sup>33</sup>
  - 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 include:<sup>34</sup>
  - 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."<sup>35</sup>
- **Associated persons**, with respect to a dealer or investment adviser, include:<sup>36</sup>
  - 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.
- **Associated persons**, with respect to a federal covered adviser, includes any person who is an investment adviser representative and who has a place of business in this state.

<sup>31</sup> U.S. Securities and Exchange Commission, Blue Sky Laws, <http://www.sec.gov/answers/bluesky.htm> (last visited November 1, 2017).

<sup>32</sup> Section 517.12(1), F.S.

<sup>33</sup> Section 517.021(6)(a), F.S.

<sup>34</sup> Section 517.021(14)(a), F.S.

<sup>35</sup> Section 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 pursuant to ss. 517.021 and 517.1201, F.S.

<sup>36</sup> Section 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 statement<sup>37</sup> 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 it argued were purely incidental to the otherwise authorized securities and investment activities for Wells Fargo and its financial advisors.<sup>38</sup>

Wells Fargo is a full-service broker-dealer firm subject to supervision by the SEC and the OFR.<sup>39</sup> Wells Fargo is indirectly owned by Wells Fargo & Co., a bank holding company that also owns certain national banks.<sup>40</sup> Therefore, Wells Fargo is affiliated with such banks through common ownership.<sup>41</sup>

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

- 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.<sup>42</sup>

If Wells Fargo's securities clients raise issues about other financial matters, such as a business need for a residential mortgage, the financial advisors may inform securities clients that the affiliated banks make mortgage loans and may provide bank-approved material.<sup>43</sup> If a securities client contacts an affiliated bank regarding a mortgage loan and ultimately obtains mortgage financing, Wells Fargo provides "additional compensation" to the financial advisor who interacted with the particular client.<sup>44</sup> Neither Wells Fargo nor the financial advisor, however, receives a fee of any kind from either the securities client obtaining the mortgage loan, or the affiliated bank making the mortgage loan.<sup>45</sup> Wells Fargo and the financial advisor do not have any additional involvement with the affiliated banks' mortgage loan origination process.<sup>46</sup>

The determinative issues in the Declaratory Statement and Final Order issued by the OFR (OFR Declaratory Statement) were: 1) the prohibition against a mortgage broker paying a commission to any person not licensed or exempt from licensure under ch. 494, F.S.;<sup>47</sup> 2) permitting

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<sup>37</sup> Pursuant to s. 120.565(1), F.S., "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."

<sup>38</sup> *In Re Petition for Declaratory Statement, Wells Fargo Advisors, LLC*, Case No. 66425, pp. 1 and 4-6 (Fla. OFR Aug. 15, 2016).

<sup>39</sup> *Id.* at 2.

<sup>40</sup> *Id.* at 3.

<sup>41</sup> *Id.*

<sup>42</sup> *Id.* at pp. 3 and 5.

<sup>43</sup> *Id.* at pp. 3-4.

<sup>44</sup> *Id.* at p. 4.

<sup>45</sup> *Id.*

<sup>46</sup> *Id.*

<sup>47</sup> Section 494.0038(2), F.S.

“additional compensation” related to the mortgage loans to be paid to the financial adviser; and 3) the referral aspect of the above set of facts.<sup>48</sup>

The OFR Declaratory Statement concluded both the compensation and the referral require Wells Fargo be licensed as either a mortgage broker or mortgage lender and require its financial advisors be licensed as mortgage loan originators.<sup>49</sup>

### III. Effect of Proposed Changes:

SB 314 amends s. 494.00115, F.S., to exempt a securities dealer, investment advisor, or associated person registered under ch. 517, F.S., from regulation as a loan originator or mortgage broker under ch. 494, F.S., if the person in the normal course of conducting securities business with corporate or individual clients:

- Solicits or offers to solicit a mortgage loan from a securities client, or refers a securities client to an entity exempt from regulation under parts I or II of ch. 494, F.S., pursuant to s. 494.00115, F.S.,<sup>50</sup> a licensed mortgage broker, a licensed mortgage lender, or a registered loan originator; and
- 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 referral or solicitation made pursuant to this exemption must comply with ch. 517, F.S., the federal Real Estate Settlement Procedures Act, and any other applicable federal law or general law of this state.

The bill provides an effective date of July 1, 2018.

### IV. Constitutional Issues:

#### A. Municipality/County Mandates Restrictions:

None.

#### B. Public Records/Open Meetings Issues:

None.

<sup>48</sup> Declaratory Statement and Final Order, *In Re: Petition for Declaratory Statement, Wells Fargo Advisors, LLC*, Case No. 66425 (Fla. OFR Aug. 15, 2016), at pp. 7-8.

<sup>49</sup> *Id.* at pp. 8 - 9.

<sup>50</sup> Section 494.00115(1)(b), F.S., provides an exemption from regulation as a mortgage broker or loan originator under parts I and II of ch. 494, F.S., for a “depository institution; subsidiaries that are owned and controlled by a depository institution and regulated by the Board of Governors of the Federal Reserve System, the Comptroller of the Currency, the Director of the Office of Thrift Supervision, the National Credit Union Administration, or the Federal Deposit Insurance Corporation; or institutions regulated by the Farm Credit Administration.” The Federal Deposit Insurance Act defines a “depository institution” as a bank or saving association. *See* 12 U.S.C. 1813(c).

C. Trust Funds Restrictions:

None.

**V. Fiscal Impact Statement:**

A. Tax/Fee Issues:

None.

B. Private Sector Impact:

The bill may decrease licensing costs for securities dealers, investment advisors, or associated persons exempted from the license requirements under ch. 494, F.S.

C. Government Sector Impact:

The Office of Financial Regulation states the licensure exemption for securities dealers, investment advisors, or associated persons may result in an insignificant loss in revenues.

**VI. Technical Deficiencies:**

None.

**VII. Related Issues:**

The provisions in SB 314 relating to the exemption from regulation as a loan originator or mortgage broker under ch. 494, F.S., for securities dealers, investment advisors, and associated persons in certain situations are substantively similar to provisions contained in CS/CS/HB 747 (2017 Regular Session), relating to Mortgage Regulation, by the Commerce Committee, Insurance and Banking Subcommittee, and Rep. Stark.<sup>51</sup> CS/CS/HB 747 passed the Legislature but subsequently was vetoed by the Governor. The Governor's veto was based on the bill's revised definition of the term "mortgage loan" in s. 494.001(24), F.S.<sup>52</sup> SB 314 does not include the provision that was the basis for the Governor's veto.

**VIII. Statutes Affected:**

This bill substantially amends section 494.00115 of the Florida Statutes.

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<sup>51</sup> The Senate companion was CS/CS/SB 830 (2017 Regular Session) by the Banking and Insurance Committee, the Regulated Industries Committee, and Senator Baxley.

<sup>52</sup> The Governor's veto of CS/CS/HB 747 was based on his concern the bill's revised definition of the term "mortgage loan" in s. 494.001(24), F.S., would expand the regulatory environment for residential mortgages and add overly prescriptive regulations related to mortgage lending. Specifically, the Governor's veto message noted CS/CS/HB 747 seemed overly burdensome on Florida families because it might have required a parent or other relative who decides to make a residential loan to a child or other loved one to be licensed by Florida Office of Financial Regulation.

**IX. Additional Information:**

- A. **Committee Substitute – Statement of Changes:**  
(Summarizing differences between the Committee Substitute and the prior version of the bill.)

None.

- B. **Amendments:**

None.

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

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