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 Committee on Banking and Insurance

BILL: CS/SB 1298

INTRODUCER: Banking and Insurance Committee and Senator Garcia

SUBJECT: Mortgage Loans

DATE: March 27, 2017 REVISED:

	ANALYST	STAFF DIRECTOR	REFERENCE	ACTION
1.	Johnson	Knudson	BI	**Fav/CS**
2.			CM	
3.			RC	

Please see Section IX. for Additional Information:

COMMITTEE SUBSTITUTE - Substantial Changes

I. Summary:

CS/SB 1298 revises provisions governing non-depository loan originators, mortgage brokers, and mortgage lender businesses subject to regulation by the Office of Financial Regulation (OFR) to provide greater consumer protections for residential loans. The bill amends the definition of "mortgage loan" to include residential mortgage loans made for business purposes. Persons originating, brokering, or lending for such loans would be subject to licensure by the OFR, unless they are otherwise exempt. Further, the bill provides a definition of the term "hold himself or herself out to the public as being in the mortgage lending business," as that term is used in two current licensing exemptions.

Under ch. 494, F.S., conditions requiring licensure by the OFR include whether a person takes part in making a mortgage loan, which requires such a loan be made primarily for personal, family, or household use. Currently two exemptions in ch. 494, F.S., permit an individual investor to make or acquire a mortgage loan with his or her own funds, or to sell such mortgage loan, without being licensed as a mortgage lender, if the individual does not "hold himself or herself out to the public as being in the mortgage lending business." However, this term is currently undefined.

The fiscal impact on the OFR is indeterminate.

II. Present Situation:

Shadow Real Estate Transactions

The Financial Crimes Enforcement Network (FinCEN) recently announced the renewal of an existing Geographic Targeting Orders (GTO) in 2017. This GTO temporarily extends the requirement that U.S. title insurance companies in six metropolitan areas in the U.S., including Miami-Dade County, Florida, identify the natural persons behind shell companies used to pay "all cash" for high-end residential real estate.[1] FinCEN has found that about 30 percent of the transactions covered by the GTOs involve a beneficial owner or purchaser representative that is also the subject of a previous suspicious activity report. The GTOs are one of the tools that FinCEN uses to combat money laundering. According to FinCEN, this corroborates their concerns about the use of shell companies to buy luxury real estate in "all-cash" transactions. In an earlier GTO issued in January 2016, FinCEN indicated that it was prioritizing anti-money laundering protections on real estate transactions involving lending.

FinCEN is covering title insurance companies because title insurance is a common feature in the vast majority of real estate transactions. Title insurance companies thus play a central role that can provide FinCEN with valuable information about real estate transactions of concern. The GTOs do not imply any derogatory finding by FinCEN with respect to the covered companies.

In recent years, private lenders and representatives of a local building association have reported alleged unlicensed mortgage lending activity in South Florida. According to these reports, some lending entities were providing residential loans with usurious interest rates and high fees made under the guise of business purpose loans in order to avoid licensure and disclosure requirements under ch. 494, F.S., as a mortgage lender. Further, these groups stated that some of these unscrupulous lenders would not make the "residential loan" unless the borrower formed a limited liability company.[2] In another example described by private lenders and a local building association, an offshore shell company buys a parcel of real estate. Shortly thereafter, a Florida corporation, which is formed to participate in the scheme, obtains a mortgage loan on the property through an unlicensed mortgage lender. Next, the shell company pays the Florida corporation's monthly mortgage payments and ultimately pays off the mortgage. As a result, the perpetrator successfully launders money in the United States.[3]

Federal Oversight of Mortgage Brokerage Industry

Secure and Fair Enforcement for Mortgage Licensing Act of 2008

On July 30, 2008, the federal Housing and Economic Recovery Act of 2008 was enacted.[4] Title V of this act is titled the "Secure and Fair Enforcement for Mortgage Licensing Act of 2008" or the "S.A.F.E. Mortgage Licensing Act of 2008." (S.A.F.E.), The SAFE Act establishes minimum standards for state licensure of residential mortgage loan originators in order to increase uniformity, improve accountability of loan originators, combat fraud, and enhance

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[1] FinCEN Press Release (Feb. 23, 2017) available at https://www.fincen.gov/news/news-releases/fincen-renews-real-estate-geographic-targeting-orders-identify-high-end-cash (last viewed Mar. 25, 2017).
[2] Latin Builders Association, Letter to Governor Rick Scott (Dec. 19, 2013) (on file with Senate Banking and Insurance Committee).
[3] http://www.miamiherald.com/opinion/letters-to-the-editor/article75237702.html (last viewed Mar. 23, 2017) (on file with Senate Committee on Banking and Insurance).
[4] Pub. L. No. 110-289.

consumer protections. The act required all states to adopt a system of licensure meeting minimum standards for mortgage loan originators by August 1, 2009, or be subject to federal regulation. The act establishes regulatory requirements for individuals, rather than businesses, licensed or registered as mortgage brokers and lenders, collectively known as loan originators. Pursuant to S.A.F.E., states are required to participate in a national licensing registry, the Nationwide Mortgage Licensing System and Registry (registry), which contains employment history as well as disciplinary and enforcement actions against loan originators. Applicants are subject to licensure by the state regulator.[5]

Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010

In 2010, the federal Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010 (Dodd-Frank Act) created the Consumer Financial Protection Bureau (CFPB) and provided sweeping changes to the regulation of financial services, including changes to federal mortgage loan origination and lending laws.[6] The Dodd-Frank Act authorizes the CFPB to have rulemaking, enforcement, and supervisory powers over many consumer financial products and services, as well as the entities that sell them. Some of the consumer laws under the CFPB include the Truth in Lending Act (TILA)[7] and the Real Estate Settlement Procedures Act (RESPA).[8] TILA is intended to ensure that credit terms are disclosed in a meaningful way so consumers can compare credit terms, and is implemented by Regulation Z. The Real Estate Settlement Procedures Act of 1974 (RESPA)[9] 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, and is implemented by Regulation X.

Both TILA and RESPA exempt from their regulations a mortgage loan made "primarily for a business, commercial or agricultural purpose."[10] Therefore, TILA and RESPA do not cover "business purpose" mortgage loans but rather only "consumer purpose" mortgage loans. When determining whether credit is for consumer purposes, the creditor must evaluate all of the following factors:

- Any statement obtained from the consumer describing the purpose of the proceeds.
- The primary occupation of the consumer and how it relates to the use of the proceeds.
- Personal management of the assets purchased from proceeds.
- The size of the transaction.
- The amount of income derived from the property acquired by the loan proceeds relative to the borrower's total income.

The Dodd-Frank Act mandated that the CFPB adopt an integrated disclosure form for use by lenders and creditors to comply with the disclosure requirements of RESPA and TILA,[11] and the

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[5] NLMS Resource Center, available at http://mortgage.nationwidelicensingsystem.org/about/Pages/default.aspx (last viewed Feb. 22, 2017).

[6] Pub. L. No. 111-203.

[7] 15 U.S.C. s. 1601, *et. seq.*

[8] 15 U.S.C. s. 2601, *et. seq.*

[9] 12 U.S.C. s. 2601, *et. seq.*

[10] Consumer Financial Protection Bureau, *2013 Integrated Mortgage Disclosure Rule Under the Real Estate Settlement Procedures Act (Regulation X) and the Truth in Lending Act (Regulation Z)*, available at https://www.consumerfinance.gov/policy-compliance/rulemaking/final-rules/2013-integrated-mortgage-disclosure-rule-under-real-estate-settlement-procedures-act-regulation-x-and-truth-lending-act-regulation-z/ (last viewed Mar. 23, 2017).

[11] 12 U.S.C. ss. 5532(f), 2603; 15 U.S.C. s. 1604(b).

CFPB issued final rules in 2015.[12] The integrated rule applies to most closed-end consumer mortgages. It does not apply to home equity lines of credit (HELOCs), reverse mortgages, or mortgages secured by a mobile home or by a dwelling that is not attached to real property (i.e., land). *The Small Entity Guide* published by the CFPB does not list investment properties or business purpose loans as one categories of loans exempt from the rule. Further, the guide provides creditors that are not prohibited from using the integrated disclosure forms on loans not covered by TILA or RESPA.[13]

State Regulation of Mortgage Brokers

The Office of Financial Regulation (OFR) regulates a wide range of financial activities, such as state-chartered banks, credit unions, and non-depository loan originators, mortgage brokers and mortgage lenders. In 2009, the Florida Legislature implemented the minimum standards of S.A.F.E., which increased licensure requirements and required licensure through the registry.[14] Section 494.001(24), F.S., defines the term, "mortgage loan," to mean a:

- Residential loan primarily for personal, family, or household use which is secured by a mortgage, deed of trust, or other equivalent consensual security interest on a dwelling, as defined in s. 103(v) of the federal Truth in Lending Act, or for the purchase of residential real estate upon which a dwelling is to be constructed;
- Loan on commercial real property if the borrower is an individual or the lender is a noninstitutional investor; or
- Loan on improved real property consisting of five or more dwelling units if the borrower is an individual or the lender is a noninstitutional investor.

Licensure of Loan Originators, Mortgage Brokers, and Mortgage Broker Lenders

The term, "loan originator," includes an individual who is required to be licensed as a loan originator under S.A.F.E. 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.[15]

Licensure as a loan originator is required for 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.

A mortgage broker license is required for an entity conducting loan originator activities through one or more licensed loan originators employed by the mortgage broker or as an independent contractor to the mortgage broker.[16]

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[12] 78 Fed Reg 79730.
[13] See CFPB, *Small Entity Compliance Guide*, available at http://s3.amazonaws.com/files.consumerfinance.gov/f/documents/kbyo_smallentitycomplianceguide_v4_10072016.pdf (last viewed Mar. 23, 2017).
[14] Ch. 2009-241, Laws of Fla.
[15] Section 494.001(17), F.S.
[16] Section 494.001(22), F.S.

A mortgage lender license is required for an entity making a mortgage loan for compensation or gain, directly or indirectly, or selling or offering to sell a mortgage loan to a noninstitutional investor.[17] "Making a mortgage loan" means closing a mortgage loan in a person's name, advancing funds, offering to advance funds, or making a commitment to advance funds to an applicant for a mortgage loan.[18]

The following persons are exempt from regulation as a mortgage lender under part III of this chapter:[19]

- 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.
- A person who acts solely under contract and as an agent for federal, state, or municipal agencies for 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.

Examination Authority, Administrative Penalties and Fines

The OFR may conduct investigations, examinations and investigate complaints.[20] The OFR may take disciplinary action against a person licensed or subject to licensure under part II or III of ch. 494, F.S., if the person violates any provision of RESPA, TILA, or any regulations adopted under such acts, during the course of any mortgage transaction.[21]

III. Effect of Proposed Changes:

Section 1 amends the definition of the term, "mortgage loan" in s. 494.001, F.S., by removing the requirement that residential loans be used primarily for personal, family, or household purposes. As a result, residential loans made for a business purpose would fall under the definition of a "mortgage loan," and would be subject to regulation by the OFR. Persons originating such loans would be subject to licensure by the OFR, unless they were exempted under s. 494.00115, F.S.

Section 2 amends s. 494.00115, F.S., relating to exemptions from regulation. Two current exemptions in ch. 494, F.S., permit an individual investor to make or acquire a mortgage loan with his or her own funds, or to sell such mortgage loan, without being licensed as a mortgage lender under ch. 494, F.S., if the individual does not hold himself or herself out to the public as

[17] Section 494.001(23), F.S.
[18] *See* Section 494.001(20), F.S.
[19] Section 494.00115, F.S.
[20] Section 494.0012, F.S.
[21] Section 494.00255(1)(m), F.S.

being in the mortgage lending business. This provision defines the term "hold himself or herself out to the public as being in the mortgage lending business" to include any of the following:

- Representing to the public, through advertising or other means of communicating or providing information (including the use of business cards, stationery, brochures, signs, rate lists, or promotional items), by any medium whatsoever, that such individual can or will perform the activities described in s. 494.001(23), F.S., as a mortgage lender.
- Soliciting in a manner that would lead the intended audience to reasonably believe that such individual is in the business of performing the activities described in s. 494.001(23), F.S.
- Maintaining a commercial business establishment at which, or premises from which, such individual regularly performs the activities described in s. 494.001(23), F.S., or regularly meets with current or prospective borrowers.
- Advertising, soliciting, or conducting business through use of a name, trademark, service mark, trade name, Internet address, or logo which indicates or reasonably implies that the business being advertised, solicited, or conducted is the kind or character of business transacted or conducted by a licensed mortgage lender or which is likely to lead any person to believe that such business is that of a licensed mortgage lender.
- Using any form promulgated by the Federal National Mortgage Association, the Federal Home Loan Mortgage Corporation, the U.S. Department of Housing and Urban Development, or the CFPB in performing the activities described in s. 494.001(23), F.S.

Section 3 provides the act take effect January 1, 2018.

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:

Implementation of the bill would allow borrowers obtaining residential mortgage for business purposes (not primarily for personal, family, or household use) greater consumer protections provided under ch. 494, F.S., which requires compliance with RESPA and TILA. All residential mortgage loans regardless of the purpose would be subject to the provisions of ch. 494, F.S.

Persons making residential mortgage loans for business purposes and who are not licensed would be required to obtain licensure under ch. 494, F.S., in order to continue such lending activity.

C. Government Sector Impact:

Indeterminate at this time. The OFR has indicated that additional staff may be needed to perform licensing and regulatory functions. In recent years, the OFR has closed cases relating to information pertaining to approximately 24 entities allegedly making residential mortgage loans for business purposes. Of these cases, the OFR imposed administrative fines on three entities engaging in unlicensed mortgage lending. The OFR closed 15 other cases because the residential loans were determined to be for business purposes, which was outside of the jurisdiction of the OFR.[22]

VI. Technical Deficiencies:

None.

VII. Related Issues:

A violation of RESPA, TILA, or any regulations adopted thereunder committed in any mortgage transaction, is a ground for disciplinary action under ch. 494, F.S. Both RESPA and TILA exclude business purpose loans from the scope of their regulation. Therefore, a person may be subject to licensure under ch. 494, F.S., but would not necessarily be required to provide the disclosures required under RESPA and TILA if the residential mortgage loan is made for business purposes.

VIII. Statutes Affected:

This bill substantially amends the following sections of the Florida Statutes: 494.001 and 494.00115.

IX. Additional Information:

A. Committee Substitute – Statement of Substantial Changes:

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

CS by Banking and Insurance Committee on March 27, 2017:
The bill provides a definition of the term "hold himself or herself out to the public as being in the mortgage lending business," which is used in two current licensure exemptions and removes a rulemaking provision.

B. Amendments:

None.

[22] OFR Mortgage Lender Referrals (Nov. 3, 2016) (on file with Senate Banking and Insurance Committee).