

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: SB 1298

INTRODUCER: Senator Garcia

SUBJECT: Mortgage Loans

DATE: March 24, 2017

REVISED: _____

	ANALYST	STAFF DIRECTOR	REFERENCE	ACTION
1.	Johnson	Knudson	BI	Pre-meeting
2.			CM	
3.			RC	

I. Summary:

SB 1298 revises provisions governing non-depository loan originators, mortgage brokers, and mortgage lender businesses subject to regulation by the Office of Financial Regulation to provide greater consumer protections for residential loans. The bill revises the definition of the term, “mortgage loan,” by removing the requirement that such residential loans must be primarily for personal, family, or household purposes, resulting in all residential loans, regardless of purpose being subject to ch. 494, F.S. Persons making residential loans that are not primarily for person, family, or household purposes, namely business purpose, would be subject to licensure as mortgage lenders unless they were eligible for an exemption under ch. 494, F.S. As a result, borrowers obtaining residential loans for business purposes would have the same consumer protections currently provided under Florida’s laws for borrowers obtaining residential loans primarily for personal, family, or household purposes. This will assist consumers in understanding the costs, benefits, and risks associated with the product or service.

II. Present Situation:

Shadow Real Estate Transactions

The Financial Crimes Enforcement Network (FinCEN) recently announced the renewal of existing Geographic Targeting Orders (GTO) that will temporarily require U.S. title insurance companies in six metropolitan areas in the U.S., including Miami-Dade County, Florida, to identify the natural persons behind shell companies used to pay “all cash” for high-end residential real estate in six major metropolitan areas. 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. According to FinCEN, this corroborates their concerns about the use of shell companies to buy luxury real estate in “all-cash” transactions. The GTOs are one of the tools that FinCEN uses to combat money laundering.

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. To the contrary, FinCEN appreciates the continued assistance and cooperation of the title insurance companies and the American Land Title Association in protecting the real estate markets from abuse by illicit actors.

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.¹

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 (typically with a name that sounds like a financial institution), 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.²

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.³ 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 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.⁴

¹ Latin Builders Association, Letter to Governor Rick Scott (Dec. 19, 2013) (on file with Senate Banking and Insurance Committee).

² <http://www.miamiherald.com/opinion/letters-to-the-editor/article75237702.html> (last visited Mar. 23, 2017) (on file with Senate Committee on Banking and Insurance).

³ Public Law 110-289.

⁴ NLMS Resource Center, at <http://mortgage.nationwidelicingsystem.org/about/Pages/default.aspx> (last viewed Feb. 22, 2017).

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.⁵ 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)⁶ and the Real Estate Settlement Procedures Act (RESPA).⁷ 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)⁸ 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.

For purposes of residential mortgages,⁹ the Dodd-Frank Act provides that creditors must make a reasonable and good faith determination based on verified and documented information that the consumer has a reasonable ability to repay the loan, and establishes certain protections from liability under the requirement for “qualified mortgages.” Regulation Z, which implement these provisions, establishes product-feature prerequisites and affordability underwriting requirements for qualified mortgages and provides a safe harbor for loans that satisfy the definition of a qualified mortgage and are not higher-priced mortgages.¹⁰

Regulation Z defines consumer credit to mean credit offered or extended to a consumer primarily for personal, family, or household purposes.¹¹ A loan may have a mixed purpose, and the creditor must determine if the primary purpose is consumer or business. In determining whether

⁵ Public Law 111-203.

⁶ 15 U.S.C. s. 1601, *et. seq.*

⁷ 15 U.S.C. s. 2601, *et. seq.*

⁸ 12 U.S.C. s. 2601, *et. seq.*

⁹ Under TILA, a “residential mortgage loan” means, with some exceptions, any consumer credit transaction secured by a mortgage, deed of trust, or other equivalent consensual security interest on “a dwelling or on residential real property that includes a dwelling.” TILA section 103(v) defines “dwelling” to mean a residential structure or mobile home, which contains one- to four-family housing units, or individual units of condominiums or cooperatives. Thus, a “residential mortgage loan” is a dwelling-secured consumer credit transaction, regardless of whether the consumer credit transaction involves a home purchase, refinancing, home equity loan, first lien or subordinate lien, and regardless of whether the dwelling is a principal residence, second home, vacation home (other than a timeshare residence), a one- to four-unit residence, condominium, cooperative, mobile home, or manufactured home.

¹⁰ 24 C.F.R. Part 1026.

¹¹ 24 C.F.R. s. 1026.2(a)(12).

credit to finance is primarily for business¹² or commercial purposes (as opposed to a consumer purpose), the following general factors are considered:¹³

- The relationship of the borrower's primary occupation to the acquisition. The more closely related, the more likely it is to be business purpose.
- The degree to which the borrower will personally manage the acquisition. The more personal involvement there is, the more likely it is to be business purpose.
- The ratio of income from the acquisition to the total income of the borrower. The higher the ratio, the more likely it is to be business purpose.
- The size of the transaction. The larger the transaction, the more likely it is to be business purpose.
- The borrower's statement of purpose for the loan.

RESPA applies generally to “federally related mortgage loans,” which means loans (other than temporary financing such as construction loans) secured by a lien on residential real property designed principally for occupancy by one to four families and that are: (1) made by a lender with Federal deposit insurance; (2) made, insured, guaranteed, supplemented, or assisted in any way by any officer or agency of the Federal government; (3) intended to be sold to Fannie Mae, Ginnie Mae, or (directly or through an intervening purchaser) Freddie Mac; or (4) made by a “creditor,” as defined under TILA, that makes or invests in real estate loans aggregating more than \$1 million per year, other than a State agency. RESPA does not apply to credit for business, commercial, or agricultural purposes or to credit extended to government agencies. Thus, RESPA disclosures essentially are required for consumer-purpose loans that have some Federal nexus (or are made by a TILA creditor with sufficient volume) and that are secured by real property improved by single-family housing.¹⁴

The Dodd-Frank Act mandated that the CFPB establish an integrated disclosure form for use by lenders and creditors to comply with the disclosure requirements of RESPA and the TILA,¹⁵ and the CFPB issued final rules in 2015.¹⁶ 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.¹⁷

¹² Credit extended to acquire, improve, or maintain rental property (regardless of the number of housing units) that is not owner-occupied is deemed to be for business purposes. This includes, for example, the acquisition of a warehouse that will be leased or a single-family house that will be rented to another person to live in. If the owner expects to occupy the property for more than 14 days during the coming year, the property cannot be considered non-owner-occupied and this special rule will not apply. For example, a beach house that the owner will occupy for a month in the coming summer and rent out the rest of the year is owner occupied and is not governed by this special rule. (Official Interpretation Supplement I for 24 C.F.R. s. 1026.2(a)(12). available at <https://www.consumerfinance.gov/eregulations/1026-Subpart-A-Interp/2013-07066#1026-2-a-25-Interp-3> (last viewed Mar. 22, 2017).

¹³ Id.

¹⁴ 12 U.S.C. 2606(a). 24 C.F.R. s. 1024.5(b).

¹⁵ 12 U.S.C. 5532(f), 2603; 15 U.S.C. 1604(b).

¹⁶ 78 Fed Reg 79730.

¹⁷ 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)

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.¹⁸ 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.¹⁹

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.²⁰

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.²¹ “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.²² A mortgage lender-servicing license is required for any mortgage lender licensee who services a mortgage loan. The term, “servicing a mortgage loan”

¹⁸ Ch. 2009-241, Laws of Fla.

¹⁹ Section 494.001(17), F.S.

²⁰ Section 494.001(22), F.S.

²¹ Section 494.001(23), F.S.

²² See Section 494.001(20), F.S.

means to receive, cause to be received, or transferred for another, installment payments of principal, interest, or other payments pursuant to a mortgage loan.²³

The following persons are exempt from regulation as mortgage lenders under part III of this chapter:²⁴

- 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.²⁵ 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.²⁶

Licensure Requirements of Other States

Based on a survey conducted by the OFR, three out of 14 states that responded indicated that they do not require that a residential loan, for purposes of a mortgage loan be used primarily for personal, family, or household purposes.²⁷

III. Effect of Proposed Changes:

Section 1 amends the definition of the term, “mortgage loan” 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. As a result, borrowers obtaining residential loans for business purposes would have the same consumer protections currently provided under Florida’s laws for borrowers obtaining residential loans primarily for personal, family, or household purposes. This will assist consumers in understanding the costs, benefits, and risks associated with the product or service.

²³ See Section 494.001(35), F.S.

²⁴ Section 494.00115, F.S.

²⁵ Section 494.0012, F.S.

²⁶ Section 494.00255(1)(m), F.S.

²⁷ OFR Correspondence (Mar. 20, 2017) (on file with the Senate Committee on Banking and Insurance).

Section 2 requires the OFR to define by rule what it means to “hold himself or herself out to the public as being in the mortgage lending business.”

Section 3 provides the act takes 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 state law since ch. 494, F.S., requires compliance with RESPA and TILA. All residential loans regardless of personal or business purpose would be subject to the provisions ch. 494, F.S.

Persons engaged in making such mortgage loans for business purposes would be subject to OFR licensure and regulation as a mortgage lender, unless they meet an exemption under the chapter. The application fee for a lender is \$750, and the renewal fee is \$575.

C. Government Sector Impact:

Indeterminate at this time. However, 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 is outside of the OFR jurisdiction.²⁸

²⁸ OFR Mortgage Lender Referrals (Nov. 3, 2016) (on file with Senate Banking and Insurance Committee).

VI. Technical Deficiencies:

The Financial Services Commission is required to adopt rules defining the term, “holding himself or herself out to the public as being in the mortgage lending business.” However, the bill does not provide guidelines for defining this term and delegates this responsibility to the OFR.

VII. Related Issues:

None.

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 Changes:**

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

None.

B. Amendments:

None.