

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 Commerce and Tourism

BILL: SB 894

INTRODUCER: Senator Garcia

SUBJECT: Mortgage Lending

DATE: February 5, 2018

REVISED: _____

	ANALYST	STAFF DIRECTOR	REFERENCE	ACTION
1.	<u>Johnson</u>	<u>Knudson</u>	<u>BI</u>	Favorable
2.	<u>Little</u>	<u>McKay</u>	<u>CM</u>	Pre-meeting
3.	_____	_____	<u>RC</u>	_____

I. Summary:

SB 894 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 such loans may 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 currently exists under two licensing exemption provisions.

Under ch. 494, F.S., conditions requiring licensure by the OFR include whether a person takes part in making a mortgage loan primarily for personal, family, or household use. Under current law, 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 federal Financial Crimes Enforcement Network (FinCEN)¹ recently announced the renewal of an existing Geographic Targeting Order (GTO) in 2017. This GTO temporarily extends the

¹ Financial Crimes Enforcement Network, a bureau of the U.S. Department of Treasury, serves as the nation’s financial intelligence unit, and is charged with safeguarding the U.S. financial system from the abuses of money laundering, terrorist financing, and other financial crime. FinCEN administers the federal Bank Secrecy Act. FinCEN analyzes and shares

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.² 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.

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. These groups also claimed that some of these unscrupulous lenders would not make the “residential loan” unless the borrower formed a limited liability company.³ In another example described by the private lenders and 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.

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” (SAFE Act). 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 the SAFE Act, states are required to participate in a national licensing registry, the Nationwide Mortgage Licensing System and Registry (registry), which contains employment

financial intelligence with law enforcement and regulatory agencies. In addition, FinCEN works with the financial industry to deter, detect, investigate, and prosecute money laundering, terrorist financing, and other crimes.

² 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 Feb. 5, 2018).

³ Latin Builders Association, Letter to Governor Rick Scott (Dec. 19, 2013) (on file with the Senate Committee on Banking and Insurance.).

⁴ Pub. L. No. 110-289.

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 The 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 RESPA 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.”⁹ Therefore, TILA and RESPA do not cover “business purpose” mortgage loans but rather only “consumer purpose” mortgage loans. When determining whether credit is for a consumer purpose, 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; and
- 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,¹⁰ and the CFPB issued final rules in 2015.¹¹ The integrated rule applies to most closed-end consumer mortgages secured by real property. 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 specify whether loans for business purposes or for investment properties are exempt from the rule.

⁵ NLMS Resource Center, available at <http://mortgage.nationwidelicencingsystem.org/about/Pages/default.aspx> (last viewed Feb. 5, 2018).

⁶ Pub. L. No. 111-203.

⁷ 15 U.S.C. 1601, *et. seq.*

⁸ 15 U.S.C. 2601, *et. seq.*

⁹ 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 Feb. 5, 2018).

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

¹¹ 78 Fed Reg 79730.

However, the guide does provide that creditors are not prohibited from using the integrated disclosure forms on loans that are not covered by the rule.¹²

State Regulation of Mortgage Loans

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 the SAFE Act, which increased licensure requirements and required licensure through the registry.¹³

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 TILA,¹⁴ 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

An individual who acts as a loan originator must obtain a loan originator license.¹⁵ A “loan originator” means 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.¹⁶

The term “loan originator” includes an individual who is required to be licensed as a loan originator under the SAFE Act. 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.¹⁷

¹² See CFPB, *Small Entity Compliance Guide*, available at http://s3.amazonaws.com/files.consumerfinance.gov/f/documents/kbyo_smallentitycomplianceguide_v4_10072016.pdf (last viewed Feb. 5, 2018).

¹³ Chapter 2009-241, Laws of Fla.

¹⁴ The term “dwelling” means a residential structure or mobile home which contains one to four family housing units, or individual units of condominiums or cooperatives. Current law inadvertently references the definition of “material disclosure” under s. 103(v), rather than the term “dwelling,” which is defined under s. 103(w). See 15 U.S.C. 1602.

¹⁵ Section 494.00312, F.S.

¹⁶ Section 494.001(17), F.S.

¹⁷ *Id.*

A “mortgage broker” means a person conducting loan originator activities through one or more licensed loan originators employed by the mortgage broker or as an independent contractor to the mortgage broker¹⁸ and such persons are required to be licensed as mortgage brokers.¹⁹

A “mortgage lender” means any person making a mortgage loan for compensation or gain, directly or indirectly, or selling or offering to sell a mortgage loan to a noninstitutional investor,²⁰ and such persons are required to be licensed as mortgage lenders.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

The following persons are exempt from regulation as a mortgage lender under part III of ch. 494, F.S.:

- 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; and
- 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.²³

The OFR’s Examination Authority, Administrative Penalties, and Fines

The OFR may conduct investigations, examinations, and investigate complaints.²⁴ The OFR may take disciplinary action against a person licensed or subject to licensure under parts 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.²⁵

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 was unable to take disciplinary action on 15 other cases because the residential loans were determined to be for business purposes, which is currently outside of the jurisdiction of the OFR.²⁶

¹⁸ Section 494.001(22), F.S.

¹⁹ Section 494.00321, F.S.

²⁰ Section 494.001(23), F.S.

²¹ Section 494.00611, F.S.

²² Section 494.001(20), F.S.

²³ Section 494.00115(2), F.S.

²⁴ Section 494.0012, F.S.

²⁵ See s. 494.00255, F.S.

²⁶ OFR Mortgage Lender Referrals (Nov. 3, 2016) (on file with Senate Banking and Insurance Committee).

III. Effect of Proposed Changes:

Section 1 amends the definition of the term, “mortgage loan” in s. 494.001(24), F.S., by removing the requirement that residential loans be used primarily for personal, family, or household purposes. As a result, the bill allows residential loans made for a business purpose to fall under the definition of a “mortgage loan” and to be subject to regulation by the OFR. The bill may require persons originating, brokering, or lending such loans to obtain licensure under ch. 494, F.S., unless they fall within an exemption under s. 494.00115, F.S.

The bill also makes a technical change to correct a reference to the definition of “dwelling” in s. 103(w) of the federal TILA.

Section 2 amends s. 494.00115, F.S., to define a term currently used under two mortgage lender licensing exemption provisions. The bill defines “hold himself or herself out to the public as being in the mortgage lending business” as 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; or
- 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.

The exemptions from mortgage lender licensure affected by this section are those for:

- An individual making or acquiring a mortgage loan using his or her own funds for his or her own investment, and who does 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.²⁷

Section 3 provides the effective date of January 1, 2019.

IV. Constitutional Issues:

A. Municipality/County Mandates Restrictions:

None.

²⁷ See s. 494.00115(2)(e) and (f), F.S.

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:

The bill affords borrowers obtaining residential mortgage loans for any purpose (not primarily for personal, family, or household use) greater consumer protections under ch. 494, F.S., which also requires compliance with RESPA and TILA.

According to the OFR, the bill will require an indeterminate number of businesses and individuals to become licensed as mortgage lenders, mortgage brokers, and loan originators. The total number of entities operating in the state of Florida in this manner is unknown; however, the OFR has received information suggesting that approximately 24 entities currently make mortgage loans for business purposes.²⁸

²⁸ Office of Financial Regulation, *Analysis of SB 894* (Dec. 17, 2017) (on file with Senate Banking and Insurance Committee).

C. Government Sector Impact:

The OFR has indicated that two additional FTEs²⁹ may be needed to perform licensing and regulatory functions, since additional persons will be required to be licensed and examined.³⁰

	<u>Year 1</u>		<u>Year 2</u>		<u>Year 3</u>	
Salaries & Benefits:	Recurring	Non-Recurring	Recurring	Non-Recurring	Recurring	Non-Recurring
Financial Specialist (Registrations)	\$46,681.50	\$0.00	\$62,242.00	\$0.00	\$62,242.00	\$0.00
Financial Specialist (Enforcement)	\$46,681.50	\$0.00	\$62,242.00	\$0.00	\$62,242.00	\$0.00
	<u>\$93,363.00</u>	<u>\$0.00</u>	<u>\$124,484.00</u>	<u>\$0.00</u>	<u>\$124,484.00</u>	<u>\$0.00</u>
Expenses:	Recurring	Non-Recurring	Recurring	Non-Recurring	Recurring	Non-Recurring
Financial Specialist (Registrations)	\$1,350.00	\$0.00	\$1,800.00	\$0.00	\$1,800.00	\$0.00
Financial Specialist (Enforcement)	\$1,350.00	\$0.00	\$1,800.00	\$0.00	\$1,800.00	\$0.00
	<u>\$2,700.00</u>	<u>\$0.00</u>	<u>\$3,600.00</u>	<u>\$0.00</u>	<u>\$3,600.00</u>	<u>\$0.00</u>
OCO:	Recurring	Non-Recurring	Recurring	Non-Recurring	Recurring	Non-Recurring
Financial Specialist (Registrations)	\$0.00	\$0.00	\$0.00	\$0.00	\$0.00	\$0.00
Financial Specialist (Enforcement)	\$0.00	\$1,500.00	\$0.00	\$0.00	\$0.00	\$0.00
	<u>\$0.00</u>	<u>\$1,500.00</u>	<u>\$0.00</u>	<u>\$0.00</u>	<u>\$0.00</u>	<u>\$0.00</u>
	<u>\$97,563.50</u>	<u>\$1,500.00</u>	<u>\$128,084.00</u>	<u>\$0.00</u>	<u>\$128,084.00</u>	<u>\$0.00</u>

VI. Technical Deficiencies:

Section 2 of the bill amending s. 494.00115, F.S., relating to exemptions from licensure (lines 38 – 41), provides that anyone “soliciting in a manner that would lead the intended audience to reasonably believe that such individual is in the business of performing activities described in s. 494.001(23).” According to the OFR, this paragraph appears very broad, leaving uncertain who it encompasses, which will likely create confusion for impacted businesses, individuals, and the OFR. Paragraphs (a), (c), and (d) provide more definitive guidance as to the exact activities

²⁹ *Id.*

³⁰ Office of Financial Regulation correspondence (Jan. 2018) (on file with Senate Committee on Banking and Insurance Committee).

or circumstances by which a business or individual is included in the definition. The OFR suggests that paragraph (b) should be clarified or removed in its entirety.

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 might not necessarily be required to provide the disclosures required under RESPA and TILA when a 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 Changes:**
(Summarizing differences between the Committee Substitute and the prior version of the bill.)

None.

- B. **Amendments:**

None.