

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 1632

INTRODUCER: Senator Taddeo

SUBJECT: Mortgage Lending

DATE: March 29, 2019

REVISED: _____

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

I. Summary:

SB 1632 amends the definition of “mortgage loan” such that a residential mortgage loan made for a business purpose will be included in the definition of a “mortgage loan.” Persons originating, brokering, or lending such loans will be subject to licensure and regulation by the Office of Financial Regulation (OFR), unless they are otherwise exempt. Pursuant to ch. 494, F.S., conditions currently 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.

In recent years, private lenders and representatives of a South Florida 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.

Consumers who obtain a residential mortgage loan, regardless of the loan’s purpose, will have to use the services of a licensed loan originator, mortgage broker, or mortgage lender. To the extent that such licensed mortgage professionals comply with TILA and RESPA mortgage disclosures as a matter of course, even on business purpose mortgage loans, the consumer is afforded more protection in the form of disclosures regarding the terms and costs of the mortgage loan.

The bill has an indeterminate positive impact on state revenues since an unknown number of additional persons would be subject to licensure and licensure fees by the OFR. The fiscal impact of the additional licensees is indeterminate at this time.

The bill provides an effective date of July 1, 2019.

II. Present Situation:

Shadow Real Estate Transactions

In 2017, the federal Financial Crimes Enforcement Network (FinCEN)¹ announced the renewal of an existing Geographic Targeting Order (GTO) that requires covered businesses to collect and report information about certain residential real estate transactions. The GTOs are one of the tools that FinCEN uses to combat money laundering. 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.² The 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. 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.⁴

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.⁵ Title V of this act is titled the “Secure and Fair Enforcement for Mortgage Licensing Act of

¹ Financial Crimes Enforcement Network (FinCEN), 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 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. See <https://www.fincen.gov/> (last viewed Mar. 13, 2019).

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 Mar. 5, 2019).

³ Latin Builders Association, Letter to Governor Rick Scott (May 4, 2017) (on file with the Senate Committee on Banking and Insurance.).

⁴ Latin Builders Association, Resolution Urging the Florida Legislature to Revise Section 494.001, F.S. (June. 13, 2016) (on file with Senate Committee on Banking and Insurance).

⁵ Pub. L. No. 110-289.

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 history as well as disciplinary and enforcement actions against loan originators. Applicants are subject to licensure by the state regulator.⁶

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.⁷ 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)⁸ and the Real Estate Settlement Procedures Act (RESPA).⁹ 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;”¹⁰ and regulate “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.

⁶ NLMS Resource Center, available at <http://mortgage.nationwidelicensingsystem.org/about/Pages/default.aspx> (last viewed Feb. 5, 2018).

⁷ Pub. L. No. 111-203.

⁸ 15 U.S.C. s. 1601, *et. seq.*

⁹ 15 U.S.C. s. 2601, *et. seq.*

¹⁰ Consumer Financial Protection Bureau (CFPB), *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. 5, 2019). The CFB believed that most loans that fall into this category are separately exempt under a provision excluding extensions of credit primarily for business, commercial, or agricultural purposes, set forth in s.1024.5(b)(2).

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 CFPB issued final rules in 2015.¹² 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. 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.¹³

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.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 TILA,¹⁵ 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.¹⁶ 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.¹⁷

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

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. 5, 2019).

¹⁴ Ch. 2009-241, L.O.F.

¹⁵ 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.

¹⁶ Section 494.00312, F.S.

¹⁷ Section 494.001(17), F.S.

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.¹⁸

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 broker¹⁹ and such persons are required to be licensed as mortgage brokers.²⁰

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,²¹ and such persons are required to be licensed as mortgage lenders.²² “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.²³

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.²⁴

The OFR’s Enforcement Authority

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 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.²⁶ 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

¹⁸ *Id.*

¹⁹ Section 494.001(22), F.S.

²⁰ Section 494.00321, F.S.

²¹ Section 494.001(23), F.S.

²² Section 494.00611, F.S.

²³ Section 494.001(20), F.S.

²⁴ Section 494.00115(2), F.S.

²⁵ Section 494.0012, F.S.

²⁶ *See* s. 494.00255, F.S.

disclosures required under RESPA and TILA if the residential mortgage loan is made for a business purpose.

In recent years, the OFR has closed cases involving 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 are currently outside of the jurisdiction of the OFR.²⁷ Since March 2018, the OFR has received four additional complaints, and the investigation of the complaints is ongoing.²⁸

2019 Business Purpose Loan Law

In 2018, legislation²⁹ was enacted that revises provisions of ch. 494, F.S., to provide greater consumer protections. The act defines the term “business purpose loan” and prohibits any person from directly or indirectly misrepresenting a residential mortgage loan as a business purpose loan in any practice or transaction or course of business relating to the sale, purchase, negotiation, promotion, advertisement, or hypothecation (pledging collateral without delivery of title or possession) of mortgage loan transactions. A business purpose loan is a mortgage loan, the proceeds of which the borrower intends to use primarily for a business purpose and not primarily for a personal, family, or household purpose. In determining if the loan is for a business purpose, a person must refer to the official interpretation by the Consumer Financial Protection Bureau of 12 C.F.R. s. 1026.3(a). A violation of this prohibition is punishable as a third-degree felony or as a first-degree felony if the total value of money and property unlawfully obtained exceeds \$50,000 and there are five or more victims.

Two current exemptions in ch. 494, F.S., allow 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, so long as the individual does not “hold himself or herself out to the public as being in the mortgage lending business.” The act provides a definition for the phrase “hold himself or herself out to the public as being in the mortgage lending business.” The act provides that it is unlawful for any person to misrepresent a residential mortgage loan as a business purpose loan, and defines the term, “business purpose loan.”

III. Effect of Proposed Changes:

Section 1 amends s. 494.001, F.S., to revise the definition of “mortgage loan” by removing the requirement that a residential mortgage loan be used primarily for personal, family, or household purposes. As a result, a residential mortgage loan made for a business purpose will fall under the definition of a “mortgage loan.” Persons originating, brokering, or lending for such loans will be subject to licensure by the OFR, unless otherwise exempt under s. 494.00115, F.S.

Section 2 provides the bill takes effect July 1, 2019.

²⁷ OFR *Analysis of SB 1632* (Mar. 27, 2019) (on file with Senate Banking and Insurance Committee).

²⁸ OFR correspondence (Mar. 28, 2019) (on file with Senate Banking and Insurance Committee).

²⁹ Ch. 2018-61, L.O.F. The act is effective July 1, 2019.

IV. Constitutional Issues:

A. Municipality/County Mandates Restrictions:

None.

B. Public Records/Open Meetings Issues:

None.

C. Trust Funds Restrictions:

None.

D. State Tax or Fee Increases:

None.

E. Other Constitutional Issues:

None.

V. Fiscal Impact Statement:

A. Tax/Fee Issues:

Upon implementation of the bill, individuals subject to licensure under the bill as a loan originator would incur an initial licensure fee of \$300.25, and an annual renewal fee of \$237.25. Companies engaging in these transactions would also be subject to an initial licensure fee of \$578.50 and a renewal fee of \$490.³⁰ However, the number of additional individuals and businesses who would be subject to regulation and licensure fees is indeterminate at this time.

B. Private Sector Impact:

Consumers who obtain a residential mortgage loan, regardless of the loan's purpose, will have to use the services of a licensed loan originator, mortgage broker, or mortgage lender. To the extent that such licensed mortgage professionals comply with TILA and RESPA mortgage disclosures as a matter of course, even on business purpose mortgage loans, the consumer is afforded more protection in the form of disclosures regarding the terms and costs of the mortgage loan.

Any person who is currently making a residential mortgage loan for a business purpose, and is not licensed, will be subject to licensure under ch. 494, F.S., in order to continue such activity. However, the fiscal impact to the private sector is indeterminate at this time.

³⁰ OFR Correspondence (March. 28, 2019) (on file with Senate Banking and Insurance Company).

C. Government Sector Impact:

The bill may have an indeterminate positive impact on revenue to the state due to additional persons being subject to licensure and licensure fees by the OFR. At this time, the OFR is unable to determine how many additional persons would be required to be licensed as result of the implementation of this bill, and consequently cannot project the amount of staff needed to process the increase in license applications or conduct examinations. The OFR can initially absorb the added workload through the hiring of OPS staff. However, the OFR may need additional staff later to handle the increased number of licensed persons.³¹

VI. Technical Deficiencies:

None.

VII. Related Issues:

On June 26, 2017, Governor Scott vetoed a similar bill that revised the definition of the term, “mortgage loan,” as provided in SB 1632. In his veto letter, Governor Scott provided the following concerns:

“...it expands the regulatory environment on residential mortgages and adds overly prescriptive regulations pertaining to mortgage lending. These requirements would make Florida one of the most restrictive states in the nation in the residential mortgage lending area. In certain circumstances, this could mean a parent or other relative who decides to make a residential mortgage loan to a child or another loved one would be required to be licensed with the Florida Office of Financial Regulation. This concerns me and seems overly burdensome on Florida families.”³²

Implementation Issues³³

The current definition of a “mortgage loan” is consistent with the definitions used in the Federal Truth in Lending Act and the Real Estate Settlement Procedures Act. Implementation of the bill will result in inconsistent definition of the term, “mortgage loan,” at the state and federal level.

The bill provides an effective date of July 1, 2019; however, the current annual licensure is period is effective for a 12-month calendar year. An effective date of January 1, 2020 for the bill would allow additional time for individuals and businesses subject to regulation under the bill to comply with regulatory requirements, such as, undergoing a criminal background check, authorizing the release of a credit report, and meeting pre-licensure education and testing prerequisites.³⁴

³¹ OFR, *Analysis of SB 1632* (Mar. 27, 2019) (on file with Senate Banking and Insurance Committee).

³² Correspondence from Governor Rick Scott to Ken Detzner, Secretary of State, Veto Message CS/CS/HB 747, June 6, 2017, (on file with Senate Committee on Banking and Insurance).

³³ OFR, see fn. 31.

³⁴ Nationwide Multistate Licensing System Resource Center, *State Licensing*, available at <https://mortgage.nationwidelicensingsystem.org/slr/Pages/default.aspx> (last viewed Mar. 20, 2019).

VIII. Statutes Affected:

This bill substantially amends section 494.001 of the Florida Statutes.

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.

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