



The Florida Senate

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Committee on Banking and Insurance

IMPACT OF FEDERAL LEGISLATION ON MORTGAGE BROKERAGE AND LENDING LAWS IN FLORIDA

Statement of the Issue

The tremendous growth in subprime mortgages in recent years has enabled many consumers to obtain home loans who previously would have had much more limited access or no access to the credit market due to low credit ratings. However, with this increase in residential mortgage lending, there has also been an increase in reports of abusive lending practices and fraud. According to some sources, Florida leads the nation in residential mortgage foreclosures and mortgage fraud.¹

In response to the turmoil in the housing market, the federal Housing and Economic Recovery Act was enacted on July 30, 2008.² Title V of this act is entitled, "The Secure and Fair Enforcement for Mortgage Licensing Act of 2008" (S.A.F.E.). The intent of S.A.F.E. is to provide greater accountability and regulation of loan originators (mortgage brokers and lenders) and enhance consumer protections by establishing minimum licensure and registration requirements for loan originators and a national database for consumers to inquire about the credentials and disciplinary history of their brokers and lenders.

Generally, if Florida does not enact minimum regulatory standards that comply with S.A.F.E. and participate in the national registry system within 12 months after the enactment of this act, the U.S. Department of Housing and Urban Development is required to enforce the minimum standards for loan originators operating in Florida as state-licensed loan originators. This issue brief summarizes key provisions of the federal law and differences with the Florida law that would be necessary to address in order to comport with the federal act. The issue brief also provides other legislative options for increasing consumer protections.

Discussion

In Florida, the Office of Financial Regulation (OFR) is responsible for regulating mortgage brokers and lenders and other specified financial entities.³ Generally, mortgage brokers and lenders must comply with federal laws as well as state laws regulating the industry, unless they are exempted under state law or preempted under federal law. State and federally chartered financial institutions and other entities are exempt from licensure as a mortgage broker and as a mortgage lender under ch. 494 F.S. Florida requires licensure of individual mortgage brokers, mortgage broker businesses, mortgage broker schools, and mortgage lender (nondepository) businesses.

The federal act, in contrast, establishes regulatory requirements for individuals, rather than businesses, licensed or registered as mortgage brokers and lenders, collectively known as loan originators. The federal act generally defines the term, "loan originator," to mean an individual who takes loan applications and offers or negotiates terms of a loan for compensation. These activities would include advising on loan terms, preparing loan packages, and collecting information on behalf of a consumer. S.A.F.E. makes a distinction for the regulation of loan originators based on whether or not they are employees of a financial institution or its subsidiaries. Loan originators that are not employees

¹ 2008 Mortgage Asset Research Institute, LLC.

² H.R. 3221, Public Law 110-289.

³ The OFR is organized under the Financial Services Commission. The commission is composed of the Governor and Cabinet. [Section 20.121(3), F.S.]

of a financial institution or its subsidiaries, that is, mortgage brokers or nondepository mortgage lenders, are subject to the minimum state licensure requirements of S.A.F.E. and registration with the national registry as a “state-licensed loan originator.” A loan originator that is an employee of a financial institution or its subsidiary, that is, a loan officer or lender, is subject to certain S.A.F.E. provisions and registration requirements by the primary federal regulator as a “registered loan originator.”

Under S.A.F.E., an applicant must meet the following minimum standards for licensure as a state-licensed loan originator:

- Require state licensure and annual renewal of mortgage brokers and all employees of nondepository lenders;
- Provide fingerprints to the regulator for submission to the FBI and any governmental entity authorized for a state and national criminal history background check;
- Allow the regulator to obtain a credit report from a consumer reporting agency;
- Have never had a license as a loan originator revoked;
- Have no felony convictions during the 7-year period preceding the date of the application (or at any time preceding such date of application, if such felony involved an act of fraud, dishonesty, or a breach of trust, or money laundering);
- Meet pre-licensing and annual continuing education requirements;
- Pass the prescribed pre-licensing written test, administered by an approved provider;
- Meet either a net worth or surety bond requirement, or pay into a state fund, as required by a particular state; and
- Continue to meet minimum standards after the issuance of the initial license.

A comparison of the current Florida statutory requirements of an applicant for a mortgage broker license and the federal act indicates the following key differences:

- Authorizes, but does not require, the OFR to deny a license if the applicant has had his or her license revoked by a licensing agency in any state for the following acts: fraud, dishonest dealing, or any other act of moral turpitude.⁴
- Authorizes, but does not require, the OFR to deny a license if the applicant has committed any violation specified in ss. 494.001-494.0077, F.S. (includes fraud, dishonest dealing, embezzlement, misrepresentation, an act of moral turpitude). The OFR may place an applicant or licensee on probation for such violations. As an alternative, the OFR may impose revocation or suspension of a license for such violations;⁵
- Requires submission of fingerprints to the OFR for processing by the state and the Federal Bureau of Investigation at the time of the initial application rather than annually;⁶
- Does not authorize the OFR to obtain access to or use an applicant’s or licensee’s credit report as a basis for initial licensure or renewal;
- Requires an applicant to complete a 24 hour pre-licensing course and pass a written test prior to licensure and obtain 14 hours of continuing education every 2 years, rather than completing a 20-hour pre-licensing course and a pre-licensure test and obtaining eight hours of continuing education per year;⁷
- Authorizes, but does not require the OFR to revoke a license if a licensee is found guilty of a felony that involved an act of fraud, dishonest dealings, or any other act of moral turpitude;
- Does not require an individual applicant to meet any net worth, bonding, or guaranty fund requirements; and
- Provides additional consumer protections by requiring the licensure of mortgage broker businesses and mortgage broker schools.

A comparison of the current Florida statutory requirements for the licensure of a mortgage lender (a nondepository business engaged in lending) and the federal act indicates the following major differences:

⁴ Sections 494.0033(4) and 494.0041(2)(i), F.S.

⁵ Sections 494.0033(4), 494.0041(2)(q), and 494.0041(2) (t), F.S.

⁶ Section 494.033(2)(d), F.S.

⁷ Sections 494.0033(2)(b) and 494.00295, F.S.

- Authorizes, but does not require, the OFR to deny a license if the applicant has had his or her license revoked by a licensing agency in any state for the following three acts: fraud, dishonest dealing, or any other act of moral turpitude;⁸
- Authorizes, but does not require, the OFR to deny a license if the applicant has committed any violation specified in s. 494.0072, F.S. (includes fraud, dishonest dealing, embezzlement, misrepresentation, an act of moral turpitude). The OFR is authorized to place an applicant or licensee on probation for such violations. As an alternative, the OFR may impose revocation or suspension of a license for such violations;⁹
- Requires submission of fingerprints of the personal representative to the OFR for processing by the state and the Federal Bureau of Investigation at the time of the initial application rather than on an annual basis;¹⁰
- Does not authorize the OFR to obtain or use an applicant's or licensee's credit report as a basis for licensure or renewal;
- Requires the principal representative, with some exceptions, to complete a 24 hours pre-licensing course and pass a test prior to licensure, rather than completing a 20-hour pre-licensing education course and passing a test;¹¹
- Requires the personal representative to complete 14 hours of continuing education every 2 years rather than 8 hours annually;
- Authorizes, but does not require, the OFR to revoke a license if a licensee is found guilty of a felony that involved an act of fraud, dishonest dealings, or any other act of moral turpitude;
- Requires a mortgage lender business to meet a \$250,000 net worth requirement and provide a surety bond for \$10,000 rather than meet individual net worth or surety bond requirements; and
- Requires licensure of the mortgage lender business only, rather than all employees of the lender.

S.A.F.E. also requires states to participate in a national mortgage licensing system and registry. The national mortgage licensing and registration system, which would also be accessible to consumers, would provide employment history and disciplinary and enforcement actions against loan originators. The OFR may incur significant nonrecurring and annual costs associated with implementing and administering the provisions of S.A.F.E.

Legislative Options to Increase Consumer Protections

In addition to addressing statutory changes necessary to comply with the federal act, the Legislature may want to consider additional changes to strengthen and clarify the regulatory and enforcement authority of the OFR and provide additional consumer protections. For example, a recent report issued by the Governor and Cabinet, which evaluated the mortgage brokerage regulatory structure of the OFR, concluded that the fines associated with statutory violations may be inadequate to deter fraudulent activity.¹² This concern could be addressed by requiring the Financial Services Commission to adopt rules to establish disciplinary guidelines and administrative fines for violations of ch. 494, F.S., which would impose significant fines for such fraudulent activities.

Currently, states use a surety bond, net worth requirements, or a guaranty fund (or combination thereof) to provide some level of compensation for consumers defrauded by mortgage brokers and lenders. Currently, Florida requires licensed mortgage lenders to maintain a \$250,000 net worth and a \$10,000 surety bond. However, there is no net worth or surety bond requirement for an individual mortgage broker or mortgage broker business.

Prior to 1992, Florida had a guaranty fund that compensated consumers who had suffered monetary losses as a result of any violation of ch. 494, F.S., committed by a licensed entity, as adjudged by a court of competent jurisdiction in Florida. The law limited the total recovery for all persons defrauded by one business to \$100,000 and \$20,000 per claimant. Revenues derived from mortgage broker and lender license and renewal fees were used to fund the payment of claims. However, the funding mechanism did not adequately or timely fund all approved claims, which resulted in

⁸ Sections 494.0061(3) and 494.0072(2)(i), F.S.

⁹ Sections 494.0061(3), 494.0072(2)(a) and 494.0072(2) F.S.

¹⁰ Section 494.061(2)(g), F.S.

¹¹ Section 494.0061(2)(f), F.S.

¹² Chief Inspector General's Office, Executive Office of the Governor, General Case #200807290003, September 15, 2008.

delays in compensating victims. Recovery from the fund took at least 2 years, with 3 to 4 years as the average recovery time. In almost all cases, a claimant retained an attorney and incurred that expense. The Comptroller's Mortgage Brokerage and Mortgage Lending Sunset Review Task Force Report characterized the fund as "...partial and qualified insurance for persons dealing with licensed mortgage brokers." The task force concluded "...that it is not the proper role of government to insure private investments in mortgages."¹³ In 1991, the Legislature abolished the fund.

Senate professional staff conducted a limited review of the bonding, net worth, or guaranty fund requirements in other states and noted that the majority of the states have net worth and bonding requirements. A few states, such as Oklahoma, Texas, and Utah were noted as having a guaranty fund. Based on preliminary research, most states require a surety bond or fidelity bond for mortgage brokers, ranging from about \$10,000 to \$500,000. The federal S.A.F.E. requires loan originators, which includes mortgage brokers and lenders, to meet minimum net worth, surety bond, or applicable guaranty fund requirements.

The federal act does not require or establish minimum licensure requirements for mortgage broker businesses, mortgage broker schools, and nondepository, mortgage lenders. Since the OFR also regulates these entities, it is considering legislative options to increase accountability and consumer protections for these entities.

¹³ Department of Banking and Finance, December 1990. This task force was required pursuant to ch. 90-353, L.O.F. The law directed the Comptroller to create a task force to review ch. 494, F.S. and make recommendations to the Legislature.