



## FULL ANALYSIS

### I. SUBSTANTIVE ANALYSIS

#### A. HOUSE PRINCIPLES ANALYSIS:

Protects individual liberty: The bill provides additional enforcement and investigative tools for prosecuting residential mortgage fraud.

#### B. EFFECT OF PROPOSED CHANGES:

According to information provided to staff, mortgage fraud is one of the fastest growing white collar crimes in the U.S. The crime is defined as a material misstatement, misrepresentation, or omissions relied upon by an underwriter or lender to fund, to purchase, or to insure a loan.<sup>1</sup> According to the Federal Bureau of Investigations' (FBI) statistics, the number of reported mortgage fraud cases more than tripled from 6,890 in 2003 to 21,944 in 2005, based on Suspicious Activity Reports that are required to be filed by financial institutions and certain other entities with the Financial Crimes Enforcement Network of the U.S. Department of the Treasury.

The extent or dollar amount of this type of fraud is unknown. However, the dollar amount potentially exposed to mortgage fraud, according to the Mortgage Bankers' Association, was estimated to have reached \$2.8 trillion in 2004 by the volume of mortgage originations. It is also estimated that up to 10 percent of all residential loan applications have some form of material misrepresentation, both inadvertent and malicious.<sup>2</sup>

There are specific factors that may be attributable to this trend. In recent years, there has been a dramatic growth in the housing market accelerated by low interest rates. This area is vulnerable for exploitation as credit is strong, profits are high, and technology is enhancing criminals' ability to access financial institution data.

Mortgage fraud is divided into two types: fraud for property and fraud for profit. Fraud for property is a misrepresentation made by a borrower or other party in order to qualify for a mortgage loan. The applicant may alter or falsify tax returns or misrepresent income or expenses. Generally, the buyer intends to repay the loan. The FBI estimates that this type of fraud accounts for 20 percent of all the fraud.

Fraud for profit generally involves multiple loan transactions with several financial institutions involved. Parties to these schemes, generally perpetuate a transaction by using fictitious, forged, or altered documents, fraudulently transferring deeds, grossly inflating the value of purchased homes, and submitting fraudulent escrow letters or other documents to mortgage companies. This type of fraud may involve numerous gross misrepresentations regarding the true identity of the buyer or seller, income, assets, collateral, and employment. Various documents relating to title insurance, which confirms the stated owner has title and right to transfer the property, can be altered to change the financial institution lender or omit prior liens. Often, the borrower assumes the identity of another person (straw buyer). The FBI estimates that 80 percent of all mortgage fraud involves collaboration or collusion by industry insiders.

#### Residential Mortgage Fraud in Florida

In recent years, according to information provided to staff, the investigations, arrests, and prosecutions of mortgage cases have dramatically increased. According to the Miami-Dade Police, the number of

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<sup>1</sup> 1 Federal Bureau of Investigations website: <http://www.fbi.gov/page2/dec05/operationquickflip121405.htm>.

<sup>2</sup> The Detection, Investigation, and Deterrence of Mortgage Loan Fraud Involving Third Parties: White Paper, Federal Financial Institutions Examination Council, February 2005.

reported mortgage and real estate fraud cases increased from 16 in 2003 to 78 in 2006. The FBI reported 1,191 cases of real estate and mortgage fraud cases in Miami, thereby ranking Miami fourth highest in the top ten spots for fraud for the quarter ending September 30, 2006. Los Angeles was ranked first with 2,293 reported cases.

An example case occurred in February 2006; the Florida Office of the Statewide Prosecution and the FDLE arrested several persons for allegedly conducting mortgage fraud. The mortgage broker completed the loan applications, which included false credit information of the borrowers. A title company approved the transactions with knowledge of false information being filed. Six persons were charged with participation in an enterprise through a pattern of racketeering activity, racketeer influence and corrupt action (RICO) and conspiracy to commit RICO, under ch. 895, F.S., both of which are first-degree felonies. These types of collaborative activities have resulted in fraud against mortgage lenders exceeding \$3.7 million.

#### Florida Regulation of Mortgage Brokerage and Lender Transactions

The Financial Services Commission (commission) consists of the Governor, the Chief Financial Officer, the Attorney General, and the Commissioner of Agriculture. The commission is an independent entity housed within the Department of Financial Services. The Office of Financial Regulation is one of the entities under commission jurisdiction.

The Office of Financial Regulation (OFR) is responsible for all activities of the commission relating to the regulation of financial institutions, mortgage brokers and lenders, finance companies, securities industries, and money transmitters.<sup>3</sup> Mortgage brokers, lenders, and transactions are regulated by the OFR pursuant to chapter 494, F.S., the Mortgage Brokerage and Lending Act. The OFR also is charged with enforcing the Florida Financial Institutions Code, chs. 655-667, F.S.

Mortgage brokerage businesses, lenders, and brokers must apply to the OFR and meet certain licensing standards before they may offer their services to the public. Monetary fines and civil sanctions can be levied if a person or company is discovered to be operating in Florida without being exempt or properly licensed. These entities are subject to periodic examinations to ensure compliance with the laws.

Section 494.0025, F.S., provides that it is unlawful for any person, engaging in a mortgage transaction, to knowingly or willingly employ any scheme to defraud, obtain property by fraud, willful misrepresentation, and to falsify, conceal or cover up a material fact, make any false or fraudulent statement or representation or make or use any false writing or document.

Section 494.0018, F.S., provides that any person who knowingly violates s. 494.0025, F.S., is guilty of a felony of the third degree. If the value of the land and property exceeds \$50,000 and involves five or more victims, then it is a felony of the first degree.

Section 655.0322(5) and (6), F.S., provides criminal penalties for fraudulent transactions involving land or property for the purpose of obtaining a loan. Any person who makes any false statement or willfully overvalues any land or property for the purpose of influencing a financial institution or any other entity authorized to extend credit is guilty of a felony in the second degree. Additionally, any person who knowingly executes or attempts to execute a scheme to defraud a financial institution or other entity authorized to extend credit by means of false representations or fraudulent representations is guilty of a felony of the second degree.

Section 494.001 Definitions.—As used in ss. 494.001-494.0077, provides in part that the term: “Person” means an individual, partnership, corporation, association, or other group, however organized.

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<sup>3</sup> Section 20.121(3), F.S.

## Prosecution of Residential Mortgage Fraud in Florida

According to information provided to staff, prosecutors in South Florida utilize various criminal provisions to prosecute residential mortgage, including ss. 494.0018, 812.014, 817.03, 817.034(4)(a)(1), 817.54, and ch. 895, F.S.

Section 812.014, F.S., provides in part that:

(1) A person commits theft if he or she knowingly obtains or uses, or endeavors to obtain or to use, the property of another with intent to, either temporarily or permanently:

(a) Deprive the other person of a right to the property or a benefit from the property.

(b) Appropriate the property to his or her use or to the use of any person not entitled to the use of the property.

(2)(a)1. If the property stolen is valued at \$100,000 or more or is a semitrailer that was deployed by a law enforcement officer;

the offender commits grand theft in the first degree, punishable as a felony of the first degree, as provided in s. 775.082, s. 775.083, or s. 775.084. . .

(b)1. If the property stolen is valued at \$20,000 or more, but less than \$100,000;

the offender commits grand theft in the second degree, punishable as a felony of the second degree, as provided in s. 775.082, s. 775.083, or s. 775.084.

Pursuant to s. 817.03, F.S., Making false statement to obtain property or credit.—Any person who shall make or cause to be made any false statement, in writing, relating to his or her financial condition, assets or liabilities, or relating to the financial condition, assets or liabilities of any firm or corporation in which such person has a financial interest, or for whom he or she is acting, with a fraudulent intent of obtaining credit, goods, money or other property, and shall by such false statement obtain credit, goods, money or other property, shall be guilty of a misdemeanor of the first degree, punishable as provided in s. 775.082 or s. 775.083.

Section 817.34, F.S., False entries and statements by investment companies offering stock or security for sale provides that:

Any person who shall knowingly subscribe to or make or cause to be made, any false statements or false entry in any book of any investment company or exhibit any false paper with the intention of deceiving any person authorized to examine into the affairs of any investment company, or shall make, utter or publish any false statement of the financial condition of any investment company, or the stock, bonds or other securities by it offered for sale, shall be guilty of a felony of the third degree, punishable as provided in s. 775.082, s. 775.083, or s. 775.084.

Section 817.54, F.S., Obtaining of mortgage, mortgage note, promissory note, etc., by false representation provides that:

Any person who, with intent to defraud, obtains any mortgage, mortgage note, promissory note or other instrument evidencing a debt from any person or obtains the signature of any person to any mortgage, mortgage note, promissory note or other instrument evidencing a debt by color or aid of fraudulent or false representation or pretenses, or obtains the signature of any person to a mortgage, mortgage note, promissory note, or other instrument evidencing a debt, the false making whereof would be punishable as forgery, shall be guilty of

a felony of the third degree, punishable as provided in s. 775.082, s. 775.083, or s. 775.084.

Chapter 895, F.S., is the Florida RICO (Racketeer Influenced and Corrupt Organization) Act. Racketeering activity means to commit, to conspire to commit, or to solicit another person to commit any crime that is chargeable, as delineated in s. 895.02, F.S. This list includes ch. 812, F.S. relating to theft and ch. 817, F.S., relating to fraudulent practices. Section 895.03, F.S., provides that it is unlawful for any person who with criminal intent receives any proceeds derived from a pattern of racketeering activity. Section 895.04, F.S., provides that any person convicted of engaging in activity that is a violation of s. 895.03, F.S., is guilty of a felony of the first degree.

#### Proposed Changes

Section 1: The bill creates 817.545, F.S.

Legislative findings are provided and, in general, declares the escalation of residential fraud in the United States. Millions of dollars in losses are being experienced by mortgage lending institutions and borrowers. With this growing threat, the bill states that “for the protection of the general public. . . mortgage fraud should be made unlawful and subject to the provisions of chapter 895.” Chapter 895 relates to Offenses Concerning Racketeering and Illegal Debts

For the purposes of this section, the following definitions are provided:

“Mortgage lending process” means the process through which a person seeks or obtains a residential mortgage loan, including, but not limited to, solicitation, application, or origination, negotiation of terms, third-party provider services, underwriting, signing and closing, and funding of the loan. The documents involved in this process include, but are not limited to, uniform residential loan applications or other loan applications, appraisal reports, HUD-1 settlement statements, and specified supporting personal financial documentation for the loan application such as W-2 forms, verifications of income and employment, bank statements, tax returns, and payroll stubs; and any required disclosures.

“Person” means a natural person, corporation, company, limited liability company, partnership, trustee, association, or any other entity.

“Residential mortgage fraud” means one or more misstatements, misrepresentations, or omissions made during a mortgage lending process that involves residential property.

“Residential mortgage loan” means a loan or agreement to extend credit made by a person, which loan is secured by a deed, security deed, mortgage, security interest, deed of trust, or other document representing a security interest or lien upon any interest in one-family to four-family residential property located in this state, including the renewal or refinancing of any such loan.

Subsection (4) of s. 817.545, F.S., provides that: A person commits the offense of residential mortgage fraud if, with the intent to defraud, the person:

- a. Knowingly makes any deliberate misstatement, misrepresentation, or omission during the mortgage lending process with the intention that the misstatement; misrepresentation, or omission will be relied upon by a mortgage lender, borrower, or any other party to the mortgage lending process;
- b. Knowingly uses or facilitates the use of any deliberate misstatement, misrepresentation, or omission knowing the misstatement, misrepresentation, or omission contains misstatement, misrepresentation, or omission, during the mortgage lending process with the intention that the misstatement, misrepresentation, or omission will be relied upon by the a mortgage lender, borrower, or any other party to the mortgage lending process;
- c. Receives any proceeds or another funds in connection with a residential mortgage closing that the person knew resulted in a violation of (a) or (b);

- d. Conspires to violate any of the provisions of (a)-(c); or
- e. Files or causes to be filed with the clerk of the circuit court for any county any document the person knows to contain a deliberate misstatement, misrepresentation, or omission.

These provisions would address potential misrepresentations by various parties to the loan, including the appraiser, title insurers, broker, lender, seller, and borrower. As such: Any person who violates this section commits a felony of the third degree, punishable as provided in s. 775.082, 775.083, or s. 775.084, F.S. Also, an offense of residential mortgage fraud shall not be predicated solely upon information lawfully disclosed under federal disclosure laws, regulations, and interpretations related to the mortgage lending process

Moreover, according to information provided to staff, prosecutors and criminal investigators conveyed that the venue for prosecuting residential mortgage fraud needs to provide greater flexibility for the investigation and prosecution of these types of cases. For example, a property that is the subject of a loan could be located in Dade County; however, the actual closing transaction occurred in Broward County. Yet an awareness of some cities and counties not having the resources to pursue the parties across state and county lines does exist.

For purposes of venue, the bill provides in subsection (5) of s. 817.545 that any violation shall be considered to have been committed:

- (a) In the county in which the residential property for which a mortgage loan is being sought is located;
- (b) In any county in which any act was performed in furtherance of the violation;
- (c) In any county in which any person alleged to have violated this section had control or possession of any proceeds of the violation;
- (d) If a closing occurred, in any county in which the closing occurred; or
- (e) In any county in which a document containing a deliberate misstatement, misrepresentation, or omission is filed with the clerk of the circuit court for such county.

Subsection (6) of s. 817.545, F.S., reads:

- (6)(a) Any person who violates this section commits a felony of the third degree, punishable as provided in s. 110 775.082, s. 775.083, or s. 775.084.
- (b) Any person who engages in a pattern of residential mortgage fraud or a conspiracy or endeavor to engage or participate in a pattern of residential mortgage fraud in violation of this section commits a felony of the second degree, punishable as provided in s. 775.082, s. 775.083, or s. 775.084. For purposes of this paragraph, the term "pattern of residential mortgage fraud" means one or more misstatements, misrepresentations, or omissions made during the mortgage lending process that involve two or more residential properties, which have the same or similar intents, results, accomplices, victims, or methods of commission or otherwise are interrelated by distinguishing characteristics.
- (c) Each residential property transaction subject to a violation of this section shall constitute a separate offense and shall not be combined with any other offense.

This subsection is similar to the current criminal violation provided in s. 494.0025, F.S., which provides that it is unlawful for any person, engaging in a mortgage transaction, to knowingly or willingly employ any scheme to defraud, obtain property by fraud, willful misrepresentation, and to falsify, conceal or cover up a material fact, make any false or fraudulent statement or representation or make or use any

false writing or document and any person who knowingly violates s. 494.0018, F.S., is guilty of a felony of the third degree. Ch. 494, F.S., also provides for penalty, if the value of the land and property exceeds \$50,000 and involves five or more victims, then it is a felony of the first degree.

Subsection (7) of s. 817.545, F.S., of the bill provides that an investigative agency, as defined in s. 895.02<sup>4</sup>, F.S., may conduct the criminal investigation and prosecution of all cases of residential mortgage fraud under this section.

Subsection (8) of s. 817,545, F.S., of the bill provides that:

All real and personal property of every kind used or intended for use in the course of, derived from, or realized through a violation of this section is subject to civil forfeiture to the state, as provided in s. 895.05. An investigative agency as defined in s. 895.02 may commence forfeiture proceedings under this section pursuant to s. 895.05.

Section 2: To incorporate the provisions of s. 817.545, F.S., as created by this act, the bill reenacts s. 895.02(1)(a), F.S., relating to the definition of racketeering activity.

Section 3 provides that this act will take effect October 1, 2007.

#### C. SECTION DIRECTORY:

- Section 1. Provides short title; legislative findings; definitions; description of offense; venue; investigative agencies; forfeiture provisions.
- Section 2. Reenacts subsection (1) of s. 895.02
- Section 3. Provides effective date/

## II. FISCAL ANALYSIS & ECONOMIC IMPACT STATEMENT

#### A. FISCAL IMPACT ON STATE GOVERNMENT:

##### 1. Revenues:

Indeterminable

##### 2. Expenditures:

Indeterminable

#### B. FISCAL IMPACT ON LOCAL GOVERNMENTS:

##### 1. Revenues:

Indeterminable

##### 2. Expenditures:

Indeterminable

#### C. DIRECT ECONOMIC IMPACT ON PRIVATE SECTOR:

Indeterminable

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<sup>4</sup> Section 895.02(7), F.S., defines "investigative agency" as the Department of Legal Affairs, the Office of Statewide Prosecution, or the office of a state attorney

D. FISCAL COMMENTS:

The Criminal Justice Impact Conference has not yet met to consider the prison bed impact of this bill. However, bills creating new third degree felonies are generally found to have insignificant impact because they typically default to a lowest permissible sentence of a non-prison sanction under the state's sentencing guidelines.

**III. COMMENTS**

A. CONSTITUTIONAL ISSUES:

1. Applicability of Municipality/County Mandates Provision:

This bill does not appear to require counties or municipalities to take an action requiring the expenditure of funds, reduce the authority that counties or municipalities have to raise revenue in the aggregate, nor reduce the percentage of state tax shared with counties or municipalities.

2. Other:

None.

B. RULE-MAKING AUTHORITY:

None.

C. DRAFTING ISSUES OR OTHER COMMENTS:

None.

D. STATEMENT OF THE SPONSOR

Mortgage and property transfer fraud have become a serious and destructive cottage industry in our state. Its ramifications and scope are well described in this staff analysis. This bill will provided well-focused ammunition in the arsenal of law enforcement to bring these practices to a halt.

**IV. AMENDMENTS/COUNCIL SUBSTITUTE CHANGES**