

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 Banking and Insurance Committee:

BILL: PCS/SB 2226 (103612)
INTRODUCER: Banking and Insurance Committee
SUBJECT: Mortgage Brokering and Lending
DATE: March 24, 2009 **REVISED:** _____

	ANALYST	STAFF DIRECTOR	REFERENCE	ACTION
1.	Johnson	Burgess		Pre-meeting
2.				
3.				
4.				
5.				
6.				

I. Summary:

In response to the recent turmoil in the housing market and reports of abusive lending practices in Florida as well other states, the federal Housing and Economic Recovery Act was enacted on July 30, 2008.¹ 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 individual loan originators (mortgage brokers and mortgage 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 brokers and lenders.

The Proposed Committee Substitute (PCS) implements the minimum standards of S.A.F.E. and provides increased licensure and enforcement authority for the Office of Financial Regulation (OFR) to regulate loan originators, mortgage broker businesses, and non-depository, mortgage lender businesses. The bill provides the following significant changes in the licensure and regulation of mortgage brokers and mortgage lenders:

- Requires state licensure and annual renewal of an individual who engages in loan originations through a mortgage broker business or non-depository, mortgage lender business. Currently, the OFR renews all licensees biennially and employees of non-depository lenders are not subject to licensure.
- Requires applicants to provide fingerprints to the OFR for submission to the Federal Bureau of Investigation and any governmental entity authorized for a state and national criminal

¹ H.R. 3221, Public Law 110-289.

history background check on an annual basis. Under current law, the OFR conducts background checks at the time of application.

- Requires the OFR to obtain a credit report of the applicant from a consumer-reporting agency. Currently, the OFR does not have the authority to request or use credit reports.
- Prohibits the licensure of an individual as a loan originator who has had his or her loan originator license revoked. Under the current law, the OFR has the discretion to use a prior revocation as grounds for denial.
- Prohibits the licensure of a loan originator who has a felony conviction 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). Florida has adopted emergency rules, which provide more restrictive eligibility requirements than S.A.F.E. These rules require rather than authorize the OFR to deny a license if an applicant has had a criminal conviction. The PCS codifies these rules.
- Requires an applicant to meet pre-licensing educational and testing requirements and annual continuing education requirements. The registry, rather than the OFR, is responsible for approving providers of education and testing services.
- Requires a loan originator to meet either a net worth or surety bond requirement, or pay into a state guaranty fund. Currently, Florida mortgage broker businesses are not subject to any net worth, surety bond, or guaranty fund requirement. However, non-depository mortgage lenders are subject to net worth and surety bond requirements. The bill creates a guaranty fund.
- Provides that a loan originator must continue to meet minimum standards of S.A.F.E. (which includes the requirements summarized above) after the issuance of the initial license.
- Requires loan originator to register through the National Mortgage Licensing System and Registry (“registry”) for state licensure and renewal of the license. Currently, applicants for licensure and renewal submit applications and fees to the OFR.

The bill requires applicants and licensees to submit an annual fee for funding the Mortgage Guaranty Trust Fund until the fund balance reaches \$5 million. Thereafter, licensees and applicants would be subject to an assessment when the fund balance drops below \$1 million. As a condition of using the licensure and renewal functions of the registry, an applicant must pay processing fees to the registry.

This bill substantially amends the following sections of the Florida Statutes: 494.001, 494.0011, 494.0014, 494.00165, 494.0018, 494.0019, 494.002, 494.0023, 494.0025, 494.0028, 494.003, 494.00331, 494.0035, 494.0036, 494.0038, 494.0039, 494.004, 494.0042, 494.00421, 494.0043, 494.006, 494.0063, 494.0066, 494.0067, 494.0068, 494.0069, 494.007, 494.0071, 494.00721, 494.0073, 494.0075, 494.0077, and 501.1377.

This bill creates the following sections of the Florida Statutes: 494.00121, 494.00172, 494.255, 494.00296, 494.00312, 494.313, 494.00321, 494.00322, 494.00323, 494.00324, 494.00385, 494.00611, 494.00612, and 494.00665.

This bill repeals the following sections of the Florida Statutes: 494.0017, 494.0029, 494.00295, 494.0031, 494.0032, 494.0033, 494.0034, 494.0041, 494.0061, 494.0062, 494.0064, 494.0065, and 494.0072.

II. Present Situation:

In Florida, the Office of Financial Regulation (OFR) is responsible for regulating mortgage brokers and mortgage lenders, and other specified financial entities.² Generally, mortgage brokers and mortgage lenders must comply with federal and state laws regulating the industry unless they are exempt from such laws. State and federally chartered depository institutions and other entities are exempt from state 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 non-depository mortgage lender businesses. Loan originators employed by licensed lenders are exempt from individual licensure requirements.

Florida licenses three types of mortgage lender businesses: mortgage lenders, correspondent mortgage lenders, and savings clause mortgage lenders. A mortgage lender business closes a mortgage loan in its name or advances funds to an applicant for a mortgage and may also service mortgage loans for another without limitation and sell the loan to a non-institutional lender. A correspondent mortgage lender may perform the same functions; however, it may only service a loan for a maximum of four months after closing. The remaining license type, a savings clause mortgage lender, was created in 1991 because of changes in ch. 494, F.S., which required a mortgage lender to apply for the new correspondent mortgage lender or mortgage lender license and provide a surety bond of \$25,000. However, the 1991 law required a mortgage lender to have a net worth of \$250,000. Existing mortgage broker businesses that were acting as a lender were allowed to be “grandfathered” under the old licensure requirements and were exempt from the surety bond requirement, yet subject to a lower net worth requirement of \$25,000.

The S.A.F.E., 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. The S.A.F.E. act makes a distinction for the purpose of regulating loan originators based on whether or not they are employees of a depository institution or its subsidiaries. Loan originators who are not employees of a depository institution or its subsidiaries, that is, mortgage brokers or non-depository 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 who is an employee of a depository 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.”

The S.A.F.E. act also requires states to participate in a national licensing registry, the National Mortgage Licensing System and Registry (“registry”). The registry, which will also be accessible to consumers, will provide employment history and disciplinary and enforcement actions against loan originators.

² The OFR is organized under the Financial Services Commission. The commission is composed of the Governor and Cabinet. [Section 20.121(3), F.S.]

Florida's Licensing Requirements

Chapter 494, F.S., provides general guidance regarding grounds for denial of licensure if the applicant has committed any violation specified in ss. 494.001-494.008, F.S., or has pending against him or her in any jurisdiction any criminal prosecution or administrative enforcement action that involves fraud, dishonest dealing, or any other act of moral turpitude. Ch. 494, 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 acts: fraud, dishonest dealing, or any other act of moral turpitude. The law 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.³

Last year, the Governor and Cabinet raised concerns related to the licensure of mortgage brokers and mortgage lenders who had certain criminal convictions. In response, the Chief Inspector General of the Executive Office of the Governor conducted an examination of the OFR in August 2008 to determine if the regulation of the mortgage industry adequately protects the state particularly in the area of licensing. The results of the examination included several findings, including a finding that the OFR had not sent fingerprint cards to the FDLE for federal criminal screening, as required by law, until March 24, 2008. The OFR issued licenses without the required federal criminal background checks from October 2006 to March 2008.⁴

To address concerns regarding the adequacy of the OFR's licensure of mortgage brokers and mortgage lenders, the Financial Services Commission adopted emergency rules in August 2008. The rules address the processing of ch. 494, F.S., license applications for persons found guilty of, or who have pled guilty or nolo contendere to, certain crimes, such as a felony involving fraud, dishonesty, breach of trust, or money laundering. The comprehensive rules, adopted August 12, 2008, provide that such license applicants are not eligible for licensure. Until the adoption of the emergency rules, the OFR did not have written guidelines to ensure consistency in the determination of disqualifying criminal offenses, such as moral turpitude. These rules are more comprehensive and restrictive than the S.A.F.E. requirements.

Compensation for Consumers

Currently, states use a surety bond, net worth requirements, or a guaranty fund (or combination thereof) to establish financial responsibility for licensees and provide some level of compensation for consumers defrauded by mortgage brokers and mortgage lenders. 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. Based on preliminary research by committee staff, most states require a surety bond or fidelity bond for mortgage brokers, ranging in an amount from \$10,000 to \$500,000. The S.A.F.E. act requires loan originators, which include mortgage brokers and lenders, to meet minimum net worth, surety bond, or applicable guaranty fund requirements.

³ Sections 494.0033(4), 494.0041(2)(q), and 494.0041(2) (t), F.S.

⁴ Chief Inspector General's Office, Executive Office of the Governor, September 15, 2008.

Currently, Florida law 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 licensee to \$100,000 and to \$20,000 per claimant. Revenues derived from mortgage broker and lender license and renewal fees were intended to fund the payment of claims.

As part of a sunset review of ch. 494, F.S., the Comptroller's Mortgage Brokerage and Mortgage Lending Sunset Review Task Force reviewed the guaranty fund.⁵ The Task Force Report noted that recovery from the prior guaranty fund took at least 2 years after the judgment, with 3 to 4 years as the average recovery time. In almost all cases, a claimant retained an attorney and incurred that expense. Concerning the compensation limits of the guaranty fund, the Task Force Report noted that a guaranty fund "...may provide an illusory protection" since many mortgage schemes involve millions of dollars. Payouts from this fund reached almost \$4 million during the period of 1978-1993. The funding mechanism did not adequately or timely fund all approved claims, which resulted in delays in compensating victims. In 1991, the Legislature abolished the fund.

Foreclosure Rescue Consultants

In 2008, the Florida Legislature enacted additional protections for homeowners facing foreclosure and seeking the services of foreclosure rescue consultants or equity purchasers.⁶ A foreclosure-rescue consultant solicits, represents, or offers to a homeowner to provide or perform, in return for payment of money or other valuable consideration, foreclosure related rescue services.⁷ These services may include modification of an existing mortgage loan, which falls within the scope of services provided by a loan originator under S.A.F.E. A foreclosure rescue consultant is prohibited from soliciting, charging, or receiving fees for such services until all services contained in a signed, written agreement have been completely performed.

III. Effect of Proposed Changes:

Licensure

The S.A.F.E. act requires state licensure and annual renewal of individual loan originators (mortgage brokers and mortgage lenders). Currently, Florida requires licensure of individual mortgage brokers, mortgage broker businesses, mortgage broker schools, and mortgage lender (non-depository) businesses. Florida will continue to license mortgage broker and mortgage lender businesses. However, individuals who solicit mortgage loans, offer or accept an application, or negotiate the terms of a new or existing mortgage loan would be subject to licensure as a loan originator. The correspondent mortgage lender license and savings clause lender license would be eliminated and replaced with the mortgage lender license, thereby

⁵Department 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.

⁶Chapter 2008-79.

⁷Section 501.1377, F.S.

subjecting all mortgage lenders to the \$250,000 net worth and \$25,000 surety bond requirement. Since the registry would authorize providers of education and testing services, the bill eliminates OFR's regulation of mortgage broker schools, effective September 30, 2010.

A comparison of the current Florida statutory requirements of an applicant for a mortgage broker license and a license under the requirements of S.A.F.E. indicates the following key changes, which the SPB addresses. An applicant or licensee must meet the following requirements:

- 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). Currently, ch. 494, F.S., authorizes, but does not require the OFR to deny a license if the applicant has had his or her license revoked in any state for the following acts: fraud, dishonest dealing, or any other act of moral turpitude.⁸
- Have never had a license as a loan originator revoked. Currently, the law authorizes, but does not require the OFR to use a revocation as grounds for denial for licensure or renewal of a license.
- Submit fingerprints to the FBI and any governmental entity authorized for a state and national criminal history background check annually. Presently, a person submits fingerprints at the time of the initial application rather than annually.⁹
- Authorize the OFR to obtain access to and use a credit report of an applicant or licensee as part of the initial licensure and renewal process.
- Complete a 20-hour pre-licensing course and a pre-licensing examination provided by an entity approved by the registry. The PCS also requires a licensee to obtain 14 hours of continuing education per year. Presently, an applicant is required to complete a 24-hour pre-licensing course, pass a written test prior to licensure, and obtain 14 hours of continuing education every 2 years.¹⁰

Since the scope of the OFR's jurisdiction within ch. 494, F.S., will include the regulation of loan modification transactions, the provisions relating to foreclosure rescue consultants currently codified in s. 501.1377, F.S., are transferred to ch. 494, F.S., to provide the OFR with the authority to enforce.

Enforcement Authority

The bill authorizes the OFR to impose an administrative fine of \$1,000 per day, or \$25,000 cumulatively, on unlicensed persons acting as a loan originator, mortgage broker business, or mortgage lender business. Currently, ch. 494, F.S., does not have such an administrative fine. The PCS also increases administrative fines the OFR may impose for each separate violation of any provision of ss. 494.001-494.0077, F.S., from \$5,000 to \$25,000. The S.A.F.E. act authorizes H.U.D. to impose a \$25,000 fine per violation in states that H.U.D. is the enforcer of S.A.F.E. This would occur in a state that does not implement the minimum standards of S.A.F.E.

⁸ Sections 494.0033(4) and 494.0041(2)(i), F.S.

⁹ Section 494.033(2)(d), F.S.

¹⁰ Sections 494.0033(2)(b) and 494.00295, F.S.

Mortgage Guaranty Trust Fund

The bill authorizes a recovery fund for compensating persons who have suffered monetary damages because of a violation of ch. 494, F.S. by a licensed individual or business. The recovery fund would allow payments of up to \$50,000 per borrower with a maximum recovery of \$250,000 against a licensee. (See Private Sector Impact.)

Other Potential Implications:

The S.A.F.E. act provides that, if a state does not enact minimum regulatory standards that comply with S.A.F.E. within two years after the enactment of this act, the U.S. Department of Housing and Urban Development will enforce the minimum standards for loan originators operating in Florida as state-licensed loan originators. The act authorizes the Secretary of HUD to extend this deadline for no more than 24 months in any state if the Secretary determines that the state is making a good faith effort to establish a state licensing law that meets the minimum requirements.

Recently, HUD issued an interpretative letter, which authorizes states to delay implementation of the licensure requirements until July 1, 2010, for individuals who do not possess a valid loan originator license. Considering the education, testing, and background check standards that an applicant must meet, HUD views this as a reasonable delay to ensure an orderly transition in the marketplace. For individuals who possess a license prior to the enactment of S.A.F.E., HUD views a reasonable delay for current licensees as a date that does not extend past December 31, 2010.

IV. Constitutional Issues:**A. Municipality/County Mandates Restrictions:**

None.

B. Public Records/Open Meetings Issues:

The bill requires the OFR to determine licensure eligibility based on S.A.F.E.'s standards. One of the minimum standards requires the regulator to evaluate the financial responsibility of the applicant, which would include an analysis of his or her credit report.

Currently, ch. 494, F.S., does not provide an exemption from public records for credit reports. Senate Bill 2652 creates a public record exemption. Without a public records exemption, the release of such financial information could lead to the fraudulent use of such information, such as identity theft.

C. Trust Funds Restrictions:

The bill authorizes a Mortgage Guaranty Trust Fund for compensating persons who have suffered monetary damages because of a violation of ch. 494, F.S., by a licensed individual or business. A linked bill, Senate Bill 1940 establishes this trust fund.

V. Fiscal Impact Statement:

A. Tax/Fee Issues:

See Private Sector Impact, below.

B. Private Sector Impact:

Currently, all licenses of mortgage broker businesses, mortgage lenders, and branch offices are valid from the date of issuance until August 31 of each “even” year. An individual mortgage broker license is valid from the date of issuance until August 31 of every “odd” year and a renewal license is valid until August 31 of the next “odd” year.

The bill eliminates the exemption for non-depository loan originators (individuals), effective January 1, 2010, and requires these loan originators to become licensed as a mortgage broker by that date. Currently licensed mortgage brokers (individuals) are required to renew their license by August 31, 2009, and their licenses will be valid until December 31, 2010, rather than a 2-year period. Currently licensed mortgage brokers (individuals) will be required to obtain licensure renewals through the registry, effective January 1, 2011.

Currently licensed mortgage broker and mortgage lender businesses and branches that are subject to renewal by August 31, 2010, will have their renewal deadline extended until December 31, 2010. Effective January 1, 2011, they will be subject to licensure through the registry.

The following table summarizes the current and proposed fee schedule for ch. 494, F.S. licensees:

Licensure/Permit Fee Category	Current State Fee New/Renewal Biannually	Proposed State Fee New/Renewal Annually
Mortgage Broker Individual--Loan Originators	\$195/150	\$195/150
Mortgage Broker Business	425/375	425/375
Mortgage Lender	575/475	500/475
Correspondent Lender	500/475	(all lenders)
Broker Business Branch Office	225/225	225/225
Lender Business Branch Office	325/325	(all branch offices)
Mortgage Broker Schools	900	900
Mortgage Broker Guaranty Fund (Annual assessment by the OFR until fund reaches \$5 million). The assessment is effective 7/1/09.		
Individual	None.	\$20
Business	None.	100

In addition to the fees imposed by the OFR, the national registry will assess the following processing fees:

- Initial set-up fee charged each time a company (\$100), branch (\$20), or loan officer (\$30) applies to a state through the registry for a license.
- Annual processing fee charged annually, typically at the time of renewal. (company \$100, branch \$20, and loan officer \$30.)
- Loan officer sponsorship transfer fee (\$30) charged each time the registry processes a company request to establish a relationship with a loan officer and sponsor that loan officer's existing license.

Also, an applicant will incur costs associated with the submission of the fingerprints and credit report.

The guaranty fund provides a mechanism whereby some persons defrauded by ch. 494, F.S., licensees can be reimbursed from funding provided by the licensees. The recovery for a borrower is limited to \$50,000 per claim and an aggregate limit of \$250,000 against any licensee. Some consumer advocates have expressed concerns regarding the monetary limit of the guaranty fund, the lengthy processing time to recover the claim amount, and the inability to recover attorney fees incurred by the borrower.

C. Government Sector Impact:

Staffing

The OFR has requested seven additional full-time-equivalent positions and three OPS positions for fiscal year 2009-2010 to implement licensure requirements of S.A.F.E.

Mortgage Guaranty Trust Fund

The OFR estimates that the guaranty fund fees will generate \$5 million in 3 years. However, given the current downturn in the financial services industry, the actual revenues could be considerably different.

The OFR has not requested any additional positions to administer the guaranty fund for fiscal year 2009-2010 due to the delayed effective of the fund, January 1, 2010. Borrowers will be eligible to seek recovery from the fund for acts that occurred on or after January 1, 2011. As a condition of seeking recovery from the fund, the borrower must have recorded a final judgment issued by a state court, wherein the cause of action against a licensee was based on a violation of ch. 494, F.S., and the actual or compensatory damages were the result of that violation.

VI. Technical Deficiencies:

None.

VII. Related Issues:

The Legislature may want to consider additional changes to strengthen and clarify the enforcement authority of the OFR by requiring the Financial Services Commission, on behalf of the OFR, to adopt by rule disciplinary guidelines concerning violations of ch. 494, F.S.

VIII. Additional Information:

- A. **Committee Substitute – Statement of Substantial Changes:**
(Summarizing differences between the Committee Substitute and the prior version of the bill.)

None.

- B. **Amendments:**

None.

IX. Related Issues:

None.

X. Additional Information:

- A. **Committee Substitute – Statement of Substantial Changes:**
(Summarizing differences between the Committee Substitute and the prior version of the bill.)

None.

- B. **Amendments:**

None.