

# ***FREQUENTLY ASKED QUESTIONS:*** **WHAT ISN'T NEW WITH FLORIDA STATUTES CHAPTER 494 – MORTGAGE LAW?**

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*Sometimes the questions are complicated and the answers are simple.  
-Dr. Seuss (1904 - 1991)*

This is a summary of the law. Many of the changes are discussed here; however, not every changed is discussed. I hope this helps you wade your way through the Florida Chapter 494 swamp! Don't forget your boots!

This article was written to provide accurate and authoritative information in regard to the subject matter covered. It is printed with the understanding that the author is not offering any legal, accounting or professional service and the information stated should not be applied to any specific factual instance. If you are unsure about a particular situation, you should consult an attorney. Gary Opper addressed the Miami Chapter of Florida Association of Mortgage Brokers with the this presentation.

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The new mortgage law is 121 pages long. Now is the time to be up to date with the new Florida mortgage act. At first glance it appears ominous and voluminous; however, upon closer inspection many of the changes only substitute a single or a few word changes. For example, "shall" is changed to "must" or "mortgage broker" is changed to "loan originator." Other changes just clean up and clarify the current Chapter 494. Part II of Chapter 494 is changed from "Mortgage Brokers" to "Loan Originators and Mortgage Brokers." A lot of the pages are just the current law or the writing with words stricken, which indicate deletions in the law.

Looking at the underlined sections, which are the new additions, there are less than 60 pages to review. Additionally, in some cases, the new mortgage broker and mortgage lender laws basically mirror each other. Also, the requirements for each new license type mirror each other.

A business will be licensed as a mortgage lender or a mortgage broker; there will be no more mortgage brokerage businesses. Individuals will be licensed as mortgage originators; no longer mortgage brokers. The correspondent mortgage lender license is eliminated. Most of the previous laws concerning mortgage brokerage businesses will apply to mortgage

brokers. Most of the laws that applied to mortgage brokers will apply to mortgage originators.

Florida Governor Charlie Crist approved the bill on June 29, 2009. A PDF copy of the bill is located at: <http://www.myfloridahouse.gov/Sections/Bills/billsdetail.aspx?BillId=41471>  
Click "Enrolled" under "Bill Text." You can search the bill for a particular word. If you wanted to know everything about a "loan originator," just type loan originator in as a search and all the matches will be located.

Chapter 494 is located at:  
<http://www.leg.state.fl.us/Statutes/index.cfm?Mode=View%20Statutes&Submenu=1&Tab=statutes&CFID=94151113&CFTOKEN=42281529>  
or just type in Florida Statutes Chapter 494 in the search section and then click on Statutes & Constitution : View Statutes: Online Sunshine. This is also searchable.

**THESE STATUTES ARE EFFECTIVE JULY 1, 2009 –**

**What are the new advertising rules?**

Effective July 1, 2009, it is an advertising violation to engage in unfair, deceptive or misleading advertising regarding mortgage loans, brokering services or lending services. 494. (F.S. 494.00165(e)) The

previous violations and the requirement to keep a record of advertisements are still in effect. (F.S. 494.00165)

**THESE STATUES ARE EFFECTIVE  
SEPTEMBER 30, 2010 -**

**When do mortgage business school permits expire?**

All mortgage business school permits expire on September 30, 2010. (SB2226, Section 70(1)) All future educational classes will be approved by the Nationwide Mortgage Licensing System and Registry. (S.A.F.E. Mortgage Licensing Act 1505(e)(2) & 1506(b)(2))

**THESE STATUES ARE EFFECTIVE OCTOBER  
1, 2010 -**

**What is the definition of a “loan originator?”**

A “loan originator” means an individual who, directly or indirectly:

1. Solicits or offers to solicit a mortgage
2. Accepts or offers to accept an application for a mortgage
3. Negotiates or offers to negotiate the terms or conditions of a new or existing mortgage on behalf of a borrower or lender
4. Processes a mortgage application
5. Negotiates or offers to negotiate the sale of an existing mortgage to a noninstitutional investor for compensation or gain

The term includes the activities of a loan originator as defined in the S.A.F.E Mortgage Licensing Act of 2008. Also, an individual acting as a loan originator pursuant to that definition is acting as a loan originator for the purposes of this definition.

The term does not include an employee of a mortgage broker or mortgage lender who performs only administrative or clerical tasks, including quoting available interest rates, physically handling a completed application form or transmitting a completed form to a lender on behalf of a prospective borrower. (F.S. 494.001(14))

**What is the definition of a “mortgage broker?”**

A “mortgage broker” means a person conducting loan origination activities through one or more licensed loan originators employed by the mortgage broker or as independent contractors to the mortgage broker. This was a mortgage brokerage business in the old law. (F.S. 494.001(18))

**What is the definition of “mortgage lender?”**

“Mortgage lender” means a person making a mortgage or servicing a mortgage for others, or, for compensation or gain, directly or indirectly, selling or

offering to sell a mortgage to a noninstitutional investor (F.S. 494.001(19))

**When do mortgage brokerage business licenses expire?**

See the chart. The pre-act mortgage broker business is applying for a new mortgage broker license.

**When do mortgage broker licenses expire?**

See the chart. The pre-act mortgage broker is applying for a new loan originator license.

**When do mortgage lender licenses expire?**

See the chart. The mortgage lender is applying for a mortgage lender license (the equivalent license) or a mortgage broker license.

**When do correspondent mortgage lender licenses expire?**

See the chart. The pre-act correspondent mortgage lender is applying for a new mortgage broker or a mortgage lender license.

**How long does the Office of Financial Services (“OFR”) have to approve a mortgage broker or loan originator application?**

Mortgage broker applications submitted between July 1, 2009, and December 31, 2009, or loan origination applications submitted between October 1, 2010 and December 31, 2010, the OFR has 60 days to notify the applicant of any errors or omissions and request any additional information. The OFR has 180 days to approve or deny a completed application. (SB2226, Sec. 70(3))

**What is the definition of the “registry?”**

The “Registry” means the Nationwide Mortgage Licensing System and Registry, which is the mortgage licensing system developed and maintained by the Conference of State Bank Supervisors and the American Association of Residential Mortgage Regulators for licensing and registration of loan originators. (F.S. 494.001(29))

The OFR shall participate in the registry and shall regularly report to the registry violations of Chapter 494, disciplinary actions and other information deemed relevant by the OFR.

**What are the requirements for a mortgage originator’s license?**

See chart.

**What are some of the new requirements of mortgage originators?**

The mortgage originator shall notify the OFR of any conviction or nolo contendere plea for any felony or any crime or administrative violation that involves fraud, dishonesty, breach of trust, money laundering or moral turpitude. (F.S. 494.004(1) (a))

- (d) For a trust, each trustee
- (e) For a limited liability company, all elected managers and those members that have contributed 10 percent or more or that have the right to receive, upon dissolution, 10 percent or more of the partnership’s capital
- (f) A principal loan originator (F.S. 494.001(5))

**What are grounds for denial of a mortgage originator?**

If the applicant has:

- a) Committed any violation of Chapter 494
- b) Has a pending felony, criminal prosecution or an administrative enforcement prosecution which involves fraud, dishonesty, breach of trust, money laundering or moral turpitude
- c) Has failed to demonstrate the character, general fitness and financial responsibility to command the confidence of the community and warrant a determination that the applicant will operate honestly, fairly and efficiently. (F.S. 494.00312(4)(b)(1))

**What are grounds for denial of a mortgage broker or a mortgage lender?**

If the applicant or the applicant’s control person has done any of the above three items they are grounds for denial of mortgage originator. F.S. 494.00611(4) & 494.00321(4))

**What is the definition of a “control person?”**

A “control person” means an individual, partnership, corporation, trust or other organization that possesses the power, directly or indirectly, to direct the management or policies of a company, whether through ownership or securities, by contract or otherwise. The term includes, but is not limited to:

- (a) A company’s executive officers, including the President, Chief Executive Officer, Chief Financial Officer, Chief Operations Officer, Chief Legal Officer, Chief Compliance Officer, Director and other individuals having similar status or functions
- (b) For a corporation, each shareholder that, directly or indirectly, owns 10 percent or more or that has the power to vote 10 percent or more, of a class of voting securities unless the applicant is a publicly traded company
- (c) For a partnership, all general partners and limited or special partners that have contributed 10 percent or more or that have the right to receive, upon dissolution, 10 percent or more of the partnership’s capital

**What is the definition of a “credit score?”**

A “credit score” means a score, grade or value that is derived by using data from a credit report in any type of model, method or program, whether electronically, in an algorithm, in a computer software or program, or by any other process for the purpose of grading or ranking credit report data. (F.S. 494.001(7))

**How is the credit report evaluated?**

If there is adverse information in a credit report of any applicant, the information must be considered within the totality of the circumstances. The adverse items may have resulted from factors that do not necessarily reflect negatively upon the applicant’s character, general fitness or financial responsibility. (F.S. 494.00312(4)(b)(2))

The OFR may not use a credit score or the absence of insufficient credit history information to determine character, general fitness or financial responsibility. (F.S. 494.00312(4)(b)(3))

If the credit report is used as basis to deny a license, the OFR shall provide the applicant the grounds or basis for denial. The use of the terms “poor credit history,” “poor credit rating” or similar language cannot be used by the OFR. (F.S. 494.00312(4)(b)(3))

**How long is a mortgage originator’s license good?**

All mortgage loan originator licenses must be renewed annually by December 31. (F. S. 494.00312(4)(b)(3))

**What are the requirements to renew a mortgage originator’s license?**

See the chart.

**How many mortgage employers can a mortgage originator work for at one time?**

A mortgage originator must be an employee or an independent contractor for one mortgage broker or mortgage lender only. They may not be an employee or contract with more than one mortgage entity. (F.S. 494.00331)

**What is the definition of a “branch manager?”**

A “branch manager” means the licensed loan originator in charge of, and responsible for, the

operation of the branch office of a mortgage broker or mortgage lender. (F.S. 494.001(2))

**What if there are branch offices?**

Each branch office of a mortgage entity must be licensed (F.S 494.0036(1) & F.S 494.0066(1)) and must designate a branch manager. (F.S 494.0035(2) & F.S 494.0065(2)) The branch manager shall have full charge, control and supervision of the mortgage entity. (F.S. 494.0066(2) & F.S 494.0035(2))

The initial fee and the annual renewal fee for a branch office is \$225.00. (F.S 494.0036(2) & (3) & F.S 494.0066(2) & (3))

**What if the branch manager or principal loan originator designation is deemed inaccurate?**

If the PLO or branch manager designation is deemed inaccurate then the business shall be deemed to be operated under the control of each officer, director, ultimate equitable owner of 10% or greater or any person in similar capacity. (F.S. 494.0035(2) & 494.0066(1))

**Is a mortgage broker or mortgage lender license assignable?**

Neither a mortgage broker or mortgage lender license is assignable or transferable. (F.S 494.004(4) & 94.0611(7))

**NOW THAT WE FINALLY HAVE LICENCES, WHAT IS A MORTGAGE APPLICATION AND MORTGAGE LOAN?**

**What is the definition of a “mortgage application?”**

A “mortgage loan application” means the submission of a borrower’s financial information in anticipation of a credit decision, which includes:

1. The borrower’s name
2. The borrower’s monthly income
3. The borrower’s social security number to obtain a credit report
4. The property address
5. An estimate of the value of the property
6. The mortgage loan amount sought
7. Any other information deemed necessary by the loan originator

An application may be in writing or electronically submitted, including a written record of an oral application. (F.S. 494.001(21))

**What is the definition of a “borrower?”**

A “borrower” means a person obligated to repay a mortgage and includes, but is not limited to, a co-borrower, cosigner or guarantor. (F.S. 494.001(1))

**What is a definition of a “mortgage loan?”**

“Mortgage loan” means any:

- (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 Truth in Lending Act, or for the purchase of residential real estate upon which a dwelling is to be constructed
- (b) Loan on commercial real property or improved real property consisting of five or more dwelling units if, either apply:
  1. The borrower is an individual
  2. The lender is a noninstitutional investor (F.S. 494.001(20))

**What is new with the mortgage broker agreement with the borrower?**

In order to earn a loan origination fee, the written mortgage broker agreement between the mortgage broker and the borrower must be signed and dated by the Principal Loan Officer (“PLO”) or branch manager and the borrower. The PLO is explained below. The unique registry identifier of each loan originator responsible for the loan must be on the agreement. (F.S. 494.0038)

Except for application and third-party fees, all fees received by the mortgage broker from a borrower must be called a loan origination fee. (F.S. 494.0038(1))

All fees must be disclosed in dollar amounts. (F.S. 494.0038(2))

All loan origination fees must be paid to the mortgage broker. (F.S. 494.0038(3))

A mortgage broker may not pay a commission to an unlicensed person. (F.S. 494.0038(8))

**What is a “loan origination fee?”**

A “loan origination fee” means the total compensation from any source received by a mortgage broker acting as a loan originator. (F.S. 494.001(13))

**Is a separate fee allowed for third party mortgage processing?**

No, any payment for processing mortgage loan applications must be included in the fee and must be paid to the mortgage broker. (F.S. 494.001(13))

**What are net worth requirements of a mortgage lender?**

The mortgage lender must submit annually its audited financial statement. The mortgage lender’s net worth

must be at least \$63,000 if the applicant is not seeking a servicing endorsement and at least \$250,000 if it is seeking a servicing endorsement. The net worth requirement must continually be maintained.

**What are net worth requirements for a mortgage lender under the saving clause and for a mortgage lender who is seeking a servicing endorsement?**

The net worth requirement until September 30, 2011 is \$63,000. The net worth requirement from October 1, 2011 to September 30, 2012 will be \$125,000. On or after October 1, 2012, the net worth requirement will be \$250,000. (F.S. 494.0061(2)(f))

**What is the definition of “servicing endorsement?”**

“Servicing endorsement” means authorizing a mortgage lender to service a loan for more than 4 months. (F.S. 494.001(31))

**Is a broker or mortgage lender license transferable or assignable?**

No, the license is not transferable or assignable. (F.S. 494.0061(7))

**What is the definition of a “principal loan originator (“PLO”)?”**

A “principal loan originator” means the licensed loan originator in charge of, and responsible for, the operation of a mortgage lender or mortgage broker. It includes all of the activities of the mortgage lender’s or mortgage broker’s loan originators and branch managers, whether employees or independent contractors. (F.S. 494.001(26))

**What does a principal loan originator do?**

Each mortgage broker and mortgage lender must have a principal loan originator. The PLO shall have full charge, control and supervision of the mortgage entity.

**What are the PLO qualifications?**

The individual must be a loan originator for at least one year before becoming the PLO or show that he or she has been in a mortgage broker-related business for at least one year. The entity must keep the OFR informed of any changes to the PLO.

**Can a loan originator be a PLO for more than one mortgage entity?**

No, a loan originator can be a PLO for only one mortgage entity. F.S. 494.0035(1)

**What if the PLO designation is deemed inaccurate?**

The business shall be deemed to be operated under the control of each officer, director, ultimate equitable

owner of 10% or greater or any person in a similar capacity. (F.S. 494.0035(1)). The same is true for a branch manager. F.S. 494.0035(2)

**What about certain changes in the business?**

A mortgage entity shall report any changes to the OFR for the following:

- a) Principal loan originator
- b) Control person
- c) Or, any change in the business organization form (F.S. 494.004(1)(f) & F.S. 494.0067(4)(b))

**What if the OFR does not approve of a new control person?**

If the OFR determines that the mortgage business does not meet the licensing requirements it may take administrative action. F.S. 494.004(1)(e) & F.S. 494.0067(4)

Any change in the PLO or a control person must be reported. (F.S. 494.004(5)(a))

The licensee shall report any addition of a control person who has not previously filed a Uniform Mortgage Biographical Statement & Consent Form, Form MU2, or has not previously complied with the fingerprinting and credit report requirements.

**What rules may the Financial Service Commission (“commission”) adopt under the new laws?**

The legislation has left many of the rule making for the laws up to the commission.

**What if a mortgage entity or loan originator is involved in a crime or administrative violation?**

The citations for these laws F.S. 494.0067(5) are for mortgage lenders and 494.004(a) for mortgage broker and loan originators. The laws are very similar, but not exactly the same. A technical correction act will probably fix the difference so that the laws will match. The law applies to a loan originator, a mortgage broker, a mortgage lender or a control person of either mortgage entity.

The person or entity shall report any indictment, information, charge, conviction or plea of guilty or nolo contendere, regardless of adjudication, to any felony, or any crime or administrative violation that involves fraud, dishonesty, breach of trust, money laundering or moral turpitude, in any jurisdictions within 30 days.

**What is “moral turpitude?”**

West's Encyclopedia of American Law, edition 2 states, “Crimes involving moral turpitude have an inherent quality of baseness, vileness or depravity with

respect to a person's duty to another or to society in general." Examples include rape, forgery, robbery and solicitation of prostitutes. Many jurisdictions impose penalties, such as deportation of aliens and disbarment of attorneys, following convictions of crimes involving moral turpitude.

#### **How long can a mortgage lender service a loan?**

Mortgage brokers and loan originators cannot service a loan. A mortgage lender may close a loan in its own name, but may not service the loan for more than 4 months unless the mortgage lender has a servicing endorsement.

#### **What is the definition of a "material change?"**

"Material change" means a change that would be important to a reasonable borrower in making a borrowing decision, and includes:

1. A change in the interest rate previously offered to a borrower
2. A change in the type of loan offered to a borrower
3. A change in fees to be charged to a borrower resulting in total fees greater than \$100. (F.S. 494.001(17))

#### **What must you do if there is a material change?**

These are not new in the law; however, combined with the definition of material change they bring new meaning to the statute.

A mortgage entity must notify a borrower of any material change in a mortgage loan transaction within 3 business days after being made aware of the changes by a mortgage lender and at least 3 days before the signing of the settlement statement. The licensee bears the burden of proving the notification was provided and accepted by the borrower. A borrower may waive the right to receive notice of the loan if it is needed to meet a bona fide personal financial emergency. (F.S. 494.004(2) & 494.0067(10))

#### **What action constitutes a ground for disciplinary action?**

Each of the following acts constitutes a ground for which the disciplinary actions under F. S. 494.00255 apply:

- a) Escrow - Failure to immediately place upon a receipt, and maintain until authorized to disburse, any money entrusted to the licensee as a licensee in a bank account
- b) Retain Property - Failure to account or deliver to any person any property that is not the licensee's, or that the licensee is not entitled to retain, under the circumstances and at the time that has been agreed upon or

as required by law or, in the absence of a fixed time, upon demand of the person entitled to such accounting and delivery

- c) Retain Funds - Failure to disburse funds in accordance with agreements
- d) Property Misuse- The misuse, misapplication or misappropriation of personal property entrusted to the licensee's care to which the licensee had no current property right at the time of entrustment
- e) Mortgage Fraud - Fraud, misrepresentation, deceit, negligence or incompetence in any mortgage financing transaction
- f) Appraisal Pressure - Requesting a specific valuation, from an appraiser, implying that a specific valuation is needed or conditioning the order on the appraisal meeting a specific valuation. The numeric value need not be stated, but rather the mere statement that a specific valuation is sought, violates this section
- g) Understanding Costs - Consistently and materially underestimating maximum closing costs
- h) Mortgage Guarantee Trust Fund ("MGTF") Disbursement - Disbursement, or an act which has caused or will cause disbursement, to any person in any amount from the MGTF, the Securities Guaranty Fund or the Florida Real Estate Recovery fund, regardless of any repayment or restitution to the disbursed fund by the licensee or any person acting on behalf of the licensee
- i) General Fraud - Commission of fraud, misrepresentation, concealment or dishonest dealing by trick, scheme or device; culpable negligence; breach of trust in any business transaction in any state, nation or territory; or aiding, assisting, or conspiring with any other person engaged in any such misconduct and in furtherance thereof
- j) Crime - Being convicted of, or entering a plea of guilty or nolo contendere to, regardless of adjudication, any felony or any crime involving fraud, dishonesty, breach of trust, money laundering or act of moral turpitude.
- k) Civil Fraud Judgment - Having a final judgment entered against the licensee in a civil action upon grounds of fraud, embezzlement, misrepresentation or deceit

- l) SEC violations - Violating security or commodity laws records, or refusal to comply with an office subpoena or subpoena duces tecum
  - m) RESPA/TIL Violations - Violating the Real Estate Settlement Procedure Act or the Federal Truth in Lending Act. Having a loan originator, mortgage broker, or mortgage lender license, or the equivalent of such license, revoked in any jurisdiction
    - x) Dead Beat - Failure to timely pay any fee, charge or fine imposed or assessed pursuant to ss. 494.001-494.0077 or related rules
- The state has broad subpoena powers.
- What are the penalties for a violation of the above?**
- If the OFR finds a person in violation of the act specified in this section, it may enter an order imposing one or more of the following penalties:
- (a) Issuance of a reprimand
  - (b) Suspension of a license, subject to reinstatement upon satisfying all reasonable conditions imposed by the office
  - (c) Revocation of a license
  - (d) Denial of a license
  - (e) Imposition of a fine in an amount up to \$25,000 for each count or separate offense
  - (f) An administrative fine of up to \$1,000 per day, but not to exceed \$25,000 cumulatively, for each day that:
    1. A Mortgage broker or mortgage lender conducts business at an unlicensed branch office
    2. An unlicensed person acts as a loan originator, mortgage broker or a mortgage lender
- Can the mortgage entity be responsible for the action of a control person or a loan originator?**
- A mortgage broker or mortgage lender is subject to the disciplinary actions for a violation by either:
- a) A control person of the mortgage entity
  - b) A loan originator of the mortgage entity
- Can the PLO, control person or the branch manager be held responsible for the actions of a loan originator?**
- A principal loan originator or branch manager is subject to the disciplinary actions for violations by a loan originator if there is a pattern of repeated violations by the loan originator or if the principal loan originator has knowledge of the violations. (F.S.494.00255(4) & (6).
- An individual who is associated with the mortgage entity is subject to the disciplinary actions for a violation with respect to an action in which such person was involved.
- n) Mortgage License Revocation – Having a any mortgage license revoked in anywhere
  - o) Any License Revocation - Having a license, or the equivalent of such license, to practice any profession or occupation revoked, suspended, or otherwise acted against, including the denial of licensure by a licensing authority of this state or another state, territory, or country
  - p) Unlicensed Practice - Acting as a loan originator, mortgage broker or mortgage lender (without a current license issued under part II or part III of this chapter
  - q) Unlicensed Practice - Operating a mortgage broker or mortgage lender branch office without a current license issued under part II or part III of this chapter
  - r) No PLO or branch manager designation - Conducting any mortgage brokering or mortgage lending activities in the absence of a property designated principal loan originator or mortgage brokering or mortgage lending activities at any particular branch office without a properly designated branch manager
  - s) License mistake - A material misstatement or omission of fact on an initial or renewal license application
  - t) Bad Check - Payment to the office for a license or permit with a check or electronic transmission of funds, which is dishonored by the applicant's or licensees financial institution
  - u) Mortgage Law Breaker - Failure to comply with, or violations of, any provision or rule under Chapter 494
  - v) Maintain Records - Failure to maintain, preserve and keep available for examination all books, accounts or other documents required by ss. 494.001-494.0077and the rules of the commission
  - w) Investigation Refusal - Refusal to permit an investigation or examination of books and

### **When can the OFR suspend a license?**

Pursuant to F.S 120.60(6), the OFR may summarily suspend the license of a loan originator, mortgage broker or mortgage lender if the office has reason to believe that a licensee poses an immediate, serious danger to the public's health, safety or welfare. The arrest of the licensee, the mortgage broker or the mortgage lender's control person for any felony or any crime involving fraud, dishonesty, breach of trust, money laundering or any other act of moral turpitude is deemed sufficient to constitute an immediate danger to the public's health, safety or welfare. Any proceeding for the summary suspension of a license must be conducted by the commissioner of the office, or designee, who shall issue the final summary order.

### **What is the Mortgage Guaranty Trust Fund ("MGTF")?**

The MGTF was set up to compensate borrowers who have final judgments against a licensee for damages caused by Chapter 494 violations and the borrower has not been able to collect from the licensee.

A nonrefundable initial and renewal fee is imposed as follows:

- 1) Mortgage Originators - \$20.00
- 2) Mortgage Brokers and Lenders - \$100.00

This fee is in addition to the application fee. The amount is deposited into the Mortgage Guaranty Trust Fund for the payment of claims. (F.S. 494.00172)

When the fund reaches \$5,000,000, the additional fee will be discontinued until the fund is below \$1,000,000.

### **How is borrower eligible for the MGTF?**

A borrower is eligible to seek a recovery from the trust fund if all the following conditions are met:

- a) The borrower has a recorded final judgment issued by a state court based on violation of Chapter 494 and damages were the result of that violation
- b) There is a writ of execution on the judgment and there is no debtor property that can be found or sale of the debtor's property is insufficient to satisfy the judgment
- c) The borrower has searched for the debtor's property and has discovered no property or the amount of the debtor's property is insufficient to satisfy the judgment
- d) The borrower has applied all amounts received from the debtor to the judgment amount
- e) At the time that the action was instituted, the borrower gave notice by certified mail the OFR; this may be waived with good cause

- f) The debtor's act occurred on or after January 1, 2011 (F.S. 494.00172 (a)-(f))

Any person who meets all the conditions above may apply to the OFR for compensation from the MGTF for the unpaid portion of the licensee's judgment or \$50,000, whichever is less. They can request the actual or compensatory damages, attorney's fees and cost awarded by court and documented collection fees. The amount cannot include postjudgment interest. The attorney's fee may not exceed \$5,000 or 20% of the damages, whichever is less. A borrower may not collect more than \$50,000 regardless of the number of licensees involved. (F.S. 494.00172)

Payments for claims are limited to \$250,000 per licensee regardless of total claims. If the claims exceed \$250,000, the amount due each claimant will be prorated. (F.S. 494.0172 (4)(b))

Payments shall be made to all claimants two years after the first complete and valid notice is received by the OFR. Claimants who give notice after two years and comply with the conditions precedent may recover any remaining portion of the \$250,000. The claims will be paid in the order received. F.S. 494.00172 (4)(c)

A claimant may assign their right to recovery from the MGTF. (F.S. 494.00172(d))

If there is insufficient money in the MGTF for any claim, the OFR will satisfy the claim as soon as enough money is available. The claims shall be satisfied in the order they are received. (F.S. 494.00172(4)(e))

### **Can a borrower still get compensated by the MGTF if the licensee files bankruptcy?**

The above does not have to be done if the subject licensee filed for bankruptcy or has been adjudicated bankrupt. The borrower must file a proof of claim and notify the OFR of the proof of claim by certified mail. (F.S. 494.00172(3))

### **When a payment is made for a judgment what is the licensee's status?**

The MGTF payments constitute prima facie grounds for the revocation of the license. (F.S. 494.00172(4)(f)) Prima facie is Latin for "on its face." Lectric Law Library states, "a prima facie case is one that at first glance presents sufficient evidence for the plaintiff to win. Such a case must be refuted in some way by the defendant for him to have a chance of prevailing at trial."

### **When does a licensee have a conflicting interest?**

A conflicting interest occurs when:

1. The licensee or the licensee's relative provides the borrower with additional products or services
2. The licensee or the licensee's relative owns, controls or holds voting power or proxies of 1% or more of any equity or beneficial interest in the entity providing the product or service
3. The provider owns, controls or holds voting power or proxies of 1% or more of any equity or beneficial interest in the licensee
4. A holding company owns, controls or holds voting power or proxies of 1% or more of any equity or beneficial interest or licensee and the provider of the product or service
5. One or more person or person's relative is an officer, director or performs similar function for both the licensee and the provider
6. The licensee or the licensee's relative is an officer, director or performs similar function for the additional provider (F.S. 494.4940023(2))

**What is the definition of a "relative?"**

A "relative" means any of the following, whether by the full or half blood or by adoption:

- (a) A person's spouse, father, mother, children, brothers and sisters
- (b) The father, mother, brothers and sisters of the person's spouse
- (c) The spouses of person's children, brothers or sisters (F.S. 494.001(30))

**What must the licensee do if there is a conflicting interest?**

At a minimum, the licensee shall provide the following written disclosures:

- a) The relationship between the licensee and the provider of the product or service
- b) An estimated charge or range of charges
- c) That the licensee may receive a financial benefit
- d) That alternative sources may be chosen by the borrower for the product or service (F.S. 494.0023(1))

**What practices are prohibited?**

It is prohibited to act as loan originator, mortgage broker or mortgage lender without a current active license. (F.S. 494.0025)

It is prohibited to knowingly alter, withhold, conceal or destroy any information related to a person's mortgage activity. (F.S. 494.0025(10))

**What are some of the changes in the mortgage lender laws?**

A mortgage lender shall report any changes in the principal loan originator, control person or any change in business organization by written amendment in such form and at such time that Financial Services Commission specifies by rule. (F. S. 494.0067(4))

Any addition of a control person who has not previously filed a Uniform Mortgage Biographical Statement & Consent Form, Form MU2, or has not previously complied with the fingerprinting and credit report requirements of mortgage lender license is subject to the mortgage lender requirements. (F.S. 494.0067(4)(b))

If after the addition of a control person the OFR determines that the licensee does not continue to meet the licensure requirements, the OFR may bring administrative actions to enforce the mortgage lender requirements. . (F.S. 494.0067(4)(b))

Each mortgage lender shall report any indictment, information, charge, conviction or plea of guilty or nolo contendere, regardless of adjudication, to any felony or any crime or administrative violation that involves fraud, dishonesty, breach of trust, money laundering or another act of moral turpitude, in any jurisdiction, by the licensee or any principal officer, director or ultimate equitable owner of 10% or more of the licensed corporation, within 30 business days after the incidence. (F.S. 494.0067(5))

Each mortgage lender must mail or deliver to the applicant a good faith estimate of costs within three business days after the lender receives a written loan application from the applicant. (F.S. 494.0067(8))

A mortgage lender may close loans in its own name, but may not service the loan for more than 4 months unless the lender has a servicing endorsement. Only a lender with net worth of at least \$250,000 may obtain a servicing endorsement. (F.S. 494.0067(11))

A servicing endorsement means authorizing a mortgage lender to service a loan from more than 4 months. (F.S. 494.001(31))

A mortgage lender must report to the OFR within two days after the mortgagee knows or should have known that the \$250,000 net worth requirement is not meet. (F.S. 494.0067(12))

**What is the definition of a "loan modification?"**

"Loan modification" means a modification to an existing loan. The term does not include a refinancing transaction. (F.S. 494.001(12)) Effective January 1, 2010, new rules regarding loan modification will take effect.

**What must a loan modification services agreement have to avoid a prohibited act?**

F.S 494.00296 is stated negatively. Here is how the agreement must be structured:

- a) Before any services are performed, a written loan modification service agreement with the borrower must be executed
- b) Before executing a loan modification, the borrower must be aware of each modified term and consent to each term
- c) Before receiving payment, all the services included in the loan modification service agreement must be completed. A fee may only be charged if there is a material benefit to the borrower. The commission may adopt rules as to what is a material benefit to the borrower.(F.S 494.00296(1)(a),(b) and (c))

**What must the loan modification agreement contain?**

The loan modification service agreement must:

- 1. Be at least 12-point uppercase type
- 2. Be signed by both parties
- 3. Include the names and addresses of the person providing the loan modification services
- 4. State the exact nature and specific detail of each service to be provided
- 5. Include the total amount and terms of the charges
- 6. Include the date of the agreement

The date of the agreement cannot be earlier than the date the borrower signed the agreement. The mortgage entity must give the borrower a copy of the agreement to review at least one business day before the borrower signs the agreement. (F.S 494.00296(2)(a))

The borrower has the right to cancel the agreement without penalty or obligation if they cancel within three business days of signing the agreement. The right to cancel may not be waived or limited by the borrower or the mortgage entity. (F.S 494.00296(2)(b)) A mortgage entity can give a borrower more time to cancel. (F.S 494.00296(2)(d)) If the borrower cancels, any payments must be returned to the borrower within ten business days after the mortgage entity receives the cancellation notice. (F.S 494.00296(2)(b))

Additionally, immediately above the signature line, a 12 –point uppercase four paragraph statement concerning the borrower’s right of cancellation must be included. (F.S 494.00296(2)(c))

The borrower must receive a signed copy of the agreement within three hours after the borrower signs the agreement. (F.S 494.00296(2)(e))

**What are some the requirements relating to the SAFE Mortgage Licensing Act of 2008?**

Under Section 494.0011(2)(c) the commission shall adopt rules that comply with the following:

- 1. Require loan originators, mortgage brokers, mortgage lenders, and branch offices to register through the registry.
- 2. Require the use of uniform forms that have been approved by the registry and any subsequent amendments to such forms if the forms are substantially in compliance with the provisions of this chapter - Uniform forms that the commission adopts include, but are not limited to:
  - a. Uniform Mortgage Lender/Mortgage Broker Form, Form MU1
  - b. Uniform Mortgage Biographical Statement & Consent Form, Form MU2
  - c. Uniform Mortgage Branch Office Form, Form MU3
  - d. Uniform Individual Mortgage License/Registration & Consent Form, Form MU4
- 3. Require the filing of forms, documents and fees in accordance with the requirements of the registry
- 4. Prescribe requirements for amending or surrendering a license or other activities as the commission deems necessary for the office’s participation in the registry
- 5. Prescribe procedures that allow a licensee to challenge information contained in the registry
- 6. Prescribe procedures for reporting violations of this chapter and disciplinary actions on the licensees to Registry

**Who did the legislature exempt from this new statute?**

Effective January 1, 2010, everybody, but you! The folks who are exempt from Part I (General Provisions), II (Mortgage Brokers) and III (Mortgage Lenders) of Chapter 494, are not exempt from Part IV (Florida Fair Lending) and V (Loans under Florida Uniform Land Sales Practices Law). (F. S. 494.00115) The following entities are exempt:

- a) Any person operating exclusively as a registered loan originator in accordance with

the S.A.F.E. Mortgage Licensing Act of 2008

- b) Depository institutions like banks and credit unions
- c) The Federal National Mortgage Association (“FNMA”), the Federal Home Loan Mortgage Corporation (“FHLMC”), any Federal Government agency, any state, county or municipal government; or any quasi-governmental agency that acts in such capacity under specific authority of the laws of any state or the United States
- d) A licensed attorney who negotiates mortgage terms for a client as an ancillary matter to the representation of a client
- e) A person involved solely in timeshare plan financing

Effective January 1, 2010, the following are exempt under Part III (Mortgage Lending) (F.S. 494.00115(2) :

- a) A fiduciary under court authority
- b) A real estate seller who receives one or more mortgages in a purchase money transaction
- c) A mortgage servicer for federal, state or municipal agencies
- d) A person who makes nonresidential mortgages and sells loans only to institutional investors
- e) Individuals who:
  - 1. Makes or acquires mortgage loans
  - 2. Uses his or her own funds for his or her own investment
  - 3. Does not hold himself or herself out to the public as being in the mortgage lending business
- f) An individual who sells a mortgage that was purchased with that individual’s funds and who does not hold himself or herself out to the public as being in the mortgage lending business

The burden of establishing the exempt right is on the party claiming the exempt.

**What is the definition of a “registered loan originator?”**

“Registered loan originator” means a loan originator who is employed by a depository institution, by a subsidiary that is owned and controlled by a depository institution and regulated by a federal banking agency, or by an institution regulated by the Farm Credit Administration and who is registered with and maintains a unique identifier through the registry. (F.S. 494.001(28))

**What is the definition of a “depository institution?”**

“Depository institution” has the same meaning as in s. (3)(c) of Federal Deposit Insurance Act and includes any credit union. (F.S. 494.001(8))

# LICENSING CHART FOR CHAPTER 494 UPDATE

LICENSE EXPIRATION DATE	Mortgage	Mortgage	Mortgage	Correspondent
	Broker	Brokerage Business	Lender	Mortgage Lender
New license type	Loan Originator	Mortgage Broker	Mortgage Lender	Mortgage Broker, Mortgage Lender with/without Service Endorsement
Licenses issued before October 1, 2010 - All old licenses issued before October 1 2010, expire on December 31, 2010.	x	x	x	x
Any old license does not expire until the Office of Financial Services approves or denies the new license application, if the following requirements are met: 1. The person holds an active old license issued before October 1, 2010 2. The person applies for a new license through the Nationwide Mortgage Licensing System and Registry between October 1, 2010 and December 31, 2010	x	x	x	x

## Initial Applications

	Mortgage Originator	Mortgage Broker	Mortgage Lender
Must be 18 years old or older and have a high school diploma or equivalent	x		
Complete a 20-hour registry's preclicensing class	x		
Pass a written test	x		
Submit a completed application	x	x	x
Submit fees	\$195 application, \$20 MGTF	\$425 application, \$100 MGTF	\$500 application, \$100 MGTF
Submit fingerprints	x	x (1)	x (1)
Authorize the registry to obtain a credit report at the applicant's cost	x	x (1)	x (1)
Submit any additional information required by the office to help determine eligibility	x	x	x
Submit any additional information required by the registry	x	x	x
Designate a qualified principal loan originator		x	x
Indicate whether the mortgage lender is seeking a servicing endorsement			x
Submit audited financial statements with adequate net worth			x

(1) submit for each control person

## License Renewals

	Mortgage Originator	Mortgage Broker	Mortgage Lender
Submit a completed license renewal form	x	x	x
Submit a nonrefundable fee, the Mortgage Guarantee Trust Fund fee and, if required, a fingerprint fee	\$150 renewal, \$20 MGTF	\$375 renewal, \$100 MGTF	\$475 renewal, \$100 MGTF
Complete an 8 hour continuing education class	x		
Authorize the registry to obtain a credit report at the applicant's cost	x	x (1)	
Submit any additional information required by the office to help determine renewal eligibility	x	x	
Continue to meet the requirements for the initial license (F.S 494.0313)	x		
Submit fingerprints for a new control person		x	x
Annual renewal period	x	x	x

(1) Submit for each control person