

## HOUSE OF REPRESENTATIVES STAFF ANALYSIS

**BILL #:** PCS for HB 1081 Mortgage Lending  
**SPONSOR(S):** Insurance & Banking Subcommittee  
**TIED BILLS:** **IDEN./SIM. BILLS:** SB 1298

REFERENCE	ACTION	ANALYST	STAFF DIRECTOR or BUDGET/POLICY CHIEF
Orig. Comm.: Insurance & Banking Subcommittee		Hinshelwood	Luczynski

### SUMMARY ANALYSIS

The Office of Financial Regulation (OFR) licenses and regulates various aspects of the non-depository financial services industries, including mortgage loan originators, mortgage brokers, and mortgage lenders. The conditions requiring licensure include whether a person takes part in making a “mortgage loan,” which currently requires that the mortgage loan be made *primarily for personal, family, or household use*. The definition of residential mortgage loan under Florida law is consistent with the definition under federal law, to the extent that both regulate mortgage loan originators. It is also consistent with the coverage of disclosure requirements under federal law.

Two current exemptions in ch. 494, F.S., permit an individual investor to make or acquire a mortgage loan with his or her own funds, or to sell such mortgage loan, without being licensed as a mortgage lender, so long as the individual does not *hold himself or herself out to the public as being in the mortgage lending business*. However, this term is currently undefined.

The bill makes the following changes:

- Amends the definition of “mortgage loan” such that residential mortgage loans made for a business purposes would fall under the definition of a “mortgage loan.” Persons originating, brokering, or lending for such loans would be subject to licensure by the OFR, unless they are otherwise exempt.
- Provides a definition of the term “hold himself or herself out to the public as being in the mortgage lending business,” as that term is used in two current licensing exemptions.

The bill has no impact on local governments. The bill has an indeterminate fiscal impact on the private sector and the state. However, the OFR has noted that additional staff may be needed to perform licensing and regulatory functions.

The bill provides an effective date of July 1, 2017.

## FULL ANALYSIS

### I. SUBSTANTIVE ANALYSIS

#### A. EFFECT OF PROPOSED CHANGES:

##### **Background: Federal Regulation of the Mortgage Industry**

###### *Secure and Fair Enforcement for Mortgage Licensing Act of 2008 (SAFE Act)*

The SAFE Act<sup>1</sup> was enacted on July 30, 2008, and was designed to enhance consumer protection and reduce fraud through the setting of minimum standards for the licensing and registration of mortgage loan originators. Mortgage loan originators who work for an insured depository or its owned or controlled subsidiary that is regulated by a federal banking agency, or for an institution regulated by the Farm Credit Administration, are registered; all other mortgage loan originators are licensed by the states.<sup>2</sup> Federal registration and state licensing must be accomplished through the same online registration system, the Nationwide Mortgage Licensing System and Registry (NMLS).<sup>3</sup>

The federal SAFE Act provides that “[r]esidential mortgage loan means any loan primarily for personal, family, or household use that is secured by a mortgage, deed of trust, or other equivalent consensual security interest on a dwelling . . . or residential real estate upon which is constructed or intended to be constructed a dwelling . . . .”<sup>4</sup> Because of the required use of a residential mortgage loan within this definition, the federal SAFE Act excludes business purpose loans from the scope of its regulation.

###### *Truth in Lending Act (TILA) and Real Estate Settlement Procedures Act (RESPA)*

The TILA’s regulations<sup>5</sup> are intended to:<sup>6</sup>

- Promote the informed use of consumer credit by requiring disclosures about its terms and cost,
- Ensure that consumers are provided with greater and more timely information on the nature and costs of the residential real estate settlement process, and
- Effect certain changes in the settlement process for residential real estate that will result in more effective advance disclosure to home buyers and sellers of settlement costs.

TILA affords consumers certain protections, including:

- Giving consumers the right to cancel certain credit transactions that involve a lien on a consumer’s principal dwelling.<sup>7</sup>
- Requiring a maximum interest rate to be stated in variable-rate contracts secured by the consumer’s dwelling.<sup>8</sup>
- Imposing limitations on open-end credit plans secured by the consumer’s dwelling and on “high-cost” mortgages secured by the consumer’s principal dwelling.<sup>9</sup>

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<sup>1</sup> 12 U.S.C. §§ 5101 *et seq.*

<sup>2</sup> Nationwide Multistate Licensing System & Registry, *SAFE Mortgage Licensing Act of 2008*, <http://mortgage.nationwidelicensingsystem.org/safe/Pages/default.aspx> (last visited Mar. 25, 2017).

<sup>3</sup> Consumer Financial Protection Bureau, *CFPB Consumer Laws and Regulations: SAFE Act*, [http://files.consumerfinance.gov/f/201203\\_cfpb\\_update\\_SAFE\\_Act\\_Exam\\_Procedures.pdf](http://files.consumerfinance.gov/f/201203_cfpb_update_SAFE_Act_Exam_Procedures.pdf), at 1 (last visited Mar. 25, 2017).

<sup>4</sup> 12 C.F.R. § 1008.23. The term “dwelling” has the same meaning under ch. 494, F.S., and the federal SAFE Act, as both rely on the definition of “dwelling” that is provided in TILA. s. 494.001(24)(a), F.S., and 12 C.F.R. § 1008.23.

<sup>5</sup> 12 C.F.R. Part 1026.

<sup>6</sup> 12 C.F.R. § 1026.1(b).

<sup>7</sup> *Id.*

<sup>8</sup> *Id.*

<sup>9</sup> *Id.*

- Requiring that a loan estimate be provided within three business days from application.<sup>10</sup>
- Requiring that a closing disclosure be provided to consumers three business days before loan consummation.<sup>11</sup>

RESPA's regulations<sup>12</sup> are intended to require certain timely disclosures regarding the nature and costs of the real estate settlement process. Due to the overlapping disclosure requirements in RESPA and TILA relating to most closed-end consumer credit transactions secured by real property, disclosures and forms for these types of transactions have been integrated and are governed by TILA regulations.<sup>13</sup>

Both TILA and RESPA exempt from their regulations a mortgage loan made "primarily for a business, commercial or agricultural purpose."<sup>14</sup> Therefore, TILA and RESPA do not cover "business purpose" mortgage loans but rather only "consumer purpose" mortgage loans. When determining whether credit is for consumer purposes, the creditor must evaluate all of the following factors:<sup>15</sup>

- 1) *Any statement obtained from the consumer describing the purpose of the proceeds.*
  - For example, a statement that the proceeds will be used for a vacation trip would indicate a consumer purpose.
  - If the loan has a mixed-purpose (e.g., proceeds will be used to buy a car that will be used for personal and business purposes), the lender must look to the primary purpose of the loan to decide whether disclosures are necessary. A statement of purpose from the consumer will help the lender make that decision.
  - A checked box indicating that the loan is for a business purpose, absent any documentation showing the intended use of the proceeds could be insufficient evidence that the loan did not have a consumer purpose.
- 2) *The consumer's primary occupation and how it relates to the use of the proceeds.* The higher the correlation between the consumer's occupation and the property purchased from the loan proceeds, the greater the likelihood that the loan has a business purpose. For example, proceeds used to purchase dental supplies for a dentist would indicate a business purpose.
- 3) *Personal management of the assets purchased from proceeds.* The lower the degree of the borrower's personal involvement in the management of the investment or enterprise purchased by the loan proceeds, the less likely the loan will have a business purpose. For example, money borrowed to purchase stock in an automobile company by an individual who does not work for that company would indicate a personal investment and a consumer purpose.
- 4) *The size of the transaction.* The larger the size of the transaction, the more likely the loan will have a business purpose. For example, if the loan is for a \$5,000,000 real estate transaction, that might indicate a business purpose.
- 5) *The amount of income derived from the property acquired by the loan proceeds relative to the borrower's total income.* The lesser the income derived from the acquired property, the more likely the loan will have a consumer purpose. For example, if the borrower has an annual salary of \$100,000 and receives about \$500 in annual dividends from the acquired property, that would indicate a consumer purpose.

<sup>10</sup> Consumer Financial Protection Bureau, *CFPB Consumer Laws and Regulations: TILA*, [https://s3.amazonaws.com/files.consumerfinance.gov/f/201503\\_cfpb\\_truth-in-lending-act.pdf](https://s3.amazonaws.com/files.consumerfinance.gov/f/201503_cfpb_truth-in-lending-act.pdf), at 4 (last visited Mar. 25, 2017).

<sup>11</sup> *Id.*

<sup>12</sup> 12 C.F.R. Part 1024.

<sup>13</sup> Consumer Financial Protection Bureau, *2013 Integrated Mortgage Disclosure Rule Under the Real Estate Settlement Procedures Act (Regulation X) and the Truth in Lending Act (Regulation Z)*, <https://www.consumerfinance.gov/policy-compliance/rulemaking/final-rules/2013-integrated-mortgage-disclosure-rule-under-real-estate-settlement-procedures-act-regulation-x-and-truth-lending-act-regulation-z/> (last visited Mar. 25, 2017).

<sup>14</sup> 12 C.F.R. § 1026.3(a).

<sup>15</sup> Consumer Financial Protection Bureau, *CFPB Consumer Laws and Regulations: TILA*, [https://s3.amazonaws.com/files.consumerfinance.gov/f/201503\\_cfpb\\_truth-in-lending-act.pdf](https://s3.amazonaws.com/files.consumerfinance.gov/f/201503_cfpb_truth-in-lending-act.pdf), at 6-9 (last visited Mar. 25, 2017). RESPA states that "[p]ersons may rely on [TILA] in determining whether the [business purpose loan] exemption applies." 12 C.F.R. § 1024.5(b)(2).

All five factors must be evaluated before the lender can conclude that disclosures are not necessary. Normally, no one factor, by itself, is sufficient reason to determine the applicability of Regulation Z. In any event, the financial institution may routinely furnish disclosures to the consumer. Disclosure under such circumstances does not control whether the transaction is covered, but can assure protection to the financial institution and compliance with the law.<sup>16</sup>

## **Background: State Regulation of Non-Depository Mortgage Business**

The Office of Financial Regulation (OFR) regulates banks, credit unions, other financial institutions, finance companies, and the securities industry.<sup>17</sup> The OFR's Division of Consumer Finance licenses and regulates various aspects of the non-depository financial services industries, including individuals and businesses engaged in the mortgage business.

Under ch. 494, F.S., the OFR licenses and regulates the following individuals and businesses:

- *Loan originator*<sup>18</sup> – An individual who, directly or indirectly, solicits or offers to solicit a mortgage loan, accepts or offers to accept an application for a mortgage loan, negotiates or offers to negotiate the terms or conditions of a new or existing mortgage loan on behalf of a borrower or lender, or negotiates or offers to negotiate the sale of an existing mortgage loan to a noninstitutional investor for compensation or gain. The term includes an individual who is required to be licensed as a loan originator under the S.A.F.E. Mortgage Licensing Act of 2008. The term does not include an employee of a mortgage broker or mortgage lender whose duties are limited to physically handling a completed application form or transmitting a completed application form to a lender on behalf of a prospective borrower.
- *Mortgage broker*<sup>19</sup> – A person conducting loan originator activities through one or more licensed loan originators employed by the mortgage broker or as independent contractors to the mortgage broker.
- *Mortgage lender*<sup>20</sup> – A person making a mortgage loan or servicing a mortgage loan for others, or, for compensation or gain, directly or indirectly, selling or offering to sell a mortgage loan to a noninstitutional investor. A mortgage lender may act as a mortgage broker.<sup>21</sup>

In order to obtain licensure as a mortgage *loan originator*, an individual must:<sup>22</sup>

- Complete a 20-hour prelicensing class;<sup>23</sup>
- Pass a written test (cost: \$110);<sup>24</sup>
- Submit an application form;
- Submit a nonrefundable application fee of \$215;
- Submit fingerprints, the cost of which is borne by the applicant; and
- Authorize access to his or her credit report, the cost of which is borne by the applicant.

In order to obtain licensure as a *mortgage broker*, a person must:<sup>25</sup>

- Submit an application form, which must designate a qualified principal loan originator;
- Submit a nonrefundable application fee of \$525;

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<sup>16</sup> *Id.*

<sup>17</sup> s. 20.121(3)(a)2., F.S.

<sup>18</sup> s. 494.001(17), F.S.

<sup>19</sup> s. 494.001(22), F.S.

<sup>20</sup> s. 494.001(23), F.S.

<sup>21</sup> s. 494.0073, F.S.

<sup>22</sup> s. 494.00312, F.S.

<sup>23</sup> The cost of prelicensing courses may vary by course provider, but one such course provider charges \$349 for the required 20-hour course. See MortgageEducation.com, *Mortgage Loan Originator Courses*, <https://www.mortgage-education.com/StatePage.aspx?StateCode=FL> (last visited Mar. 25, 2017).

<sup>24</sup> Nationwide Multistate Licensing System & Registry, *Uniform State Test (UST) Implementation Information*, <http://mortgage.nationwidelicensingsystem.org/profreq/testing/Pages/UniformStateTest.aspx> (last visited Mar. 25, 2017).

<sup>25</sup> s. 494.00321, F.S.

- Submit fingerprints for each of the applicant's control persons, the cost of which is borne by the person subject to the background check; and
- Authorize access to the credit reports of each of the applicant's control persons, the cost of which is borne by the applicant.

In order to obtain licensure as a *mortgage lender*, a person must:<sup>26</sup>

- Submit an application form, which must designate a qualified principal loan originator;
- Submit a nonrefundable application fee of \$600;
- Submit fingerprints for each of the applicant's control persons, the cost of which is borne by the person subject to the background check;
- Submit a copy of the applicant's financial audit report for the most recent fiscal year, which must document that the applicant has a net worth of at least \$63,000 if the applicant is not seeking a servicing endorsement, or at least \$250,000 if the applicant is seeking a servicing endorsement; and
- Authorize access to the credit reports of each of the applicant's control persons, the cost of which is borne by the applicant.

All of the above licenses must be renewed annually by December 31.<sup>27</sup> In order to renew:

- A *mortgage loan originator* license, an individual must submit a renewal form and a nonrefundable renewal fee of \$170; provide documentation of completion of at least 8 hours of continuing education courses,<sup>28</sup> and authorize access to his or her credit report, the cost of which is borne by the licensee.<sup>29</sup>
- A *mortgage broker* license, a person must submit a renewal form and a nonrefundable renewal fee of \$475; submit fingerprints for any new control persons who have not been screened; and authorize access to the credit reports of each of the mortgage broker's control persons, the cost of which is borne by the licensee.<sup>30</sup>
- A *mortgage lender* license, a person must submit a renewal form and a nonrefundable renewal fee of \$575; submit fingerprints for any new control persons who have not been screened; submit proof that the mortgage lender continues to meet the applicable net worth requirement; and authorize access to the credit reports of each of the mortgage lender's control persons, the cost of which is borne by the licensee.<sup>31</sup>

The following persons are currently exempt from regulation under ch. 494, F.S.:<sup>32</sup>

- a) Any person operating exclusively as a registered loan originator<sup>33</sup> in accordance with the S.A.F.E. Mortgage Licensing Act of 2008.
- b) A depository institution; certain regulated subsidiaries that are owned and controlled by a depository institution; or institutions regulated by the Farm Credit Administration.
- c) The Federal National Mortgage Association; the Federal Home Loan Mortgage Corporation; any agency of the Federal Government; any state, county, or municipal government; or any quasi-governmental agency that acts in such capacity under the specific authority of the laws of any state or the United States.

<sup>26</sup> s. 494.00611, F.S.

<sup>27</sup> ss. 494.00312(7), 494.00321(7), and 494.00611, F.S.

<sup>28</sup> The cost of continuing education courses may vary by course provider, but one such course provider charges \$129 for the required 8-hour course. See MortgageEducation.com, *Mortgage Loan Originator Courses*, <https://www.mortgage-education.com/StatePage.aspx?StateCode=FL> (last visited Mar. 25, 2017).

<sup>29</sup> s. 494.00313, F.S.

<sup>30</sup> s. 494.00322, F.S.

<sup>31</sup> s. 494.00612, F.S.

<sup>32</sup> s. 494.00115(1), F.S.

<sup>33</sup> A "registered loan originator" is "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 [Nationwide Mortgage Licensing System and Registry]." A registered loan originator must comply with federal registration requirements rather than the loan originator licensing requirements under ch. 494, F.S.

- d) An attorney licensed in this state who negotiates the terms of a mortgage loan on behalf of a client as an ancillary matter to the attorney's representation of the client.
- e) A person involved solely in the extension of credit relating to the purchase of a timeshare plan.
- f) A person who performs only real estate brokerage activities and is licensed or registered in this state under part I of chapter 475, F.S., unless the person is compensated by a lender, a mortgage broker, or other loan originator or by an agent of such lender, mortgage broker, or other loan originator.

The following persons are currently exempt from the mortgage lender licensing requirements of ch. 494, F.S.:

- a) A person acting in a fiduciary capacity conferred by the authority of a court.
- b) A person who, as a seller of his or her own real property, receives one or more mortgages in a purchase money transaction.
- c) A person who acts solely under contract and as an agent for federal, state, or municipal agencies for the purpose of servicing mortgage loans.
- d) A person who makes only nonresidential mortgage loans and sells loans only to institutional investors.
- e) An individual making or acquiring a mortgage loan using his or her own funds for his or her own investment, and who does not hold himself or herself out to the public as being in the mortgage lending business.
- f) An individual selling a mortgage that was made or purchased with that individual's funds for his or her own investment, and who does not hold himself or herself out to the public as being in the mortgage lending business.

Each ch. 494, F.S., licensee is subject to:

- Certain requirements for the maintenance of books and records relating to the licensee's compliance with the chapter, with regard to expenses paid by the licensee on behalf of the borrower, and relating to its advertisements.<sup>34</sup>
- The OFR's investigation and examination authority.<sup>35</sup>
- The OFR's enforcement authority such as injunctions, cease and desist orders, suspension or revocation of licensure, and administrative fines.<sup>36</sup>

As part of the administrative penalties and fines available to the OFR under ch. 494, F.S., a violation of the RESPA, TILA, or any regulations adopted thereunder committed in any mortgage transaction, is a ground for disciplinary action.<sup>37</sup>

The conditions requiring licensure as a mortgage loan originator, mortgage broker, or mortgage lender include whether a person takes part in making a "mortgage loan," as defined under ch. 494, F.S. Currently, the definition includes a:<sup>38</sup>

- 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 for the purchase of residential real estate upon which a dwelling is to be constructed. A "dwelling" is a residential structure or mobile home which contains one to four family housing units, or individual units of condominiums or cooperatives.<sup>39</sup>
- Loan on commercial real property if the borrower is an individual or the lender is a noninstitutional investor.
- Loan on improved real property consisting of five or more dwelling units if the borrower is an individual or the lender is a noninstitutional investor.

<sup>34</sup> ss. 494.0016 and 494.00165(2), F.S.

<sup>35</sup> s. 494.0012, F.S.

<sup>36</sup> ss. 494.0013, 494.0014, and 494.00255, F.S.

<sup>37</sup> s. 494.00255(1)(m), F.S.

<sup>38</sup> s. 494.001(24), F.S.

<sup>39</sup> *Id.*; 15 U.S.C. § 1602(w).

With respect to residential mortgage loans, a person must be licensed to originate, broker, or lend for such a loan if:

- The loan is secured by a mortgage on:
  - A residential structure or mobile home containing one to four family housing units, or
  - Individual units of condominiums or cooperatives; and
- The purpose of the loan is *primarily for personal, family, or household use*.

If the residential mortgage loan is for business purposes, then a person originating, brokering, or lending for such loan does not need to be licensed under ch. 494, F.S. The definition of residential mortgage loan under Florida law is consistent with the definition under the federal SAFE Act, to the extent that both regulate mortgage loan originators.

### **Effect of Proposed Changes**

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

Two current exemptions in ch. 494, F.S., permit an individual investor to make or acquire a mortgage loan with his or her own funds, or to sell such mortgage loan, without being licensed as a mortgage lender under ch. 494, F.S., so long as the individual does not hold himself or herself out to the public as being in the mortgage lending business. The bill specifies that the term “hold himself or herself out to the public as being in the mortgage lending business,” includes the following:

- Representing to the public, through advertising or other means of communicating or providing information (including the use of business cards, stationery, brochures, signs, rate lists, or promotional items), by any medium whatsoever, that such individual can or will perform the activities described in the definition of “mortgage lender.”
- Soliciting in a manner which would lead the intended audience to reasonably believe that such individual is in the business of performing the activities described in the definition of “mortgage lender.”
- Maintaining a commercial business establishment at which, or premises from which, such individual regularly performs the activities described in the definition of “mortgage lender” or regularly meets with current or prospective borrowers.
- Advertising, soliciting, or conducting business through use of a name, trademark, service mark, trade name, Internet address, or logo which indicates or reasonably implies that the business being advertised, solicited, or conducted is the kind or character of business transacted or conducted by a licensed mortgage lender or which is likely to lead any person to believe that such business is that of a licensed mortgage lender.
- Using any form promulgated by the Federal National Mortgage Association, Federal Home Loan Mortgage Corporation, United States Department of Housing and Urban Development, or Consumer Financial Protection Bureau in performing the activities described in the definition of a “mortgage lender.”

#### **B. SECTION DIRECTORY:**

**Section 1.** Amends s. 494.001, F.S., relating to definitions.

**Section 2.** Amends s. 494.00115, F.S., relating to exemptions.

**Section 3.** Provides an effective date of July 1, 2017.



## II. FISCAL ANALYSIS & ECONOMIC IMPACT STATEMENT

### A. FISCAL IMPACT ON STATE GOVERNMENT:

1. Revenues:

See Fiscal Comments.

2. Expenditures:

See Fiscal Comments.

### B. FISCAL IMPACT ON LOCAL GOVERNMENTS:

1. Revenues:

The bill does not appear to have an impact on local government revenues.

2. Expenditures:

None.

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

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

Persons who are currently involved in making residential mortgage loans for business purposes but are not licensed would be required to seek licensure under ch. 494, F.S., in order to continue such activity. However, as it is unknown how many new licensees would result from the bill's passage, the fiscal impact to the private sector is indeterminate.

### D. FISCAL COMMENTS:

The addition of any new licensees would result in an increase in licensing fees received by the OFR and a corresponding responsibility for the OFR to provide regulatory oversight of the additional licensees. The OFR has noted that additional staff may be needed to perform licensing and regulatory functions.<sup>40</sup> However, as it is unknown how many new licensees would result from the bill's passage, the fiscal impact to the state is indeterminate.

## III. COMMENTS

### A. CONSTITUTIONAL ISSUES:

1. Applicability of Municipality/County Mandates Provision:

Not applicable. This bill does not appear to affect county or municipal governments.

2. Other:

None.

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<sup>40</sup> Office of Financial Regulation, Agency Analysis of 2017 House Bill 1081 (Mar. 14, 2017).



**B. RULE-MAKING AUTHORITY:**

The bill does not appear to create a need for rulemaking or rulemaking authority.

**C. DRAFTING ISSUES OR OTHER COMMENTS:**

The definition of “hold himself or herself out to the public as being in the mortgage lending business” includes use of forms promulgated by certain federal agencies, which may lead to a lack of standardization in the market of private residential mortgage loans.

A violation of RESPA, TILA, or any regulations adopted thereunder committed in any mortgage transaction, is a ground for disciplinary action under ch. 494, F.S. Both RESPA and TILA exclude business purpose loans from the scope of their regulation. Therefore, a person may be subject to licensure under ch. 494, F.S., but would not necessarily be required to provide the disclosures required under RESPA and TILA if the residential mortgage loan is made for business purposes.

**IV. AMENDMENTS/ COMMITTEE SUBSTITUTE CHANGES**