

## **Chapter 494, Florida Statutes, Questions & Answers**

*Last updated December 7, 2009*

During the 2009 legislative session, the Florida Legislature passed a bill that substantially changed the provisions of Chapter 494, Florida Statutes. These changes occurred, in part, to comply with the federal Secure and Fair Enforcement for Mortgage Licensing Act of 2008 (known as the "S.A.F.E Act"). As a result of these changes, the Office has received and continues to receive a number of questions regarding the impact of these changes. In order to provide guidance on the new law, the Office will be publishing answers to additional questions on its website. These answers constitute informal opinions only and based only on the questions posed and are subject to change. They do not constitute legal advice or rules of the Office. Anyone who would like an answer to a specific answer to a question should contact the Office.

As a preliminary guide to understanding the changes that occurred, all individuals and businesses operating as loan originators, mortgage brokers, mortgage broker businesses, mortgage lenders, and correspondent lenders, should be aware of the following:

- Mortgage broker, mortgage broker business, mortgage lender, and correspondent mortgage lender licenses issued prior to October 1, 2010 will expire on December 31, 2010. Entities holding an active license on October 1, 2010 that desire to continue to operate in these capacities need to reapply for licensure starting October 1, 2010 with the Nationwide Mortgage Licensing System and Registry (NMLS).

### **Chapter 494 Licensing Questions**

#### **1. General License Question**

- a) Individual Mortgage Broker Licenses – since licenses were renewed August 31, 2009 and are valid until December 31, 2010; will the fees be prorated?

**Answer:** Licensing and renewal fees are set by Chapter 494, F. S., and there is no provision for prorated fees.

- b) Mortgage Brokerage Business Licenses are to be renewed as of August 31, 2010 however due to the law change will this renewal be for a Mortgage Broker License?

**Answer:** The new law will extend the expiration date of active mortgage brokerage business licenses until December 31, 2010. Effective October 1, 2010, changes to Chapter 494, F.S., will result in redefined and reclassified license types. Consequently, mortgage brokerage business licenses cannot be renewed. Mortgage brokerage business licensees will have to apply for the new mortgage broker license (company license) between October 1, 2010 and December 31, 2010. If the company applies for the new mortgage broker license within the aforementioned dates then the existing mortgage brokerage business license will be valid until the Office renders a decision on the new mortgage broker license application.

- c) Loan Originators currently employed by correspondent lenders and mortgage lenders are currently exempt from licensure; however, the exemption is being repealed. When will these employees need to be licensed as loan originators?

**Answer:** The requirement for new loan originator license for individuals does not become effective until October 1, 2010. However, the Office is strongly recommending that employees of lenders who desire to continue to work uninterrupted seek licensure as a mortgage broker as soon as possible for a number of reasons. First, the law allows applicants already licensed with the Office to file the loan originator application until December 31, 2010 and continue operating while the Office processes and considers the application, even if the final determination on the application does not occur until some time in 2011. Therefore, employees of lenders that obtain a mortgage broker license will have a grace period during which they can continue to work.

Second, the Nationwide Mortgage Licensing System (NMLS) will not accept Florida loan originator applications until October 1, 2010, so it will not be possible for individuals to apply for a loan originator license before that date. Under normal circumstances, the processing of these applications can take a number of months during which time the applicant would not be licensed and could not work in any capacity that would require a loan originator license.

Third, individuals who delay in applying for a mortgage broker license run the risk of not having their application approved before the deadline. While the Office strives to approve or deny each application as quickly as possible, the current application process can take a number of months to complete. An application that is still in the pipeline as of October 1, 2010 will expire and a new loan originator application will need to be filed through NMLS.

Finally, the Office anticipates a large number of applications after the October 1, 2010 deadline. In addition to non-licensed individuals applying for the first time, all current Chapter 494 licensees will be filing new applications. It will take time to process these applications, which could impact someone's ability to continue working if they have not been licensed prior to October 1, 2010. In fact, the new law anticipated the additional number of applications that the Office will receive during this transition and extended the deadlines for processing these applications. The Office cannot expedite the processing of applications for unlicensed persons who wait until the new loan originator application becomes available on October 1, 2010, and it could conceivably be well into 2011 before the Office is ready to approve or deny such an application.

- d) Are the changes in Chapter 494, F.S., applicable only to residential mortgage loans?

**Answer:** No, see the definition of mortgage loans in Section 494.001(20), F.S.

- e) Will the Principal Representative need to register with the NMLS?

**Answer:** Effective October 1, 2010 the principal representative designation will be reclassified along with the principal broker designation to principal loan originator. Principal loan originators will be required to be licensed as a loan originator and have at least one year of experience. Also beginning October 1, 2010 all Florida license applications will be required to be filed through the NMLS.

## **2. License Exemptions**

- a) I understand that there were significant changes to the exemptions from Chapter 494, F.S., in the last legislative session. What entities and individuals are going to be exempt under the new law?

**Answer:** Section 494.00115, F.S., which becomes effective January 1, 2010 reads:

(1) The following are exempt from regulation under parts I, II, and III of this chapter.

(a) Any person operating exclusively as a registered loan originator in accordance with the S.A.F.E. Mortgage Licensing Act of 2008.

(b) A depository institution; subsidiaries that are owned and controlled by a depository institution and regulated by the Board of Governors of the Federal Reserve System, the Comptroller of the Currency, the Director of

the Office of Thrift Supervision, the National Credit Union Administration, or the Federal Deposit Insurance Corporation; 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.

(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, as that term is defined in 11 U.S.C. s. 101(53D)

(2) The following persons are exempt from regulation under part III of this chapter:

(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.

(3) It is not necessary to negate any of the exemptions provided in this section in any complaint, information, indictment, or other writ or proceeding brought under ss. 494.001-494.0077. The burden of establishing the right to an exemption is on the party claiming the benefit of the exemption.

### **3. License Standards**

- a) If a person has been a licensed Mortgage Broker for 20+ years and does not meet the current standards for licensure (say being a high school graduate) will they be permitted to be licensed as a Loan Originator?

**Answer:** Beginning October 1, 2010 existing individual mortgage broker licensees that apply for the new loan originator license will be subject to the new licensing standards including the requirement for a high school diploma or its equivalent, criminal background check, and financial responsibility.

- b) Is a “bounced check” considered a form of moral turpitude?

**Answer:** Criminal events are evaluated individually based upon the disposition of all charges. It is difficult to characterize a crime as moral turpitude without court documents outlining the facts.

### **4. Loan Modifications**

- a) Do I have to be licensed to perform a loan modification?

**Answer:** Yes, effective January 1, 2010.

- b) Can a licensee take an upfront fee to perform a loan modification?

**Answer:** No. Section 494.00296(1)(c), F.S., states, “When offering or providing loan modification services, a mortgage broker, mortgage brokerage business, mortgage lender, or correspondent mortgage lender licensed, or required to be licensed, under ss. 494.001-494.0077 may not solicit, charge, receive, or attempt to collect or secure payment, directly or indirectly, for loan modification services before completing or performing all services included in the agreement for loan modification services.”

- c) Is there a prescribed format for the “notice of cancellation” referenced in 494.00296(2)(b)?

**Answer:** Yes, per Section 494.00296(2)(c), F.S.

- d) Is taking an application from the potential borrower to engage in loan modification services prohibited by 494.00296(1)(a)?

**Answer:** Pursuant to Section 494.00296(1)(a), F.S., a written agreement is required prior to taking an application.

## 5. Short Sales

- a) Does a company that facilitates short sale transactions for borrowers need to be licensed?

**Answer:** Effective January 1, 2010, the definition of “acting as a mortgage broker” will include negotiating the terms or conditions of an *existing* mortgage loan on behalf of a *borrower*. See Section 494.001(3), F.S. Since a company that facilitates short sale transactions for borrowers will be asking the lender to accept less than the amount owed, it will be affecting the terms or conditions of an existing mortgage loan. Accordingly, a company that facilitates short sale transactions needs to be licensed under Chapter 494, F.S.

- b) If a real estate licensee, who has been asked by a client to list a house for sale, enters into dialogue with the client’s lender to see if a short sale would be acceptable, would the licensee need to comply with the loan modification provisions under Section 494.00296, F.S., if the only compensation for the real estate licensee would be the commission on the sale?

**Answer:** The conversations between the real estate licensee and the lender appear to be ancillary to the services being provided by the real estate licensee in the sale of his client’s property. As long as the only remuneration sought is the standard commission for the area on the sale of the property and no other fees are collected for the dialogue with the lender, the activity mentioned above does not appear to fall under the provisions of Section 494.00296, F.S.