HB 360

Department of Legislative Services
Maryland General Assembly
2008 Session

FISCAL AND POLICY NOTE
Revised

House Bill 360 (The Speaker, *et al.*) (By Request – Administration)

Economic Matters and Environmental Matters Judicial Proceedings

Real Property - Maryland Mortgage Fraud Protection Act

This emergency Administration bill creates a comprehensive mortgage fraud statute with criminal penalties and authorizes the Attorney General, a State's Attorney, and the Commissioner of Financial Regulation to take action to enforce the statute. The bill also authorizes a private right of action for violations of the statute in specified circumstances.

Fiscal Summary

State Effect: Special fund expenditures could increase by approximately $95,600 in FY 2009 for additional legal staff to assist the Commissioner of Financial Regulation in pursuing violations of the statute. Future year expenditure estimates reflect annualization and inflation. Potential increase in general fund revenues and expenditures due to the bill's penalty provisions and proceeds from the sale of forfeited property.

(in dollars)	FY 2009	FY 2010	FY 2011	FY 2012	FY 2013
GF Revenue	-	-	-	-	-
GF Expenditure	-	-	-	-	-
SF Expenditure	95,600	91,700	96,100	100,700	105,500
Net Effect	($95,600)	($91,700)	($96,100)	($100,700)	($105,500)

Note:() = decrease; GF = general funds; FF = federal funds; SF = special funds; - = indeterminate effect

Local Effect: The bill could affect local State's Attorneys offices if they are active in the investigation and prosecution of mortgage fraud cases. Potential increase in revenues and expenditures due to the bill's penalty and property forfeiture provisions.

Small Business Effect: The Administration has determined that this bill has minimal or no impact on small business (attached). Legislative Services concurs with this assessment. (The attached assessment does not reflect amendments to the bill.)

Analysis

Bill Summary:

Definitions: The bill defines "mortgage fraud" as any action by a person made with the intent to defraud that involves:

- knowingly making, using, or facilitating the use of any deliberate misstatement, misrepresentation, or omission during the mortgage lending process with the intent that it will be relied upon by a mortgage lender, borrower, or any other party to the lending process;
- receiving any proceeds or any other funds in connection with a mortgage closing that the person knows resulted from the aforementioned actions;
- conspiring to violate either of the preceding provisions;
- filing or causing to be filed in the land records in the county where a residential real property is located any document relating to a mortgage loan that the person knows to contain a deliberate misstatement, misrepresentation, or omission.

Under the bill, the "mortgage lending process" includes the solicitation, application, origination, negotiation, servicing, underwriting, signing, closing, and funding of a mortgage loan, as well as the notarizing of any document in connection with a mortgage loan. A "pattern of mortgage fraud" is defined by the bill as two or more incidents of mortgage fraud that involve one or more residential real properties and have similar intents, results, accomplices, victims, or methods of commission or are otherwise interrelated by distinguishing characteristics.

Criminal Offense: The bill prohibits mortgage fraud, as defined above, and specifies, for purposes of venue, the jurisdiction in which violations will be considered to have occurred. In addition, the bill authorizes the Attorney General or the Commissioner of Financial Regulation to seek an injunction to prohibit a person from engaging or continuing to engage in violations. The bill also allows a court to enter any order or judgment necessary to • prevent the use of a prohibited practice; • restore to a person any money, real property, or personal property acquired from the person by means of any prohibited practice; or • appoint a receiver in the case of a willful violation. Under the bill, the Attorney General or commissioner is entitled to recover the costs of actions brought to enjoin violations.

The Attorney General and a State's Attorney are authorized to conduct the criminal investigation and prosecution of all cases of mortgage fraud and must promptly report convictions to the unit of State government that has regulatory jurisdiction over the business activities of the person convicted.

The bill makes mortgage fraud a felony, punishable by a fine of up to $5,000, imprisonment for up to 10 years, or both. If the victim is a vulnerable adult as defined by the Criminal Law Article, the maximum fine is $15,000 and the maximum imprisonment period is 15 years. If a violation involves a pattern of mortgage fraud or a conspiracy to engage in a pattern of mortgage fraud, the maximum fine is $100,000 and the maximum imprisonment is 20 years. In addition to a fine, imprisonment, or both, a convicted person must pay restitution to any person damaged by the violation. The bill further states that each residential real property transaction subject to a violation constitutes a separate offense and can not merge with any other crimes in the Criminal Law Article. All real or personal property used in or derived from a violation is subject to forfeiture to the State.

Private Action: Finally, the bill allows victims of mortgage fraud to bring private actions seeking damages and attorney's fees from alleged violators. If the court finds that the defendant has violated the provisions of the bill, the court may award damages of up to three times the amount of actual damages.

Forfeiture Procedures: The bill establishes procedures for the forfeiture of property obtained through mortgage fraud. Property subject to forfeiture includes • property used or intended for use in the course of a violation of the Mortgage Fraud Law; • property derived from or realized through a violation of the Mortgage Fraud Law; and • proceeds of both preceding types of property. Such property does not include a lessor's interest in property subject to a bona fide lease, unless the forfeiting authority can show that the lessor participated in a violation of the Mortgage Fraud Law or the property was the proceeds of a violation of the Mortgage Fraud Law.

Property or an interest in property may not be forfeited if the owner establishes by a preponderance of the evidence that the violation of the Mortgage Fraud Law was committed without the owner's actual knowledge. Property used as the principal family residence may not be forfeited under the bill unless one of the owners of the property was convicted of a violation of the Mortgage Fraud Law. Without a conviction, a court may order forfeiture if the owner fails to appear for a required court appearance or fails to surrender to the jurisdiction of the court within 180 days after the required court appearance. Property used as the principal family residence by a husband and wife and held as tenants by the entirety may not be forfeited unless the property was used in connection with a violation of the Mortgage Fraud Law or an attempt or conspiracy to violate this law and both the husband and wife are convicted of either offense.

Property subject to forfeiture under the bill may be seized in accordance with existing procedures set forth by State law for forfeiture of property under the Controlled Dangerous Substances Law, except that the required probable cause is probable cause to believe that the property has been used or is intended to be used in violation of the Mortgage Fraud Law. Forfeiture proceedings may be brought in the jurisdiction where the criminal charges are pending, the owner resides, or the real property is located. If the proceedings are brought in a jurisdiction other than where the real property is located, a notice of pending litigation has to be filed in the jurisdiction where the property is located. The bill establishes requirements for this notice and allows for a stay of forfeiture proceedings during appeal of a related conviction.

The bill specifies that whenever property is forfeited according to the bill's provisions, the governing body where the property was seized is required to sell the property at public auction. The proceeds of the sale are required to be disbursed • first, to pay all proper expenses of the proceedings for forfeiture and sale; • second, for restitution as ordered by the court to victims to pay for identifiable losses resulting from the violation of the Mortgage Fraud Law; and • finally, to the general fund of the State.

Current Law: Mortgage fraud is not a crime that is specifically defined by statute in Maryland. Although mortgage fraud may be prosecuted as theft by deception, the Maryland Homeownership Preservation Task Force found that prosecuting these cases under the general theft statute is cumbersome and difficult to explain to juries. Mortgage lender licensees are subject to various administrative sanctions and criminal penalties for fraud and other bad acts.

State laws authorizing search and seizure of property, money, or valuables do not apply to property that may have been obtained through mortgage fraud. Search and seizure provisions apply to property used or intended to be used to violate controlled dangerous substance, gambling, gun, and explosives laws.

Procedures vary for the search, seizure, and forfeiture of property depending on whether the offense involves controlled dangerous substances, gambling, guns, or explosives. For example, with regard to controlled dangerous substance violations, raw materials, equipment, books, records, research, motor vehicles, other vehicles or vessels, real property, money, contraband, negotiable instruments, as well as other items of value may be subject to search, seizure, and forfeiture. Once the property is seized, a law enforcement authority must file a complaint seeking forfeiture. The owner of the seized property is entitled to notice and opportunity for hearing on the forfeiture claim. The courts are authorized to mitigate the impact of forfeiture or return all seized property to the owner. The courts are also authorized to take appropriate measures to safeguard and maintain forfeited property.

Once forfeiture is authorized, the governing body where the property was seized may keep the property for official use or dispose of or sell the property. If the property is sold by a State law enforcement unit, then proceeds from the sale must be deposited into the general fund of the State. If the property is sold by a local law enforcement unit, then proceeds from the sale must be deposited into the general fund of the political subdivision that has jurisdiction over the law enforcement unit.

Background: A number of other states have enacted statutes that prohibit mortgage fraud including Alaska, Arizona, Colorado, Connecticut, Delaware, Florida, Georgia, Illinois, Minnesota, Mississippi, Nevada, North Carolina, Texas, Virginia, and Washington.

Generally, mortgage fraud refers to any action made with the intent to misrepresent information in order to obtain a mortgage loan. The Federal Bureau of Investigation reports that mortgage fraud is one of the fastest growing financial crimes in the United States, primarily due to an increased reliance on third-party mortgage brokers by traditional mortgage lenders. For example, during a four-month period in 2005, the FBI and coordinating federal agencies indicted 156 mortgage fraud suspects, responsible for an estimated $607 million combined loss to the mortgage industry. Mortgage fraud creates wide-ranging economic damages that affect consumers as well as lenders, because mortgage lending and the housing market are integral pieces of the national economy.

In fiscal 2007, the Commissioner of Financial Regulation received approximately 30 mortgage fraud complaints and initiated another 67 mortgage fraud investigations. Thus far in fiscal 2008, the commissioner has received approximately 20 mortgage fraud complaints and has opened an additional 203 mortgage fraud investigations. A substantial number of the 203 investigations in the current fiscal year are related to the actions of a company known as the Metropolitan Money Store and have been turned over to the FBI for prosecution.

State Revenues: General fund revenues could increase minimally as a result of the bill's monetary penalty provisions from cases heard in the District Court. In addition, to the extent the sale of any forfeited property results in proceeds greater than the amount needed to pay expenditures and restitution, the general fund would benefit from deposit of additional revenues.

State Expenditures: Mortgage Special Fund expenditures could increase by an estimated $95,649 in fiscal 2009, which reflects an anticipated July 1, 2008 hiring date. This estimate reflects the cost of hiring one assistant Attorney General, assigned to the commissioner, to pursue violations of the statute. It includes a salary, fringe benefits, one-time start-up costs, and ongoing operating expenses. The Department of Labor, Licensing, and Regulation reports that the Mortgage Special Fund balance as of December 2007 was $6.4 million.

Position	1
Salary and Fringe Benefits	$88,439
Operating Expenses	7,210
Total FY 2009 State Expenditures	**$95,649**

Future year expenditures reflect • a full salary with 4.4% annual increases and 3% employee turnover; and • 2% annual increases in ongoing operating expenses.

General fund expenditures could increase minimally as a result of the bill's incarceration penalties due to more people being committed to Division of Correction facilities. The number of people convicted of this proposed crime is expected to be minimal.

Persons serving a sentence longer than 18 months are incarcerated in DOC facilities. Currently, the average total cost per inmate, including overhead, is estimated at $2,600 per month. This bill alone, however, should not create the need for additional beds, personnel, or facilities. Excluding overhead, the average cost of housing a new DOC inmate (including medical care and variable costs) is $526 per month. Excluding medical care, the average variable costs total $148 per month.

Persons serving a sentence of one year or less in a jurisdiction other than Baltimore City are sentenced to local detention facilities. For persons sentenced to a term of between 12 and 18 months, the sentencing judge has the discretion to order that the sentence be served at a local facility or DOC. The State reimburses counties for part of their incarceration costs, on a per diem basis, after a person has served 90 days. State per diem reimbursements for fiscal 2009 are estimated to range from $19 to $71 per inmate depending upon the jurisdiction. Persons sentenced to such a term in Baltimore City are generally incarcerated in DOC facilities. The Baltimore City Detention Center, a State-operated facility, is used primarily for pretrial detentions.

There is a potential for cost recovery due to the bill's cost-recovery provisions; however, it is not possible to predict how many actions brought under the bill would lead to convictions with successful post-judgment collections.

Local Revenues: Revenues could increase minimally as a result of the bill's monetary penalty provisions from cases heard in the circuit courts, as well as from the bill's property forfeiture provisions.

Local Expenditures: Expenditures could increase minimally as a result of the bill's incarceration penalties. Counties pay the full cost of incarceration for people in their facilities for the first 90 days of the sentence, plus part of the per diem cost after 90 days. Per diem operating costs of local detention facilities are expected to range from $40 to $129 per inmate in fiscal 2009. Expenditures could also increase minimally as a result of the bill's property forfeiture provisions due to required court proceedings.

Additional Information

Prior Introductions: None.

Cross File: SB 217 (The President, *et al.*) (By Request – Administration) – Judicial Proceedings.

Information Source(s): State's Attorneys Association; Judiciary (Administrative Office of the Courts); Department of Labor, Licensing, and Regulation; Office of the Attorney General; Department of Legislative Services

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