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BILL ANALYSIS

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Senate Bill 43 (as enacted) **PUBLIC ACT 205 of 2011**
Senate Bills 249 through 252 (as enacted) **PUBLIC ACTS 201-204 of 2011**
House Bills 4462, 4478, and 4492 (as enacted) **PUBLIC ACTS 206-208 of 2011**
Sponsor: Senator Tupac A. Hunter (S.B. 43)
Senator Darwin L. Booher (S.B. 249 & 250)
Senator Mike Nofs (S.B. 251)
Senator Jim Marleau (S.B. 252)
Representative Marty Knollenberg (H.B. 4462)
Representative Lisa Posthumus Lyons (H.B. 4478)
Representative Rashida H. Tlaib (H.B. 4492)
Senate Committee: Banking and Financial Institutions
House Committee: Banking and Financial Services

Date Completed: 1-18-12

RATIONALE

In 2010, Michigan was among the top 10 states with a significant mortgage fraud problem, according to the FBI's 2010 Mortgage Fraud Report (the most recent available). Despite modest improvements in some economic sectors, an increase in government-mandated scrutiny, and programs to improve mortgage fraud awareness, mortgage fraud cases have continued to increase, according to both the Wayne County Prosecuting Attorney's office and the Attorney General's office. The FBI defines mortgage fraud as a material misstatement, misrepresentation, or omission relied upon by an underwriter or lender to fund, purchase, or insure a loan. Mortgage fraud schemes can take many forms, such as loan origination schemes, illegal property flipping, foreclosure rescue scams, and short sale schemes, which evolve as market conditions change. (These and other schemes are described below in **BACKGROUND**.) Victims include borrowers as well as mortgage industry entities.

While mortgage fraud activities can be prosecuted under Federal and State laws, it was pointed out that Michigan had no statute making mortgage fraud a separate crime. At the State level, offenders have been prosecuted for other crimes, such as false pretenses and forgery, but the penalties for those offenses were considered weak and the elements of the crimes did not always apply to mortgage fraud activities.

In addition to enacting a law that criminalizes mortgage fraud, it was suggested that the State could address the mortgage fraud problem by increasing penalties for false pretenses, lengthening the statute of limitations for false pretenses involving real property, and increasing the penalty for individuals who knowingly notarize fraudulent documents related to real property.

CONTENT

Senate Bill 43 amended the Michigan Penal Code to create the felony of residential mortgage fraud, and do the following:

-- **Prescribe a penalty of up to 15 years' imprisonment and/or a maximum fine of $100,000 if the loan value was $100,000 or less; or**

imprisonment for up to 20 years and/or a maximum fine of $500,000 if the loan value exceeded $100,000.

-- **Allow forfeiture of property used in connection with a violation.**
-- **Provide an affirmative defense for residential mortgage fraud committed by an employee or agent of a defendant, if the defendant had a policy meeting the bill's criteria at the time of the offense.**
-- **Allow a victim of residential mortgage fraud to request a court order invalidating the mortgage and other documents, if a person is convicted of residential mortgage fraud or a lesser included offense and other criteria are met.**

Senate Bill 249 amended the Michigan Penal Code to increase the maximum prison term for false pretenses involving a value of $20,000 or more; and establish increased penalties for violations involving a value of $50,000 to less than $100,000, or $100,000 or more.

Senate Bill 250 amended the sentencing guidelines in the Code of Criminal Procedure to reflect the penalties established by Senate Bills 43 and 249.

Senate Bill 251 amended the Code of Criminal Procedure to increase the statute of limitations from six to 10 years for false pretenses involving real property, mortgage fraud, or forgery or uttering and publishing of an instrument affecting an interest in real property.

Senate Bill 252 amended the Michigan Notary Public Act to make it a felony for a person knowingly to violate the Act when notarizing any document relating to an interest in real property or a mortgage.

House Bill 4462 amended the Michigan Penal Code to extend a felony penalty to the forgery of a discharge of mortgage or another document that affects an interest in real property, and uttering and publishing such a forged document; and to include these documents in recording requirements.

House Bill 4478 amended the sentencing guidelines in the Code of Criminal Procedure to include forgery of a real estate document and uttering and publishing a forged real estate document.

House Bill 4492 amended the sentencing guidelines in the Code of Criminal Procedure to include felony violations of the Michigan Notary Public Act.

All of the bills took effect on January 1, 2012.

Senate Bill 250 was tie-barred to Senate Bills 43 and 249. House Bill 4478 was tie-barred to House Bill 4462. House Bill 4492 was tie-barred to Senate Bill 252.

Senate Bill 43

Elements of the Crime; Penalty

Under the bill, a person is guilty of the crime of residential mortgage fraud if the person knowingly, with intent to defraud, does any of the following:

-- Makes a false statement or misrepresentation concerning a material fact or deliberately conceals or fails to disclose a material fact during the mortgage lending process.
-- During the mortgage lending process, makes or uses a false pretense, or uses or facilitates the use of another person's false pretense, concerning the person's intent to perform a future event or to have a future event performed.
-- Uses or facilitates the use of a false statement or misrepresentation made by another person concerning a material fact, or deliberately uses or facilitates the use of another person's concealment of or failure to disclose a material fact during the mortgage lending process.
-- Receives or attempts to receive any proceeds or any other money in connection with the mortgage lending process that the person knows resulted from a violation of either of the first two provisions.
-- Files or causes to be filed with the register of deeds of any county of this State any document involved in the mortgage lending process that the person knows to contain a deliberate

material misstatement, misrepresentation, or omission.
- -- Fails to disburse funds in accordance with the settlement or closing statement for the mortgage loan.
- -- Conspires to violate, or solicits, encourages, or coerces another person to violate, any of the provisions listed above.

(The bill defines "mortgage lending process" as process through which a person seeks or obtains a residential mortgage loan, including solicitation, application, or origination, negotiation of terms, third-party provider services, underwriting, signing and closing, and funding of the loan. "Residential mortgage loan" means a loan or agreement to extend credit made to a person that is secured by a mortgage, security interest, or other document representing a security interest or lien on any interest in a one-family to four-family dwelling located in Michigan. The term includes a renewal, extension, or refinancing of a residential mortgage loan.)

A person who commits residential mortgage fraud is guilty of a felony punishable by imprisonment for up to 15 years, a maximum fine of $100,000, or both. If the loan value stated on documents used in the mortgage lending process exceeds $100,000, however, the penalty is up to 20 years' imprisonment, a maximum fine of $500,000, or both.

Each violation constitutes a separate offense.

A crime of residential mortgage fraud may not be predicated solely upon information lawfully disclosed under Federal disclosure laws, regulations, or interpretations related to the mortgage lending process.

Forfeiture

Property of any kind used or intended for use in the course of, derived from, or received in connection with residential mortgage fraud by the person who committed the violation is subject to forfeiture in the same manner as provided in Chapter 47 of the Revised Judicature Act. (Under Chapter 47, property that is the proceeds or substituted proceeds of a crime, or an instrumentality of a crime, is subject to seizure by, and forfeiture to, a local unit of government or the State, according to procedures set forth in that chapter.)

Affirmative Defense

It is an affirmative defense to a prosecution for residential mortgage fraud by an employee or agent of the defendant if the defendant demonstrates, by a preponderance of the evidence, that the defendant had in force at the time of the violation and continues to have in force a written policy that includes at least all of the following:

- -- A prohibition against conduct that violates the bill by employees and agents of the defendant.
- -- Penalties or discipline for violation of the policy.
- -- A process for educating employees and agents about the policy and consequences of a violation.

The policy also must include a requirement for a criminal history check before an employee is hired or an agent is engaged, and a requirement that the defendant not employ or engage an individual whose criminal history check reveals a previous conviction of a crime involving fraud.

In addition, the defendant must demonstrate, by a preponderance of the evidence, that it enforces the policy and, before the residential mortgage fraud violation, communicated the policy and the consequences for violating it to the employee or agent who committed the violation.

Invalidation of Mortgage

If a person is convicted of residential mortgage fraud or a lesser included offense in connection with a completed residential mortgage loan transaction, the mortgagor who obtained the loan, within six months of the date of the conviction, may request a court order invalidating the mortgage if the court finds both of the following:

- -- The mortgagor was a victim of the residential mortgage fraud and was not involved in any criminal activity.
- -- The mortgagor did not knowingly apply for the residential mortgage loan or execute the documents involved in the mortgage lending process.

If these requirements are met, the court must enter an order indicating that the residential mortgage and other documents involved in the mortgage lending process are invalid. The court must require the victim to record a certified copy of the order and a copy of the invalid mortgage in the office of the register of deeds of the county where the mortgaged property is located, and the register of deeds must record those documents. The court must designate in the order the person responsible for paying the recording fee.

If the mortgage and other documents were previously recorded, the prosecutor in the criminal proceeding must give the court the name of the county where the documents were recorded and their liber and page number or unique identifying number, and the court must include that information in the order. If a county register of deeds receives a certified copy of an order and a copy of the invalid mortgage for recording, the register of deeds must refer to the liber and page number or unique identifying number of the mortgage in the index of the recorded documents.

Before the order is recorded, the victim must give written notice to the residential mortgage lender, and any successors or assigns of the lender, that the court has entered the order. Within 30 days after receiving the notice, the lender and any successor or assignee may request a court hearing to contest the order.

Venue

For the purpose of determining venue of a prosecution for residential mortgage fraud, a violation will be considered to have been committed in any of the following:

-- The county in which the residential property for which the mortgage loan was obtained or sought is located.
-- The county in which an owner of the property resides.
-- The county in which a material act was performed in furtherance of the violation.

Additional Definitions

The bill defines "person" as an individual, corporation, limited liability company, partnership, trustee, association, or other legal entity.

"Documents involved in the mortgage lending process" include mortgages; deeds; surveys; inspection reports; uniform residential loan applications or other loan applications; appraisal reports; HUD-1 settlement statements; supporting personal documentation for loan applications, such as W-2 forms, verifications of income and employment, bank statements, tax returns, and payroll stubs; and any written disclosures required by law.

Senate Bill 249

The Michigan Penal Code prescribes a range of penalties for a person who, with intent to defraud or cheat, makes or uses a false pretense to do any of the following:

-- Cause a person to grant, convey, assign, demise, lease, or mortgage land or an interest in land.
-- Obtain a person's signature on a forged written instrument.
-- Obtain from a person any money or personal property or the use of any instrument, facility, article, or other valuable thing or service.
-- By means of a false weight or measure, obtain more than was bargained for.
-- By means of a false weight or measure, sell or dispose of less than was bargained for.

The penalties depend on the value of the land, interest in land, money, personal property, use of the instrument, facility, article, thing, or service, larger amount obtained, or smaller amount sold or disposed of, and on whether the violator has prior convictions for this offense.

Previously, if the value was $20,000 or more, or the value was $1,000 or more but less than $20,000 and the violator had two or more prior convictions for an offense involving $200 or more, the violation was a felony punishable by imprisonment for up to 10 years, a fine of up to $15,000 or three times the value, whichever was greater, or both imprisonment and a fine.

The bill establishes the penalties shown in Table 1.

Table 1

Value	Maximum Term	Maximum Fine[1)]
$20,000 to <$50,000	15 years	$15,000
$1,000 to <$20,000 w/ 2 or more priors	15 years	$15,000
$50,000 to <$100,000	15 years	$25,000
$20,000 to <$50,000 w/ 2 or more priors[2)]	15 years	$25,000
$100,000 or more	20 years	$35,000
$50,000 to <$100,000 w/ 2 or more priors[2)]	20 years	$35,000

[1)] The maximum fine is the amount listed or three times the value, whichever is greater.
[2)] A prior conviction does not include a conviction for a violation involving a value of less than $200.

Senate Bill 250

Under the bill, residential mortgage fraud involving a loan value of $100,000 or less is a Class C felony against the public order with a statutory maximum of 15 years. Residential mortgage fraud involving a loan value of more than $100,000 is a Class B felony against the public order with a statutory maximum of 20 years.

Previously, false pretenses involving $20,000 or more, or $1,000 to $20,000 with prior convictions, was a Class D felony against property with a 10-year statutory maximum. Under the bill, false pretenses involving $20,000 or more but less than $50,000, or $1,000 or more but less than $20,000 with prior convictions, is a Class C felony against property with a statutory maximum of 15 years.

False pretenses involving $50,000 or more but less than $100,000, or $20,000 or more but less than $50,000 with prior convictions, also is a Class C felony against property with a 15-year statutory maximum.

False pretenses involving $100,000 or more, or $50,000 or more but less than $100,000 with prior convictions, is a Class B felony against property with a 20-year statutory maximum.

Senate Bill 251

Under the Code of Criminal Procedure, except as provided for specific offenses, the statute of limitations for a crime is six years after the offense is committed.

The bill provides for a 10-year statute of limitations for false pretenses involving real property, mortgage fraud, or forgery or uttering and publishing of an instrument affecting an interest in real property. Specifically, an indictment for one of those offenses may be found and filed within 10 years after the offense was committed or within 10 years after the instrument affecting real property was recorded, whichever occurs later.

Senate Bill 252

Under the Michigan Notary Public Act, except as provided for a person who performs a notarial act after his or her commission has been revoked, or as otherwise provided by law, a violation of the Act is a misdemeanor punishable by a maximum fine of $5,000 and/or imprisonment for up to one year. A person who performs a notarial act after his or her commission has been revoked is guilty of a felony punishable by a maximum fine of $3,000, imprisonment for up to five years, or both.

Under the bill, if a person knowingly violates the Act when notarizing any document relating to an interest in real property or a mortgage transaction, he or she is guilty of a felony punishable by a maximum fine of $5,000, imprisonment for up to four years, or both.

House Bill 4462

Under Section 248 of the Penal Code, a person who falsely makes, alters, forges, or counterfeits certain documents with intent to injure or defraud another person, is guilty of a felony punishable by imprisonment for up to 14 years. Under Section 249, the same penalty applies to a person who knowingly, and with intent to injure or defraud, utters and publishes as true a false, forged, altered, or counterfeit document specified in Section 248.

Previously, these sections applied to a deed as well as other documents. The bill deleted the references to a deed.

The bill added Section 248b to prescribe a 14-year maximum sentence for a person who falsely makes, alters, forges, or counterfeits a deed, a discharge of mortgage, or a power or letter of attorney or other document affecting an interest in real property with intent to injure or defraud another person. The bill also added Section 249b to prescribe a 14-year maximum sentence for a person who utters and publishes as true a false, forged, altered, or counterfeit deed or other document listed in Section 248b, knowing it to be false, forged, altered, or counterfeit, with intent to injure or defraud.

Under the Code, if a violation of Section 248 or 249 involves a discharge of mortgage or other real estate document, the court must enter an order indicating that the document is invalid and requiring a copy of it and a certified copy of the order to be recorded in the office of the register of deeds of any county where the property is located. If the invalid document was previously recorded, the prosecutor must provide the court with the liber and page number or unique identifying reference number of the document, which must be included in the order, and the register of deeds must refer to the number in the index of the recorded documents. Any recording fees incurred must be paid as ordered by the court.

Under the bill, these requirements also apply to a document involved in a violation of Section 248b or 249b.

As provided in Section 248, the venue in a prosecution under Section 248b may be in the county where the forgery was performed, where a false, altered, forged, or counterfeit document was uttered and published with intent to injure or defraud, or where the rightful property owner resides.

Also as provided for Sections 248 and 249, Sections 248b and 249b do not apply to a scrivener's error.

House Bill 4478

Under the Code of Criminal Procedure, a violation of Section 248 or 249 of the Penal Code is a Class E felony against property with a 14-year statutory maximum sentence.

Under the bill, a violation of Section 248b or 249b of the Penal Code is a Class C felony against property with a 14-year statutory maximum.

House Bill 4492

Under the bill, a violation of the Michigan Notary Public Act involving the conveyance of an interest in real property is a Class F felony against the public trust with a statutory maximum of four years. Performing notarial acts while a notary public commission is revoked is a Class E felony against the public trust with a five-year statutory maximum sentence.

MCL 750.219d (S.B. 43)
750.218 (S.B. 249)
777.16l (S.B. 250)
767.24 (S.B. 251)
55.309 (S.B. 252)
750.248 et al. (H.B. 4462)
777.16n (H.B. 4478)
777.11c (H.B. 4492)

BACKGROUND

The FBI's 2010 Mortgage Fraud Report contains the following descriptions of mortgage fraud schemes.

Loan Origination Scheme - Mortgage loan origination fraud is divided into two categories: fraud for property/housing and fraud for profit. Fraud for property/housing typically involves actions taken by a single borrower in order to acquire a residence under false pretenses, such as embellishing income and concealing debt. Fraud for profit often involves multiple loans and elaborate schemes to gain illicit proceeds from property sales. These schemes involve falsifying a borrower's financial information to qualify an otherwise-ineligible buyer for a mortgage loan. Perpetrators also may employ the use of stolen identities, fictitious assets, fabricated payroll documents, and phantom rehabilitation to increase property value.

Backwards Application Scheme – The mortgage fraud perpetrator fabricates the unqualified borrower's income and assets to meet the loan's minimum application requirements. Incomes are inflated or falsified, assets are created, credit reports are altered, and previous residences are altered to qualify the borrower for the loan.

Fraudulently Inflated Appraisal – Property appraisals are fraudulently inflated during the mortgage loan origination process to generate false equity. Perpetrators either falsify the appraisal document or employ a rogue appraiser as a conspirator who will create and attest to the inflated value of the property.

Illegal Property Flipping – Property is purchased, falsely appraised at a higher value, and then quickly sold. The fraud involves the use of fraudulent bank statements, W-2s, and pay stubs; the use of straw buyer investors to purchase distressed property for alleged rehabilitation; perpetrators receiving cash back at closing; and the failure to make the first mortgage payment. This type of fraud often results in foreclosure.

Short Sale Scheme – A real estate short sale is a type of preforeclosure sale in which the lender agrees to sell property for less than the mortgage owed. Short sale fraud consists of false statements made to loan servicers or lenders that take the form of buyer or seller affirmations of no hidden relationships or agreements to resell the property, typically for 90 days. Commonly, the subject is alleged to be purchasing foreclosed property via short sale, but does not submit the "best offer" to the lender and subsequently sells the property in a dual closing the same day or within a short time frame for a significant profit.

Foreclosure Rescue – These schemes are often used in association with advance fee/loan modification program schemes. The perpetrators convince homeowners that they can save their homes from foreclosure through deed transfers and the payment of up-front fees. The foreclosure "rescue" often involves a manipulated deed process that results in the preparation of forged deeds. In extreme instances, perpetrators sell the home or secure a second loan without the homeowner's knowledge. A perpetrators might transfer the property to his or her name via a quit claim deed and promise to make mortgage payments while allowing the former homeowner to remain in the home paying rent. Often, the original mortgage is not paid and foreclosure is only delayed.

The FBI report also describes builder bailout schemes; commercial real estate loan fraud; real estate investment schemes; advance fee schemes, and equity skimming schemes.

ARGUMENTS

(Please note: The arguments contained in this analysis originate from sources outside the Senate Fiscal Agency. The Senate Fiscal Agency neither supports nor opposes legislation.)

Supporting Argument

Michigan needed to enact a statute tailored to the crime being committed by those who engage in mortgage fraud activities, with different levels of penalties based on the loan value involved. At the same time, since false pretenses violations often go hand-in-hand with mortgage fraud, the false pretenses statute needed to prescribe harsher penalties for violations that involve higher amounts. Because mortgage fraud can go undiscovered for years, and because these cases are highly complex, a longer statute of limitations for false pretenses involving real property is necessary. In addition, because mortgage fraud commonly involves the notarization of fraudulent documents, the criminal penalty in the Michigan Notary Public Act had to be updated.

This package of legislation gives prosecutors the tools they require to fight mortgage fraud, and will help ensure that the punishment fits the crime. Senate Bill 43 creates a new section of the Michigan Penal Code to criminalize residential mortgage fraud, setting different penalties for violations involving $100,000 or less and those involving higher amounts. Senate Bill 249 updates the false pretenses section of the Penal Code, establishing a range of increased penalties that are consistent with the penalties for embezzlement. Senate Bill 251 gives prosecutors up to 10 years, rather than six, to bring charges for false pretenses involving real property or a mortgage. Under Senate Bill 252, a notary public who knowingly signs a fraudulent document involving real property or a mortgage will be guilty of a felony. House Bill 4462 creates new sections of the Penal Code to prescribe penalties for offenses involving false, forged, or counterfeit real estate documents, while House Bill 4478 prescribes a sentencing guidelines classification that can subject offenders to longer sentences. Senate Bill 250 and House Bill 4492 also include new felonies in the sentencing guidelines.

These measures will protect the legitimate mortgage loan industry, and help prevent innocent homeowners from losing their homes. Fighting mortgage fraud also will benefit other victims, including those who live in neighborhoods containing abandoned homes, and local units of government that rely on property tax revenue.

Response: Legislation also is needed to address mortgage rescue fraud, which does not involve the mortgage lending process. According to the FBI's 2010 Mortgage Fraud Report, foreclosure rescue schemes were the sixth-highest reported mortgage fraud scheme in fiscal year 2009-10.

It also was recommended that the definition of "residential mortgage loan" in Senate Bill 43 should specifically include a modification, as well as a renewal, extension, or refinancing, of a loan.

In addition, it was suggested that even a 10-year statute of limitations on false pretenses involving real property will not be adequate. Reportedly, in some cases, fraudulent documents filed with a register of deeds office might not be discovered for decades but can still have negative consequences for the lawful property owner.

Supporting Argument

According to the Office of Financial and Insurance Regulation (OFIR), establishing the crime of residential mortgage fraud may simplify the process for OFIR to obtain a prohibition under the State's consumer finance laws against a person who knowingly makes or uses another's false statements or misrepresentations during the mortgage lending process.

Opposing Argument

The bills fail to hold banks and other financial institutions accountable for their role in making inadvisable mortgage loans or misleading consumers who are in default. Reportedly, some banks lead consumers to believe that their mortgages will be renegotiated and their homes will be saved, while the banks already have begun the foreclosure process, waiting until the last minute to serve the foreclosure papers in order to extract as much money as possible from the borrowers.

Legislative Analyst: Suzanne Lowe

FISCAL IMPACT

Senate Bills 43, 249, & 250

The bills will have an indeterminate fiscal impact on State and local government. There are no data to indicate how many offenders will be convicted of residential mortgage fraud or convicted of false pretenses involving the specified amounts. An offender convicted of the Class C offense under the bills will receive a sentencing guidelines minimum sentence range of 0-11 months to 62-114 months. An offender convicted of the Class B offense under the bills will receive a sentencing guidelines minimum sentence range of 0-18 months to 117-160 months. Local governments will incur the costs of incarceration in local facilities, which vary by county. The State will incur the cost of felony probation at an average annual cost of $2,500, as well as the cost of incarceration in a State facility at an average annual cost of $35,000. Additional penal fine revenue will benefit public libraries.

Senate Bill 251

The bill will have an indeterminate fiscal impact on State and local government. There are no data to indicate how many additional indictments will be filed as a result of expanding the statute of limitations from six years to 10 years for certain false pretenses offenses. Any increase in felony convictions that results from the extension of the statute of limitations might increase State and local costs by increasing incarceration and community supervision costs.

Senate Bill 252 & House Bill 4492

The bills will have an indeterminate fiscal impact on State and local government. There are no data to indicate how many offenders will be convicted of the new offense under the Notary Public Act, or the offense newly added to the sentencing guidelines. An offender convicted of the Class E offense under the bills will receive a sentencing guidelines minimum sentence range of 0-3 months to 24-38 months. An offender convicted of the Class F offense under the bills will receive a sentencing guidelines minimum sentence range of 0-3 months to 17-30 months.

House Bills 4462 & 4478

By changing certain crimes related to forged real estate documents from Class E to Class C felonies, the bills might increase the minimum sentences for offenders convicted of these crimes. Thus, the bills may increase the length of incarceration and thereby increase State and local correctional costs.

Fiscal Analyst: Steve Angelotti