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Senate Bill 43 (Substitute S-1 as reported)	<i>(as passed by the Senate)</i>
Senate Bill 44 (Substitute S-1 as reported)	<i>(as passed by the Senate)</i>
Senate Bill 249 (as reported without amendment)	<i>(as passed by the Senate)</i>
Senate Bill 250 (Substitute S-1 as reported)	<i>(as passed by the Senate)</i>
Senate Bill 251 (as reported without amendment)	<i>(as passed by the Senate)</i>
Senate Bill 252 (Substitute S-3 as reported)	<i>(as passed by the Senate)</i>
Senate Bill 253 (Substitute S-1 as reported)	<i>(as passed by the Senate)</i>
Sponsor: Senator Tupac A. Hunter (S.B. 43 & 44)	
Senator Darwin L. Booher (S.B. 249 & 250)	
Senator Mike Nofs (S.B. 251)	
Senator Jim Marleau (S.B. 252)	
Senator John J. Gleason (S.B. 253)	
Committee: Banking and Financial Institutions	

Date Completed: 5-11-11

RATIONALE

In 2009, Michigan was among the top 10 states with a significant mortgage fraud problem, according to the FBI's 2009 Mortgage Fraud Report (the most recent available). Despite small improvements in some economic sectors, an increase in government-mandated scrutiny, and programs to improve mortgage fraud awareness, mortgage fraud cases are continuing 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. The FBI describes two categories of mortgage fraud: fraud for housing and fraud for profit. Fraud for housing typically involves actions taken by a single borrower in order to acquire a residence under false pretenses, such as misrepresented income and asset information on a loan application. Fraud for profit often involves multiple loans and elaborate schemes to gain illicit proceeds from property sales, and is committed by industry insiders, including mortgage brokers, lenders, investors, loan originators, appraisers, and settlement attorneys. Evidently, mortgage fraud schemes can take many forms, such as

illegal property flipping, foreclosure rescue scams, loan modification programs, and equity skimming, 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 has been pointed out that Michigan has no statute that makes mortgage fraud a separate crime. At the State level, offenders are prosecuted for other crimes, such as false pretenses and forgery, but the penalties for those offenses are considered weak and the elements of the crimes do not always apply to mortgage fraud activities.

In addition to enacting a law that criminalizes mortgage fraud, it has been 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 (S-1) would amend 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 were \$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.
- Allow a victim of residential mortgage fraud to request a court order invalidating the mortgage and other documents, if a person were convicted of residential mortgage fraud or a lesser included offense and other criteria were met.

Senate Bill 44 (S-1) would amend the Code of Criminal Procedure to include residential mortgage fraud in the sentencing guidelines.

Senate Bill 249 would amend 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 (S-1) would amend the sentencing guidelines in the Code of Criminal Procedure to reflect the penalties proposed by Senate Bill 249.

Senate Bill 251 would amend 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 (S-3) would amend 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.

Senate Bill 253 (S-1) would amend the Code of Criminal Procedure to include violations of the Michigan Notary Public Act in the sentencing guidelines.

Senate Bill 44 (S-1) is tie-barred to Senate Bill 43. Senate Bill 250 (S-1) is tie-barred to Senate Bill 249. Senate Bill 253 (S-1) is tie-barred to Senate Bill 252.

Senate Bill 43 (S-1)

Elements of the Crime; Penalty

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

- Made a false statement or misrepresentation concerning a material fact or deliberately concealed or failed to disclose a material fact during the mortgage lending process.
- Used or facilitated the use of a false statement or misrepresentation made by another person concerning a material fact, or deliberately used or facilitated the use of another person's concealment of or failure to disclose a material fact during the mortgage lending process.
- Received or attempted to receive any proceeds or any other money in connection with the mortgage lending process that the person knew resulted from a violation of either of the first two provisions.
- Filed or caused 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 knew contained a deliberate material misstatement, misrepresentation, or omission.
- Failed to disburse funds in accordance with the settlement or closing statement for the mortgage loan.
- Conspired to violate any of the provisions listed above.

("Mortgage lending process" would mean the 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" would mean 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 would include a renewal, extension, or refinancing of a residential mortgage loan.)

A person who committed residential mortgage fraud would be 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 exceeded \$100,000, however, the penalty would be up to 20 years' imprisonment, a maximum fine of \$500,000, or both.

Each violation would constitute a separate offense.

A crime of residential mortgage fraud could 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 would be 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 would be an affirmative defense to a prosecution for residential mortgage fraud by an employee or agent of the defendant if the defendant demonstrated, by a preponderance of the evidence, that the defendant had in force at the time of the violation and continued to have in force a written policy that included at least all of the following:

- A prohibition against conduct that violated 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 would have to include a requirement for a criminal history check before an employee was hired or an agent was engaged, and a requirement that the defendant would not employ or engage an individual whose criminal history check revealed a previous conviction of a crime involving fraud.

In addition, the defendant would have to demonstrate, by a preponderance of the evidence, that it enforced 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 were convicted of residential mortgage fraud or a lesser included offense in connection with a completed residential mortgage loan transaction, within six months of the date of the conviction, the mortgagor who obtained the loan could request a court order invalidating the mortgage if the court found 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 were met, the court would have to enter an order indicating that the residential mortgage and other documents involved in the mortgage lending process were invalid. The court would have to 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 was located, and the register of deeds would have to record those documents. The court would have to

designate in the order the person responsible for paying the recording fee.

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

Before the order was recorded, the victim would have to give written notice to the residential mortgage lender, and any successors or assigns of the lender, that the court had entered the order. Within 30 days after receiving the notice, the lender and any successor or assignee could request a court hearing to contest the order.

Venue

For the purpose of determining venue of a prosecution for residential mortgage fraud, a violation would 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 was located.
- The county in which an owner of the property resided.
- The county in which a material act was performed in furtherance of the violation.

Additional Definitions

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

"Documents involved in the mortgage lending process" would 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 44 (S-1)

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

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.

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

The bill would establish 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 would be the amount listed or three times the value, whichever was greater.
²⁾ A prior conviction would not include a conviction for a violation involving a value of less than \$200.

Senate Bill 250 (S-1)

Currently, false pretenses involving \$20,000 or more, or \$1,000 to \$20,000 with prior convictions, is 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, would be 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 would be 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, would be 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 would provide 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 could 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 occurred later.

Senate Bill 252 (S-3)

Currently, 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 Michigan Notary Public 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 violated the Act when notarizing any document relating to an interest in real property or a mortgage transaction, he or she would be guilty of a felony punishable by a maximum fine of \$5,000, imprisonment for up to four years, or both.

Senate Bill 253 (S-1)

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

- Proposed MCL 750.219d (S.B. 43)
- MCL 777.16I (S.B. 44 & 250)
- 750.218 (S.B. 249)
- 767.24 (S.B. 251)
- 55.309 (S.B. 252)
- 777.11c (S.B. 253)

BACKGROUND

The FBI's Financial Crimes Report 2009 contains the following descriptions of mortgage fraud schemes.

Illegal Property Flipping – Property is purchased, falsely appraised at a higher value, and then quickly sold. What makes property flipping illegal is the fraudulent information, such as fraudulent appraisals, falsified loan documentation, or inflated buyer income. Kickbacks to buyers, investors, property/loan brokers, appraisers, and title company employees are common in this type of scheme.

Loan Modification Programs – Scammers purport to assist homeowners who are delinquent in their mortgage payments and are on the verge of losing their home, by offering to renegotiate the terms of the loans with the mortgage lender. The scammers demand large up-front fees and often negotiate unfavorable terms for the clients, or do not negotiate at all. Usually, the homeowners ultimately lose their home.

Equity Skimming – An investor may use a straw buyer, false income documents, and false credit reports to obtain a mortgage loan in the straw buyer's name. After closing, the straw buyer signs the property over to the investor in a quit claim deed, which relinquishes all rights to the property and provides no guaranty of title. The investor does not make any mortgage payments and rents the property until foreclosure takes place several months later.

Silent Second – The buyer of property borrows the down payment from the seller through the issuance of a nondisclosed second mortgage. The primary lender believes the borrower has invested his or her own money in the down payment. The scammers might not record the second mortgage in order to conceal its status from the primary lender.

Air Loans – This is a nonexistent property loan in which there usually is no collateral. For example, a broker invents borrowers and properties, establishes accounts for payments, and maintains custodial accounts for escrows. The broker may set up an office with a bank of phones used as the fake employer, appraiser, credit agency, etc., to deceive creditors who attempt to verify information on loan applications.

The FBI report also describes builder bailout/condo conversion schemes; schemes involving commercial real estate loans; schemes that involve a Home Equity

Conversion Mortgage (a reverse mortgage loan product insured by the Federal Housing Administration for borrowers who are 62 years old or older); and schemes in which scammers obtain a grant through the Neighborhood Stabilization Program (a Federal program in which block grants are paid to states, local governments, and nonprofit organizations to encourage the purchase and redevelopment of foreclosed and abandoned property).

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 needs 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 should prescribe harsher penalties for violations that involve higher amounts. Also, because mortgage fraud can go undiscovered for years, and because these cases are highly complex, the statute of limitations for false pretenses involving real property should be lengthened. In addition, because mortgage fraud commonly involves the notarization of fraudulent documents, the criminal penalty in the Michigan Notary Public Act needs to be updated.

This package of legislation would give prosecutors the tools they need to fight mortgage fraud, and would help ensure that the punishment fits the crime. Senate Bill 43 (S-1) would create a new statute to criminalize residential mortgage fraud, settling different penalties for violations involving \$100,000 or less and those involving higher amounts. Senate Bill 249 would update the false pretenses section of the Michigan Penal Code, establishing a range of increased penalties that would be consistent with the current penalties for embezzlement. Senate Bill 251 would give prosecutors up to 10 years, rather than six, to bring charges for false pretenses involving real property or a mortgage. Under Senate Bill 252 (S-3), a notary public who knowingly signed a fraudulent document involving real property or a mortgage would be guilty of a felony. The

remaining bills would include the proposed felonies in the sentencing guidelines.

These measures would protect the legitimate mortgage loan industry, and help prevent innocent homeowners from losing their homes. Fighting mortgage fraud also would 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. In this type of scheme, perpetrators identify homeowners who are in foreclosure or at risk of defaulting on their mortgage loan, and then mislead the homeowners into believing they can save their homes. Typically, the homeowners transfer their deed to a third party or put it in the name of an investor. They are told that they can rent their home and then repurchase it when their credit has improved. The scammers fail to make the mortgage payments, however, and the property usually goes into foreclosure.

It also has been recommended that the definition of "residential mortgage loan" in Senate Bill 43 (S-1) should specifically include a modification, as well as a renewal, extension, or refinancing, of a loan.

In addition, it has been suggested that even a 10-year statute of limitations on false pretenses involving real property would 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 could simplify the process for OFIR to obtain a prohibition under the State's consumer finance laws against a person who knowingly made or used another's false statements or misrepresentations during the mortgage lending process.

Opposing Argument

The bills would 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 (S-1) & 44 (S-1)

The bills would have an indeterminate fiscal impact on State and local government. There are no data to indicate how many offenders would be convicted of the proposed offense. An offender convicted of the Class C offense under the bills would 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 would receive a sentencing guidelines minimum sentence range of 0-18 months to 117-160 months. Local governments would incur the costs of incarceration in local facilities, which vary by county. The State would 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 would benefit public libraries.

Senate Bills 249 & 250 (S-1)

The bills would have an indeterminate fiscal impact on State and local government. There are no data to indicate how many offenders would be convicted of false pretenses involving the specified amounts. An offender convicted of one of the Class C offenses under the bills would 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 would receive a sentencing guidelines minimum sentence range of 0-18 months to 117-160 months.

Senate Bill 251

The bill would have an indeterminate fiscal impact on State and local government. There are no data to indicate how many additional indictments would be filed as a result of expanding the statute of

limitations from six years to 10 years. Any increase in felony convictions that resulted from the extension of the statute of limitations could increase State and local costs by increasing incarceration and community supervision costs.

Senate Bills 252 (S-3) & 253 (S-1)

The bills would have an indeterminate fiscal impact on State and local government. There are no data to indicate how many offenders would be convicted of the proposed offense. An offender convicted of the Class E offense under the bills would 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 would receive a sentencing guidelines minimum sentence range of 0-3 months to 17-30 months.

Fiscal Analyst: Matthew Grabowski

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This analysis was prepared by nonpartisan Senate staff for use by the Senate in its deliberations and does not constitute an official statement of legislative intent.