SENATE STAFF ANALYSIS AND ECONOMIC IMPACT STATEMENT

(This document is based on the provisions contained in the legislation as of the latest date listed below.)

BILL: CS/SB 2960

SPONSOR: Banking and Insurance Committee and Senator Alexander

SUBJECT: Banking

DATE: April 2, 2004 REVISED: _____ _____ _____ _____

	ANALYST	STAFF DIRECTOR	REFERENCE	ACTION
1.	Deffenbaugh	Deffenbaugh	BI	Fav/CS
2.			AGG	
3.			AP	
4.				
5.				
6.				

I. Summary:

Committee Substitute for Senate Bill 2960 makes various changes to the laws regulating financial institutions in Florida, based upon recommendations made jointly by the Office of Financial Regulation (OFR) and the Florida Bankers Association. The bill:

- Allows a bank or trust company to be formed as a limited liability company, rather than a corporation.
- Prohibits any person from using the name or logo of a financial institution in marketing materials, if done without the written consent of the financial institution and in a manner that indicates it was endorsed by the financial institution.
- Clarifies that a financial institution must notify the OFR of an "appointment" as well as employment of any individual as an executive officer or equivalent position, and adds a $35 fee for each notification of a proposed appointment of an individual to the board of directors, beginning 1 year after the opening of the state financial institution.
- Exempts any state financial institution open less than 4 months from the annual (end of year) audit requirement.
- Shortens the statute of limitations from 1 year to 90 days within which a customer must assert against a financial institution an unauthorized signature or alteration and from 5 years to 1 year for asserting any unauthorized endorsement.
- Amends the current law requiring bank records to be produced as required by a court, to provide that it must be pursuant to a subpoena and that the party seeking the production must reimburse the financial institution for its reasonable costs and fees.
- Clarifies the authority of out-of-state banks that have no operating presence in Florida to engage in certain banking related activities in the state.
- Adds the terms, "banco" and "banque" to the list of names that a business other than a financial institution is prohibited from using.

- Clarifies that the laws that apply to an international banking corporation also apply to a branch of such corporation.
- Deletes the requirement that a copy of the bylaws of a bank or trust company must be filed with the OFR.
- Provides that the allowance for a bank operating in a safe and sound manner to merely notify, rather than obtain approval from the OFR for establishing a new branch also applies to relocating an existing office.
- Provides that the one-year experience requirement for a president or chief executive officer of a bank also applies to any other person, regardless of title, who has an equivalent rank or who leads the overall operations of a bank.
- Prohibits a bank from paying a dividend or making loans if the bank has been determined by the OFR to be imminently insolvent, and repealing the current law that prohibits a bank from paying dividends or making loans if it fails to maintain a specified daily liquidity position.
- Allows a bank to value foreclosed property based on an appraisal obtained within 90 days after acquisition of the property, as an alternative to within 1 year prior to the acquisition.
- Lowers the threshold for the definition of *control* of an international banking corporation to any person or persons owning 25 percent, rather than 50 percent of the voting stock.

This bill amends the following sections of the Florida Statutes: 494.0025, 516.07, 520.995, 626.9541, 655.005, 655.0322, 655.0385, 655.045, 655.059, 655.921, 655.922, 655.94, 658.16, 658.23, 658.26, 658.33, 658.37, 658.48, 658.67, 658.73, 663.16, 663.304, 665.034, and 674.406.

The bill repeals section 658.68 of the Florida Statutes.

II. Present Situation:

The Office of Financial Regulation regulates financial institutions operating in the state, subject to its general regulatory powers of ch. 655, F.S. and specific requirements in other chapters for specified types of financial institutions. Chapter 655 applies to the regulation of state or federal banks, associations, savings banks, trust companies, international bank agencies, representative offices or international administrative offices, and credit unions.

The Office of Financial Regulation (OFR) and the Florida Bankers Association have worked together to make joint recommendations for legislation which are included in this bill. For ease of understanding, the aspects of the present situation addressed by this bill are discussed in the section-by-section analysis, below.

III. Effect of Proposed Changes:

Section 1 amends s. 494.0025, F.S., which specifies prohibited practices related to mortgage brokerage and mortgage lending. The bill makes it unlawful for any person to use the name or logo of a financial institution or its affiliates or subsidiaries when marketing or soliciting customers, if done without the written consent of the financial institution and in a manner that would lead a reasonable person to believe that the material originated from or was endorsed by the financial institution. This is particularly aimed at solicitation letters that have been made by lenders to refinance a mortgage loan, in which the solicitation implies that the current lender has

approved or endorsed the refinancing with the lender making the solicitation. *Financial institution* is defined as a state or federal association, bank, savings bank, trust company, international bank agency, representative office or international administrative, office, or credit union.

A violation of this section by a mortgage broker or a mortgage lender would be subject to potential revocation or suspension of its license or registration by the OFR, a reprimand, or a fine not exceeding $5,000 for each count or separate offense.[1] The OFR is also authorized to seek a court injunction or to issue a cease and desist order against any person who has violated certain provisions, including the section amended by this bill.[2]

Section 2 amends s. 516.07, F.S., relating to grounds for denial of a license or for disciplinary action against a consumer finance lender. The bill adds the same prohibited act added in Section 1, for using the name or logo of a financial institution in marketing materials, if done without the written consent of the financial institution and in a manner that would lead a reasonable person to believe that the material originated from or was endorsed by the financial institution.

A consumer finance lender that violates this section would be subject to potential revocation or suspension of its license, a reprimand, or an administrative fine not to exceed $1,000 for each violation.[3]

Section 3 amends s. 520.995, relating to grounds for disciplinary action against retail installment sellers licensed under this chapter, including motor vehicle sales finance, retail installment sales, installment sales finance, and home improvement sales and finance. The bill adds the same prohibited act added in Section 1, for using the name or logo of a financial institution in marketing materials, if done without the written consent of the financial institution and in a manner that would lead a reasonable person to believe that the material originated from or was endorsed by the financial institution.

A licensee under ch. 520, F.S., that violates this section would be subject to potential revocation or suspension of its license, a reprimand, or an administrative fine not to exceed $1,000 for each violation.[4]

Section 4 amends s. 626.9541, F.S., in the Florida Insurance Code, which prohibits any person from engaging in specified unfair methods of competition and unfair or deceptive acts or practices. The bill adds the same prohibited act added in Section 1, against using the name or logo of a financial institution in marketing materials, if done without the written consent of the financial institution and in a manner that would lead a reasonable person to believe that the material originated from or was endorsed by the financial institution.

An insurance company that violates this section is subject to suspension or revocation of its certificate of authority or an administrative fine not to exceed, for a nonwillful violation, $2,500 per violation or $10,000 for all nonwillful violations arising out of the same action, and

[1] Sections 494.0041 and 494.0072, F.S.
[2] Sections 494.0013 and 494.0014, F.S.
[3] Section 516.07(2), F.S.
[4] Section 520.995(2), F.S.

for a knowing and willful violation, $20,000 for each violation or $100,000 for all knowing and willful violations arising out of the same action.[5] An insurance agent that violates this section is subject to suspension or revocation of his or her license and an administrative penalty of up to $500 or, for willful violations, up to $3,500.[6]The Office of Insurance Regulation (which regulates insurers) and the Department of Financial Services (which regulated insurance agents) may issue a cease and desist order for a violation of this section, including such other relief as may be provided in the Insurance Code.[7]

Section 5 amends s. 655.005, F.S., to include an *international branch* within the definition of the term, *financial institution* and the term, *state financial institution*. This clarifies that a branch of an international banking corporation is included in the broad definition of financial institution for purposes of ch. 655, F.S., which provides the OFR with general regulatory powers. Several years ago, international banking corporations were authorized to establish one or more branches in the state, with the approval of the OFR,[8] but the definition of financial institutions has not been amended to incorporate this reference. The addition of *international branch* to the definition is similar to the current inclusion in the definition of an administrative office or representative office of an international bank agency.

Section 6 amends s. 655.0322, F.S., related to prohibited acts and practices to add a reference to *international branch*, to the definition of the term, *financial institution*, to clearly apply all of the prohibited acts and practices and criminal penalties in this section to an international branch, for the same reasons as explained in Section 5, above.

Section 7 amends s. 655.0386, F.S., related to disapproval of directors and executive officers. This section currently requires each state financial institution to notify the OFR of the proposed appointment of any individual to the board of directors or the "employment" of any individual as an executive officer or equivalent position at least 60 days before the appointment or employment becomes effective. The bill clarifies that this requirement applies to the "appointment" as well as the employment of an executive officer.

The bill also adds a $35 nonrefundable fee for each notification of a proposed appointment of an individual to the board of directors, beginning 1 year after the opening of the state financial institution. The OFR states that this is to cover its costs of conducting background checks of such individuals.

Section 8 amends s. 655.045, F.S., related to examinations, reports, and internal audits of state financial institutions. The current law requires that each state financial institution perform an internal audit and to file a copy with the OFR, subject to certain exceptions. The bill provides that any de novo (new) state financial institution open less than 4 months is exempt from the audit requirement. In effect, this means that a state financial institution that opens during the last quarter of a calendar year would be exempt from providing an end of the year audit.

[5] Sections 624.418 and 6224.4211, F.S.
[6] Sections 626.6215 and 626.681, F.S.
[7] Section 626.9581, F.S.
[8] Sections 663.064 and 663.10, F.S.

Section 9 amends s. 655.059, F.S., relating to access to books and records of a financial institution and the confidentiality of such records. Currently the books and records of a financial institution are confidential, subject to certain exceptions. One exception is for the production of records "compelled by a court of competent jurisdiction." The bill specifies that any such required production must be pursuant to a subpoena issued pursuant to the Florida Rules of Civil or Criminal Procedure or the Federal Rule s of Civil Procedure, or pursuant to a subpoena issued in accordance with state or federal law. This recognizes that subpoenas may be issued pursuant to the rules of civil procedure other than by court order, such as by a state agency or by an attorney in a lawsuit against a bank customer.

The bill also provides that the party seeking production of records pursuant to a subpoena must reimburse the financial institution for the reasonable costs and fees incurred in compliance with the production. If the parties disagree regarding the amount of reimbursement, the party seeking the records may request the court or agency having jurisdiction to set the amount of reimbursement. This effectively changes the burden that exists today, since a financial institution is compelled to comply with the subpoena, regardless of the cost. If the parties cannot agree on the cost of production, the financial institution must request the court or agency for a determination as to the reasonable reimbursement.

Section 10 amends s. 655.921, F.S., related to transaction of business by out-of-state financial institutions. The bill clarifies the authority of out-of-state banks that have no operating presence in Florida. This section currently specifies the in-state activities and business transactions that a financial institutions may engage in that has its principal place of business outside of Florida. The bill clarifies that these activities may be conducted in Florida if the financial institution does not operate branches in this state. A financial institution that does have a branch in this state would be required to be authorized by Florida or the federal government.

Section 11 amends s. 655.922, F.S., related to banking business by unauthorized persons. The current law provides that no person other than a financial institution authorized to do business in this state pursuant to the financial institution codes or federal law may engage in certain specified activities, such as receiving funds for deposit or issuing certificate of deposit, etc. The bill clarifies that the reference to "financial institutions codes" means any state's financial institutions codes.

The bill also adds to the list of names that any person, other than a financial institution, may not transact business under. The list currently includes "bank," "banker," "banking," "trust company," "savings and loan association," "savings bank," or "credit union," or words of similar import, which indicates that the business is the kind or character of business transacted by a financial institution or which is likely to lead any person to believe that such business is that of a financial institution. The bill adds the Spanish and French terms, "banco" and "banque" to the list of prohibited names.

The bill also prohibits any person from using the name or logo of a financial institution in marketing materials, if done without the written consent of the financial institution and in a manner that would lead a reasonable person to believe that the material originated from or was endorsed by the financial institution.

Under the section amended, a financial institution may seek a court order enjoining any person from violating any of the provisions of this section. It also authorizes the OFR to issue a cease and desist order against any person who violates this section.

The bill further authorizes the Financial Services Commission to adopt rules to administer this section.

Section 12 amends s. 655.94, F.S., related to special remedies for nonpayment of rent. The current law provides that if the rental due on a safe-deposit box has not been paid for 3 months, the lessor (bank) may send a notice by registered mail to the lessee stating the safe-deposit box will be opened and its contents stored at the expense of the lessee unless payment is made within 30 days. If the rental is not paid within 30 days, the current law authorizes the lessor (bank) to open the box in the presence of an officer of the lessor and of a notary public who is not a director, officer, employee, or stockholder of the lessor. The bill changes this provision to allow the notary public to be a director, officer, employee, or stockholder of the lessor.

The current law further provides that if the box is opened, the contents must be sealed in a package by a notary public who must execute a certificate specifying the list of the contents and other required information. The certificate must be included in the package and a copy of the certificate must be sent by *registered* mail to the last know address of the lessee, which the bill changes the *certified* mail.

Section 13 amends s. 658.16,F.S., relating to the creation of a banking or trust corporation. The current law requires that a bank or trust company must be formed as a corporation. The bill additionally allows a bank or trust company to be formed as a limited liability company. Last year, the Federal Deposit Insurance Corporation (FDIC) adopted rules regarding whether and under what circumstances the FDIC will grant deposit insurance to a state bank chartered as a limited liability company. Pursuant to section 5 the Federal Deposit Insurance Act, the FDIC may grant deposit insurance to a state bank that is "incorporated under the laws of any State." The FDIC received inquiries regarding whether a State bank that is chartered as a limited liability company could be considered to be "incorporated" for purposes of that requirement. The FDIC's final rule[9] provides that a bank that is chartered as a limited liability company under state law would be considered to be "incorporated" under state law if it possess the four traditional, corporate characteristics of perpetual succession, centralized management, limited liability and free transferability of interests.

The bill includes requirements for a bank or trust company formed as a limited liability company that attempt to meet the requirements of the FDIC rule. The bill provides that a bank or trust company chartered as a limited liability company under the law of any state is deemed to be incorporated under the financial institutions codes if:

- the institution is not subject to automatic termination or dissolution upon the occurrence of an event including the death, disability, bankruptcy, expulsion, or withdrawal of an owner, other than the passage of time;

[9] 12 CFR Part 303.

- the exclusive authority to manage the institution is vested in a board of managers or directors that is elected or appointed by the owners which operates in substantially the same manner as a board of directors of a corporation;
- neither the laws of the state nor the institution's operating agreement provides that an owner is liable for the debts and obligations of the institution in excess of the amount of the owner's investment, or requires the consent of any other owner in order for an owner to transfer an ownership interest.

The bill provides that as used in the financial institutions codes, the terms, *stockholder, shareholder, director, officer, stock, voting stock, voting shares, articles of incorporation, bylaws, par value, and dividend* include comparable meanings (specified in the bill) for a bank or trust company chartered as a limited liability company.

Section 14 amends s. 658.23, F.S., related to submission of articles of incorporation and bylaws. The bill deletes the current requirement that a copy of the bylaws of a bank or trust company be filed with the OFR. The OFR states that there is no useful purpose for this requirement.

Section 15 amends s. 658.26, F.S., relating to places of transacting business. Currently, a bank or trust company that establishes a new branch must apply to the OFR for approval. However, as provided by rule, a financial institution operating in a safe and sound manner may establish a branch by filing a written notice with the OFR at least 30 days before opening that branch and the OFR approval is not required. Technically, this notice-only procedure applies to establishing a new branch, but does not apply to relocating an existing office. The bill provides that the notice-only procedure would also apply to relocating an existing office, for those banks operating in a safe and sound manner pursuant to rule.

Section 16 amends s. 658.33, F.S., relating to directors. The current law requires that the president or chief executive officer of a bank or trust company must have had at least 1 year of direct experience as an executive officer, director, or regulator of a financial institution within the last 3 years. This requirement may be waived by the OFR after considering the overall experience and expertise of the proposed officer.

The bill provides that the 1-year experience requirement applies to any other person, regardless of title, who has an equivalent rank of president or chief executive officer or who leads the overall operations of a bank or trust company. The bill also provides that in considering a waiver of the experience requirement, the OFR must also consider the condition of the bank or trust company, as reflected in the most recent regulatory examination report.

Section 17 amends s. 658.37, F.S, relating to dividends and surplus. The current law allows the directors of any bank or trust company to declare a dividend of its net profits, subject to certain restrictions. For example, a divided may not be paid if the net income from the current year combined with the retained net income from the preceding 2 years is a loss or which would cause the capital accounts of the bank or trust company to fall below the minimum amount required by law. The bill adds that a dividend may not be paid if a bank has been determined by the OFR to be *imminently insolvent*. This term is defined in s. 655.005(1)(k), F.S., (in summary) as having total capital accounts of less than 2 percent of its total assets, after adjustment for apparent losses.

This section of the bill is related to the repeal of s. 658.68 , F.S., in section 25 of the bill, which currently prohibits a state bank from paying a dividend if it does not maintain a specified daily liquidity position.

Section 18 amends s. 658.48, F.S., relating to the authority for state banks to make loans. The bill provides that a bank may not make any new loans or discounts when the OFR determines that a state bank is imminently insolvent. See Section 17, above, for the definition of this term.

This section of the bill is related to the repeal of s. 658.68 , F.S., in section 25 of the bill, which currently prohibits a state bank from making loans if it does not maintain a specified daily liquidity position.

Section 19 amends s. 658.67, F.S., relating to investment powers and limitations. Currently, if a bank or trust company forecloses on property to secure a mortgage loan, the property must be entered on the books at the lesser of the balance of the loan plus acquisition costs and accrued interest or the appraisal value or market value of the property. For this purpose, the appraisal must be determined within 1 year prior to the date of acquisition of the property. The bill provides that it may, alternatively, be within 90 days after acquisition of the property.

Section 20 amends s. 658.73, F.S., relating to fees and assessments. The current law provides for the OFR to provide, for a $25 fee, a "certificate of good standing" certifying that a state-chartered financial institution is licensed to conduct business in this state. The current law also provides that the fee is to be paid by the state bank or trust company. However, the OFR states that the current law was intended to provide such certificates to parties other than the financial institution itself. The bill strikes the reference to the financial institution paying the fee, so the fee would be paid by the person requesting the certificate.

Section 21 amends s.663.16, F.S. relating to definitions of terms used in ss. 663.17-663.181, F.S., which provide for regulation of international banking. The bill amends the definition of *international banking corporation* to include an international *branch*. This updates the definition to conform to the law that allows for international banking corporations to establish one or more branches in the state, with the approval of the OFR.[10]

The bill also lowers the threshold for the definition of *control* for purposes of the an international banking corporation. As amended, any person or group of persons acting in concert who own or control 25 percent or more of the voting stock, rather than more than 50 percent, would be deemed to have "control" for purposes of this chapter. This conforms to the definition of control that applies to state banks and trust companies in s. 658.27(2), F.S.

Section 22 amends s.663.304, F.S., relating to an application for authority to organize an international development bank. The bill deletes a requirement that the application include the proposed corporate name and evidence of reservation of the proposed corporate name with the Department of State. According to the OFR, the Department of State no longer has a process for reserving a proposed corporate name.

[10] Sections 663.064 and 663.10, F.S.

Section 23 amends s. 665.034, F.AS. related to acquisition of assets of or control over an association. The bill provides that a person or group of persons acting in concert are deemed to have control of an association if they own or control "25 percent or more" rather than "more than 25 percent" of the voting stock of the association.

Section 24 amends s. 674.406, relating to the customer's duty to discover and report an unauthorized signature or alteration. This section is part of the Uniform Commercial Code, part IV, Relationship Between Payor Bank and its Customer. The bill shortens the time frame, equivalent to a statute of limitations, within which a customer must assert an unauthorized signature or alteration or any unauthorized endorsement. Currently, a customer has one year after a statement or items (such as canceled checks) are made available to the customer, to discover and report the customer's unauthorized signature or any alteration on the item. The bill shortens this time frame to 90 days.

The bill also imposes a one year time limit for the customer to discover and report any unauthorized endorsement, after the statement or items are made available to the customer. After this one-year period, the customer would be precluded from asserting against the bank the unauthorized signature. The current statute does not specifically address unauthorized endorsements. Section 674.111, F.S., provides that ch. 95, F.S., governs when an action to enforce an obligation, duty, or right arising under this chapter must be commenced. It appears that an action for an unauthorized endorsement must be commenced within five years, as a legal action founded on a written instrument, under s. 95.11(2), F.S.

Section 25 repeals s. 658.68, F.S., which currently requires state banks to maintain a daily liquidity position equal to at least 15 percent of its total transaction accounts and 8 percent of its total nontransaction accounts. If a bank fails to comply, it is prohibited from making any new loans or discounts and may not pay any dividends of it profits. The OFR has recommended repealing this statute as unnecessarily difficult to comply and enforce and, instead, to prohibit banks from making loans and dividends if the bank is determined to be imminently insolvent, as provided by the bill in sections 17 and 18.

Section 26 provides an effective date of July 1, 2004.

IV. Constitutional Issues:

A. Municipality/County Mandates Restrictions:

None.

B. Public Records/Open Meetings Issues:

None.

C. Trust Funds Restrictions:

None.

V. Economic Impact and Fiscal Note:

A. Tax/Fee Issues:

Section 7 of the bill adds a $35 nonrefundable fee for each notification by a state financial institution of a proposed appointment of an individual to the board of directors, beginning 1 year after the opening of the state financial institution. The OFR states that this is to cover its costs of conducting background checks of such individuals.

B. Private Sector Impact:

The bill allows a bank to be formed as a limited liability company which may provide tax benefits to the bank and its owners.

The bill shortens the time frame within which a bank customer may assert an unauthorized signature or endorsement against a financial institution. Whether a customer will be precluded from seeking recovery from a financial institution (i.e., whether the customer could reasonably be expected to discover the unauthorized signature or endorsement within the shortened time frames) would depend on the facts of each case. The financial institution will benefit, even if the action is brought within the shortened time frame, by being able to more likely find or recover against the party who made the unauthorized endorsement.

Financial institutions would be reimbursed from the requesting party for the costs of copying and producing records pursuant to a subpoena.

C. Government Sector Impact:

None.

VI. Technical Deficiencies:

None.

VII. Related Issues:

None.

VIII. Amendments:

None.