The Florida Senate

PROFESSIONAL STAFF ANALYSIS AND ECONOMIC IMPACT STATEMENT

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

Prepared By: Banking and Insurance Committee

BILL:	CS/SB 2084
INTRODUCER:	Senator Bennett
SUBJECT:	Financial Institutions
DATE:	April 9, 2007
REVISED:	

	ANALYST	STAFF DIRECTOR	REFERENCE	ACTION
1.	Knudson	Deffenbaugh	BI	**Fav/CS**
2.			CM	
3.			FT	
4.			GA	
5.				
6.				

I. Summary:

The bill authorizes the sale of optional guaranteed asset protection (GAP) products by motor vehicle installment sellers, sales finance companies, retail lessors and their assignees, and establishes requirements for the sale of such products.

The bill increases the maximum delinquency charge from $10 to $25 for a default of payment pursuant to a revolving account provision in a retail installment contract.

The bill defines “debt cancellation product,” specifies such products may be sold by financial institutions and their subsidiaries and other business entities authorized by law, and states that it is not insurance for purposes of the Florida Insurance Code. Insurance purchased by a creditor for debt cancellation products is defined as a form of casualty insurance.

The bill eliminates the $50,000 limit on insurance that may be procured on the life of a debtor under a debtor group contract, or pursuant to a credit life insurance policy. Instead, the limit is the amount the person’s indebtedness to the creditor. The bill also allows the term of credit disability insurance to extend for the term of the indebtedness, rather than the current 10-year time limitation.

The bill specifies that a deposit or account made in the name of two persons who are husband and wife is considered a tenancy by the entirety unless otherwise specified in writing.

The bill increases minimum proposed capitalization for a proposed bank or trust company from $6 million to $8 million. The bill also reduces the requirement regarding the total capital accounts a bank or trust company may have at its opening.

The bill eliminates the need for a bank or trust company to obtain approval from the OFR in order to increase its capital. However the bill requires a state bank or trust company to notify the OFR in writing 15 days before increasing its capital stock. The bill deletes the prohibition against a bank or trust company issuing capital stock with over a $100 par value. It states a financial institution may not issue or sell stock of the same class which creates different rights, options, warrants, or benefits among the purchasers or stockholders of that class of stock. However, the financial institution may create uniform restrictions on the transfer of stock as permitted in s. 607.0627, F.S.

The bill clarifies who can assert dissenter's rights pursuant to the approval of the sale of stock by a state bank or trust company. The bill states that the fair value of the shares of stock will be determined using the procedures in s. 607.1326, F.S., and s. 607.1331, F.S. The new procedure would be the same as is applied to corporations.

The bill is effective October 1, 2007.

This bill substantially amends the following sections of the Florida Statutes: 520.02, 520.07, 520.35, 624.605, 627.553, 627.679, 627.681, 655.005, 655.79, 655.947, 655.954, 658.21, 658.34, 658.36, and 658.44.

II. Present Situation:

Debt Cancellation Products

Federal regulation defines a debt cancellation contract (DCC) or debt suspension agreement[1] (DSA) as a loan term or contractual agreement whereby a bank agrees to cancel or suspend all or part of a customer's obligation to repay an extension of credit upon the occurrence of a specified event.[2] Generally, a bank customer agrees to pay a fee[3] to the bank in exchange for the DCC or DSA.[4] For consumers, the arrangement provides a convenient method of extinguishing debt during times of financial or personal hardship. The fee provides compensation to the bank for potentially releasing borrowers from loan obligations. Additionally, the agreement allows the bank to avoid the time and expense of collecting the balance of a loan from a borrower's estate if the borrower should die, or upon other circumstances.

National banks and federally chartered credit unions are authorized by federal law and regulation to enter into a DCC or DSA with customers. The U.S. Office of Comptroller of Currency (OCC) and the National Credit Union Administration (NCUA) have each stated that such activities are incidental to the lending powers of the financial institutions.[5] As such, they are exempt from state insurance regulation due to federal pre-emption of state law.

[1] A debt suspension agreement does not include loan payment deferral arrangements under which payments are deferred upon the borrower's unilateral election to defer repayment, or a bank's unilateral decision to allow a deferral.
[2] *See* 12 C.F.R. s. 37.2
[3] The fee may be a lump sum payment due at the outset of a loan that is possibly financed over the loan's term, or the fee may be assessed via a monthly or other periodic charge.
[4] See Part 37 final rules, 67 Fed. Reg. 58,962 (2003). Statement by the U.S. Office of the Comptroller of Currency which explains some of the purposes and benefits of DCC's and DSA's.
[5] See 12 C.F.R. Part 37 (OCC rules); 12 C.F.R. Part 721 (NCUA rules).

The Florida Statutes do not specifically define or reference debt cancellation products. However, the Office of Financial Regulation (OFR) issued an Order of General Application on February 1, 2006, to declare whether a Florida-chartered financial institution may authorize such products pursuant to their lending powers. The OFR stated that Florida-chartered institutions do have the authority to enter into such agreements with their customers, subject to various requirements. One such requirement is that the financial institution "establish and maintain an effective risk management program to ensure the financial institution's safety and soundness concerning Debt Cancellation Products, as is required for a national bank."[6] Representatives from the OFR have indicated that an institution could meet this requirement either by maintaining sufficient reserves to cover anticipated losses from such products or purchasing insurance to cover such losses.[7] However, Florida currently does not authorize the sale of such a product under the Florida Insurance Code.

A form of debt cancellation product is a Guaranteed Asset Protection (GAP) product. GAP's are generally sold in conjunction with an automobile loan and state that the lending institution for the loan will waive the difference between the value of the vehicle and the outstanding balance of the loan or lease if the loan or lease balance is greater than the vehicle value. The product is not insurance if the party that made the loan is the one that agrees to waive the difference, according to an Office of Insurance Regulation informational memorandum issued August 15, 2002.[8] However, if a third party (one who is not a named party to the loan or lease) offers to indemnify the borrower pursuant to a GAP product, then the transaction would be considered insurance, and the third party would be required to be licensed as a property and casualty insurer in Florida. Thus, a financing company that sells a GAP product may do so without being licensed as a property and casualty insurer, but an automobile dealer or other third party that is not a party to the loan or lease contract could not sell the product without a license to transact insurance.

Representatives from the Office of Insurance Regulation have opined that debt cancellation contracts and debt suspension agreements meet the definition of insurance contained in s. 624.02, F.S. Because of this, the office has not authorized direct insurance of DCCs and DSAs, asserting that the proper insurance product to provide coverage to a financial institution that sells such services is reinsurance.[9]

Credit Life and Credit Disability Insurance

Credit life insurance is insurance on the life of a debtor in connection with a loan or other credit transaction.[10] Credit disability insurance protects a borrower of money or lessee of goods connected with a loan or credit transaction against loss of time resulting from accident or sickness.[11] For each of these insurance products, regulated under part IX of ch. 627, F.S., the

[6] Office of Financial Regulation, In re: Debt Cancellation Products, OFR No. 0255-B-11/0 (February 1, 2006).
[7] Letter from the Office of Financial Regulation to the House Committee on Insurance dated March 30, 2006. The letter is on file with the Senate Banking and Insurance Committee.
[8] *See* Florida Department of Insurance Informational Memorandum 02-059M (August 15, 2002).
[9] Letter from Steven Parton, General Counsel of the Office of Insurance Regulation, to Kenneth Levine (June 30, 2004), on file with the Senate Banking and Insurance Committee.
[10] Section 627.677(1), F.S.
[11] Section 627.677(2), F.S.

creditor/consumer is directly covered by an insurer, which pays the financial institution upon death or disability of the debtor, respectively. Under Florida law, the amount of insurance that may be procured upon the life of any particular debtor is limited to $50,000.[12] Credit disability insurance or credit life insurance may not exceed a term of 10 years, with credit life insurance having the additional requirement that a term may not extend more than 15 days beyond the term of the indebtedness.[13]

Banks and Trust Companies—Capital Requirements and Regulations Regarding Stocks
Chapter 658, F.S., contains various requirements for banks and trust companies, including the financial requirements for the formation of a bank or trust company as well as ongoing regulations regarding the issuance or sale of stock by a state bank or trust company.
Section 658.21, F.S., contains findings that the Office of Financial Regulation (OFR) must make before it approves an application to organize a bank or trust company. There are six requirements, one of which is that the proposed capitalization for a bank must be deemed adequate by the OFR, and cannot be less than $6 million if the proposed bank is located in a metropolitan area, or $4 million if located in other counties. The total capitalization of a trust company must be at least $2 million. Additionally, 25 percent of the capital for a proposed bank must be directly owned or controlled by the organizing directors of the bank. Directors of banks owned by single-bank holding companies must have direct ownership or control of at least 25 percent of the bank holding companies capital assets. However, current law does not specify a standard for the directors of a proposed bank that is to be owned by a multi-bank holding company.

Another requirement placed on state-chartered banks or trust companies is that when issuing its capital stock (the total stock authorized to be issued by a company's charter) it must have a par value of over $1 per share but no more than $100 per share pursuant to s. 658.34, F.S. Additionally, only with OIR approval, may a bank or trust company issue less than all the number of shares of any of its capital stock. Such authorized but unissued shares may be issued only to provide for stock options, to declare or pay a stock dividend, or—if the OFR grants approval—to increase the capital of the bank or trust company. Current law also prohibits in s. 658.36, F.S., a state bank or trust company from reducing or increasing its outstanding capital stock without first obtaining the approval of the OFR.

In the event of a merger that results in a state bank or trust company, the merger must be approved by the stockholders of each constituent national or state bank. For constituent national banks, the approval must be made pursuant to federal law, while for a constituent state bank or trust company, the holders of a majority of the voting shares of each state bank or trust company must vote in the affirmative for a certificate of merger to be issued by the OFR. Stockholders who dissent must be notified that they are entitled to payment in cash of the value of the shares held by such stockholders. Once a merger is completed, the resulting state bank or trust company is permitted to fix an amount which it considers to be not more than the fair market value of the shares of the new company that it will pay to the holders of dissenting shares. If the owner of a dissenting share surrenders the stock certificate within 30 days of the merger's effective date, they are paid the amount the bank or trust company calculated as the fair market value. If the

[12] Section 627.679(1)(b), F.S.
[13] Section 627.681, F.S.

owner of the dissenting share does not accept the offer, then the value of the shares is determined by the panel of three appraisers, one selected by the board of directors of the resulting state bank, one selected by the owners of at least two-thirds of the dissenting shares, and a third by the other two appraisers. The value determined by the appraisers is controlling and binding on all parties. If the appraisers fail to determine a value, or one of the appraisers is not selected, then the OFR shall cause an appraisal of the dissenting shares that is binding on the parties.

Tenancy by the Entireties

A tenancy by the entireties is a form of property ownership that is unique to married couples where the property is held by a husband and wife with unity of possession (joint ownership and control). The married couple must have unity of interest (the interest in the account must be identical), unity of title (interests must originate in the same instrument), and unity of time (the interests must commence at the same time). Also, each party must have a right of survivorship. Tenancy by the entireties is not the only means by which a married couple may hold property jointly. Other forms of joint ownership include a tenancy in common or a joint tenancy.

In *Beal Bank v. Almand and Associates,*[14] the Florida Supreme Court was confronted with the question of what type of ownership applies to the bank account of a married couple that does not specify the type of ownership by which the property is held. The case dealt with creditors of a husband attempting to attach the bank accounts. The court noted that in a tenancy by the entireties, the property is not owned by either party individually, but rather both parties own the entire property. This is in comparison with a joint tenancy with right of survivorship, where each person owns his or her separate share. Thus, a creditor may reach the joint tenant's portion of property to recover that joint tenant's individual debt. However, when property is held in a tenancy by the entireties, only the creditors of both the husband and wife jointly may reach the property because it is not divisible on behalf of one spouse alone. Under current Florida law, real property titled in the name of both spouses is presumed to be a tenancy by the entireties, but personal property is only considered to be held in a tenancy by the entireties if it can be proven that the parties intended to hold the personal property as a tenancy by the entireties. The court stated that the requirement that personal property is not presumed a tenancy by the entireties has created confusion and litigation, and recommended that such property (such as a financial account) should be presumed to be held in a tenancy by the entireties unless the terms and conditions specify otherwise.

Other aspects of Present Situation affected by the bill are discussed below.

III. Effect of Proposed Changes:

Section 1. Amends s. 520.02, F.S., regarding retail installment contracts. The bill creates a definition of "Guaranteed Asset Protection Products" that defines such products as a loan, lease or retail installment contract term or contract addendum under which a creditor agrees to waive a customer's liability for payment of some or all of the amount by which the customer's debt exceeds the value of the customer's collateral. The bill retroactively applies this definition to all products that meet this definition that were issued before the bill's effective date.

[14] 780 So.2d 45 (Fla. 2001).

Section 2. Amends s. 520.07, F.S. The bill establishes the requirements as to the sale of guaranteed asset protection products by licensees. A motor vehicle retail installment seller, sales finance company or retail lessor and their assignees are authorized to offer an optional guaranteed asset protection product. However, the seller of GAP coverage may not require its purchase as a condition for making a loan. In order to offer GAP product, the seller of the GAP product must comply with the following requirements:

- The cost of the GAP product cannot exceed the amount of indebtedness.
- The GAP agreement must be governed by this section (s. 520.07).
- The GAP product must be an obligation of the person who purchases or acquires the loan contract covering the GAP product.
- Provide readily understandable disclosures that purchase of the GAP product is optional as well as regarding eligibility requirements, condition, refunds and exclusions.
- Provide a copy of the executed GAP product to the buyer. The seller bears the burden of proving the contract was provided to the buyer.
- A GAP product contract cannot allow the seller to unilaterally modify the terms of the contract unless the modification is favorable and free to the buyer, or the buyer is notified of any proposed change and has reasonable opportunity to cancel the contract without penalty before the change is effective.
- If a GAP product is terminated, any unearned fees paid for the contract must be refunded to the buyer unless the contract says otherwise. However, a contract that does not provide a refund may only be offered if the buyer is offered a bona fide option to purchase a comparable contract that provides a refund. A refund is not due if the consumer received a benefit under the GAP agreement. In order to receive a refund, the buyer must notify the seller of the GAP agreement within 90 days of the event that terminated the contact.

Section 3. Amends s. 520.35(3), F.S., to increase the maximum delinquency charge from $10 to $25 for a default of payment pursuant to a revolving account provision in a retail installment contract.

Section 4. Adds paragraph (r) to s. 624.605(1), F.S., to include insurance for debt cancellation products within the definition of "casualty insurance." A debt cancellation product is defined as insurance that a creditor may purchase against the risk of financial loss from the use of debt-cancellation products with consumer loans, leases, or retail installment contracts. A debt cancellation product may be sold by financial institutions and their subsidiaries and other business entities authorized by law. Debt cancellation products are stated not to be insurance for purposes of the Florida Insurance Code, and thus would not be regulated by the Office of Insurance Regulation.

Section 5. Amends s. 627.553(3), F.S., to eliminate the $50,000 limit on insurance that may be procured on the life of a debtor under a debtor group contract. A debtor group contract insures the lives of a group of individuals who are debtors of a creditor, with the creditor as the beneficiary. The change would allow each individual in the group to be insured up to the amount of his or her indebtedness to the creditor.

Section 6. Amends paragraph (1)(b) of s. 627.679, F.S., to eliminate the $50,000 limit of credit life insurance on the life of any particular debtor regarding loans covered in one or more

insurance policies. The change would allow the total amount of credit life insurance on the life of a debtor to be up to the amount of his or her indebtedness to the creditor.

Section 7. Amends s. 627.681, F.S., to allow for the term of credit disability insurance to extend for the term of the indebtedness, rather than the current 10-year time limitation.

Section 8. Amends s. 655.005, F.S. Amends the definition of "financial institution" to include various entities referenced in the financial institutions codes. Adds a definition of "debt-cancellation products" to the financial institutions codes. A debt-cancellation product is a loan, lease, or retail installment contract term or modification or addenda to a contract. Under a debt-cancellation product, a creditor agrees to cancel or suspend all or part of a customer's obligation to make payments if specified events occur. The term includes, but is not limited to debt-cancellation contracts, debt-suspension agreements, and GAP products offered by financial institutions and their subsidiaries.

Section 9. Amends s. 655.79, F.S., to specify that a deposit or account made in the name of two persons who are husband and wife is considered a tenancy by the entirety unless otherwise specified in writing. A tenancy by the entirety is a form of ownership where a husband and wife have the right to own the entire property. Only a creditor that is a creditor of both spouses jointly may reach property held as a tenancy by the entirety. Upon the death one spouse, the other has a right of survivorship and obtains the title. The change was recommended by the Florida Supreme Court in *Beal Bank v. Almand and Associates*, 780 So.2d 45 (Fla. 2001).

Section 10. Amends s. 655.947, F.S., to authorize financial institutions and their subsidiaries to offer and charge a fee for debt cancellation products. Financial institutions must prudently and soundly manage the risks associated with such products and establish and maintain specified risk management and control processes. The Financial Services Commission is required to adopt rules to administer this section that are consistent with the federal regulations for debt cancellation contracts and debt suspension agreements. The section also specifies that a periodic payment option is not required to be offered.

Section 11. Amends s. 655.954, F.S., to authorize the sale of debt cancellation products by financial institutions in conjunction with a loan, line of credit, or loan extension. The financial institution may not require a person to purchase a debt cancellation product as a condition for a loan, line of credit, or loan extension.

Section 12. Amends s. 658.21(2), F.S., regarding the approval of an application to organize a bank or trust company. The minimum proposed capitalization for a proposed bank or trust company is raised from $6 million to $8 million. The bill also changes the requirement regarding the total capital accounts a bank or trust company may have at its opening, to require that the organizing directors own or control 25 percent of the total capital accounts at opening or $3 million, whichever is less. This requirement is less stringent than the requirement under current law that the organizing directors control at least 25 percent of the bank's total capital accounts. If the bank will be owned by an existing multibank holding company, the proposed directors must have a substantial capital investment in the holding company, to be determined by the office, but not to exceed the amount required for a single bank holding company application specified above. Current law does not contain a standard for multibank holding companies.

The bill also specifies that the proposed stock offering pursuant to the bank application must comply with ss. 658.23-658.25, F.S., and ss. 658.34-658.37, F.S.

Section 13. Amends s. 658.34, F.S. The bill eliminates the need for a bank or trust company to obtain approval from the OFR in order to increase its capital. However, s. 658.36, F.S., as amended by section 14 of the bill requires advance notice to be provided to the OFR. The prohibition against a bank or trust company issuing capital stock with a par value of over $100 per share is deleted. The bill creates a new subsection (5) that states a financial institution may not issue or sell stock of the same class which creates different rights, options, warrants, or benefits among the purchasers or stockholders of that class of stock. However, the financial institution may create uniform restrictions on the transfer of stock as permitted in s. 607.0627, F.S.

Section 14. Amends s. 658.36, F.S., to require a state bank or trust company to notify the OFR in writing 15 days before increasing its capital stock.

Section 15. Amends s. 658.44, F.S., to clarify who can assert dissenter's rights pursuant to the approval of the sale of stock by a state bank or trust company. The bill states that the fair value of the shares of stock will be determined using the procedures in s. 607.1326, F.S., and s. 607.1331, F.S. The new procedure would be the same as is applied to corporations. It requires a shareholder who is dissatisfied with a corporation's offer to provide written notice of the shareholder's estimate of the fair value of the shares to the corporation before the vote on the offer is taken, or, if the action is to be taken without a shareholder meeting, within 20 days after receiving notice of appraisal rights. The value of the shares will be determined under a court proceeding. Under current law, a panel of three appraisers is retained and determines the value of the shares by majority vote, and if the appraisers cannot agree as to value, then the OFR makes the determination.

Section 16. The act is effective October 1, 2007.

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:

None.

B. Private Sector Impact:

The legislation would permit state chartered financial institutions to more readily sell debt cancellation contracts (DCCs) or debt suspension agreements (DSAs) to their customers, by clearly providing that such contracts are not insurance and by clearly allowing the financial institutions to purchase insurance (from an insurance company) against the risk of financial loss from the use or debt cancellation products.

While state chartered financial institutions that maintain sufficient reserves to cover anticipated losses from DCCs and DSAs can already offer these products, state chartered financial institutions that would prefer to insure such losses through insurance cannot purchase debt cancellation insurance in the state of Florida to cover the institutions' losses. Allowing for this insurance would authorize state chartered financial institutions to sell such agreements as readily as federally chartered institutions. Customers may benefit from being able to purchase a product that would, in certain circumstances, protect the borrower when he or she cannot meet incurred financial obligations. Insurers will benefit from being enabled to sell this insurance product (debt cancellation insurance) to creditors.

The bill increases the maximum delinquency charge from $10 to $25 for a default of payment pursuant to a revolving account provision in a retail installment contract.

The bill will likely limit the ability of creditors to reach the property of a married couple, in a situation where a bank account does not specifically state the type of ownership under which the property is being held. Because such property will be considered a tenancy by the entireties, only creditors of both spouses jointly would be able to reach such property.

C. Government Sector Impact:

None.

VI. Technical Deficiencies:

None.

VII. Related Issues:

None.

VIII. Summary of Amendments:

None.