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 744
INTRODUCER:	Banking and Insurance Committee and Senator Alexander
SUBJECT:	Automated Teller Machine Transaction Charges
DATE:	April 9, 2007
REVISED:	

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

I. Summary:

In 2006, legislation was enacted to allow an ATM operator or owner charge a fee to a person who accesses funds from an account held by financial institutions located outside of the United States. This legislation was in response to current operating rules of the two international Electronic Funds Transfer networks, MasterCard/Cirrus and VISA/Plus, that allow such fees only if a state's law expressly permits such fees on international transactions. However, the current law is permissive ("may charge") and does not specifically address contracts or agreements that might prohibit these fees. Such fees or surcharges are not prohibited under current state law. In response to the 2006 law, VISA determined that it would not add Florida to the list of states that permit access fees to be assessed on VISA/Plus international cardholders. VISA also indicated it would assess fines to acquirers that charge access fees to international cardholders for such transactions originating in Florida.

Senate Bill 744 addresses these issues. The bill provides that an agreement to operate or share an ATM may not "prohibit, limit, or restrict" the right of the owner or operator to charge an access fee or surcharge not otherwise prohibited under state or federal law to a customer conducting a transaction using an account from a financial institution, which is located outside of the United States. The bill also provides that nothing in the act is intended to restrict the owner or operator from entering into agreements regarding access free fee arrangements. The bill requires an owner or operator of an ATM to disclose such fees or surcharges in compliance with federal Regulation E,[1] addressing electronic fund transfers, which was issued by the Board of Governors of the Federal Reserve System, pursuant to the federal Electronic Fund Transfer Act.

[1] 12 C.F.R. part 205, as amended.

This bill substantially amends s. 655.966, F.S., of the Florida Statutes:

II. Present Situation:

When a customer withdraws cash from an automated teller machine (ATM) not owned by his or her financial institution, the customer's financial institution must pay a fee for the transaction, comprised of: a "switching fee" to the ATM network and an "interchange fee" to an ATM not owned by the customer's financial institution.

A customer's financial institution has a choice regarding the imposition of fees. Most financial institutions set a specific limit to the number of interchange fees associated with transactions at ATMs not owned by the customer's financial institution they will pay without charging the customer. If the customer goes over the limit, the bank will then either charge a flat rate or a per transaction fee.

These fees have existed since the advent of the ATM networks. Financial institutions have always been allowed to pass interchange and switching fees on to their customers. The same is not true of surcharging. The ATM network operating rules historically prohibited surcharging by financial institutions, unless the state expressly authorized it by law. However, there is no state or federal law that prohibits such charges. In 1996, MasterCard/Cirrus and VISA/Plus repealed the rules that prohibited such a surcharge on financial institutions located within the United States.

Similar to domestic surcharging, the current prohibition against ATM operators or owners charging fees to persons who wish to access funds from accounts held by financial institutions located outside of the United States is not based on current Florida law, but rather is the result of the card association operating rules that provide an exception if a state's law *expressly permits* such fees on international transactions. Prior to the 2006 Session, 13 states had passed legislation allowing for the assessment of fees or surcharges on international cardholders, including Alabama, Arkansas, California, Georgia, Idaho, Louisiana, Maine, Mississippi, Montana, Nevada, Tennessee, Texas, Washington, and Wyoming. Presently, VISA/Plus is in the process of reviewing their internal policy prohibiting this type of surcharge with a view towards eliminating it.

The lack of fees on international cardholders was less significant in prior years because international interchange fees paid by VISA and MasterCard to ATM owners and operators for international transactions have been historically higher than the domestic interchange fees. However, in recent years, Visa and Mastercard have gradually reduced interchange fees for international transactions. Advocates of the legislation contend that these current international interchange fees do not adequately compensate ATM owners and operators for their inability to impose a surcharge on international transactions.

Section 655.005(1)(h), F.S., defines a "financial institution" as a state or federal association, bank, savings bank, trust company, international bank agency, international branch, representative office or international administrative office, or credit union.
Section 655.960(3), F.S., defines an "automated teller machine" as any electronic information processing device located in Florida which accepts or dispenses cash in connection with a credit, deposit, checking, or convenience account. The definition does not include devices used solely to

facilitate check guarantees or check authorizations or which are used in connection with the acceptance or dispensing of cash on a person-to-person basis, such as by a store cashier. An operator of an ATM is defined under s. 655.960(10), F.S., to mean a financial institution, other business entity, or any other person who controls the use or operation by a customer or other member of the general public of an ATM.

In 2006, the Legislature passed SB 704, which was enacted as Ch. 2006-216, L.O.F. This law created s. 655.966, F.S., which allowed ATM owners and operators to charge an access fee or a surcharge to a customer conducting transactions using an account drawn from a financial institution located outside the United States. Section 655.966, F.S., provides that:

> The operator of an automated teller machine, as defined in s. 655.960(3), F.S., *may* charge an access fee or surcharge, not otherwise prohibited under state or federal law, to a customer conducting a transaction using an account from a financial institution, as defined in s. 655.005(1)(h), which is located outside of the United States.

As the section reads, a fee "may" be charged on international transactions. Additionally the provisions did not specifically address contracts or agreements that might prohibit these fees. It also was not a requirement of the section that an owner disclose that the transaction is subject to a fee or surcharge or the amount of such fee or surcharge; however, the Federal Reserve Board Regulation E, which implements the federal EFT Act does require disclosure of the amount of fees to be charged (see 12 C.F.R. s. 205.16), as discussed below.

Regulation E: Electronic Fund Transfers

Regulation E provides a basic framework that establishes the rights, liabilities, and responsibilities of participants in electronic fund transfer systems, such as automated teller machine transactions.[2] The term "electronic fund transfer" generally refers to a transaction initiated through an electronic terminal, telephone, computer, or magnetic tape that instructs a financial institution to either credit or to debit a consumer's asset account.

The regulation also requires financial institutions to provide consumers with initial disclosures of the terms and conditions of EFT services. Institutions must disclose the consumer's liability for unauthorized EFTs, the types of EFTs the consumer may make, and any limit on the frequency or dollar amount; fees charged by the institution; and error-resolution procedures. An institution is required to disclose all fees for EFTs or the right to make them. An institution is not required to disclose fees for inquiries made at an ATM since no transfer of funds is involved. A per-item fee for EFTs must be disclosed even if the same fee is imposed on non-electronic transfers. If a per-item fee is imposed only under certain conditions, such as when the transactions in the cycle exceed a certain number, those conditions must be disclosed. Itemization of the various fees may be provided on the disclosure statement or on an accompanying document that is referenced in the statement.

If there are adverse changes in fees, the consumer's liability, types of transfers available, or limits on transfers, the institution must provide a change-in-terms notice at least 21 days prior to the effective date. Although no particular rules govern type size, number of pages, or the relative

[2] 12 CFR 205.

conspicuousness of various terms, the disclosures must be in a clear and readily understandable written form that the consumer may retain.

An automated teller machine operator that imposes a fee on a consumer for initiating an electronic fund transfer or a balance inquiry is required to provide notice that a fee will be imposed for providing electronic fund transfer services or a balance inquiry; and disclose the amount of the fee. To meet the notice requirements, an automated teller machine operator must post in a prominent and conspicuous location on or at the automated teller machine a notice that: a fee will be imposed for providing electronic fund transfer services or for a balance inquiry; or a fee may be imposed for providing electronic fund transfer services or for a balance inquiry, but the notice may be substituted for the notice in paragraph only if there are circumstances under which a fee will not be imposed for such services; and provide the notice either by showing it on the screen of the automated teller machine or by providing it on paper, before the consumer is committed to paying a fee.

Fees paid by the account-holding institution to the operator of a shared or interchange ATM system need not be disclosed, unless they are imposed on the consumer by the account-holding institution. Fees for use of an ATM that are debited directly from the consumer's account by an institution other than the account-holding institution (for example, fees included in the transfer amount) need not be disclosed. (See 12 C.F.R. s. 205.7(b)(11) for the general notice requirement regarding fees that may be imposed by ATM operators and by a network used to complete the transfer.)

III. Effect of Proposed Changes:

The bill would specifically authorize an operator owner of an automated teller machine (ATM) in Florida to charge a fee or surcharge on a customer accessing funds from that ATM. The fee or surcharge must be disclosed in compliance with 12 C.F.R., part 205, federal Regulation E. The bill also provides that an agreement to operate or share an ATM may not prohibit, limit, or restrict the right of the operator or owner of an ATM to charge an access fee or surcharge not otherwise prohibited under state or federal law to a customer conducting a transaction using an account from a financial institution, which is located outside of the United States.

Currently, such fees or surcharges are not prohibited under current state law. In fact, s. 655.960(3), F.S., allows such fees or surcharges to be imposed. However, the law is permissive ("*may charge*") and does not specifically address contracts or agreements that might prohibit these fees. Such surcharges are prohibited by internal policies of the electronic funds networks, Visa, and MasterCard for the United States region, unless *expressly authorized* by state law. In response to the 2006 Florida law, VISA determined that it would not add Florida to the list of states that permit access fess to be assessed on VISA/Plus international cardholders due the permissive language ("may charge"). In addition, VISA indicated it would assess fines to acquirers that charge access fees to international cardholders for such transactions originating in Florida.

The bill also states these provisions are not to be construed to prohibit or limit the ability of an operator or owner of an ATM to voluntarily enter into an agreement regarding participation in a network that does not charge an access fee or surcharge.

The bill takes effect July 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 bill may impact ATM cardholders that have accounts outside of the United States, and conduct transactions in Florida since they may have to pay new fees or surcharges on these ATM transactions, if the ATM operator imposes the fee.

C. Government Sector Impact:

None.

VI. Technical Deficiencies:

None.

VII. Related Issues:

Currently, state law does not prohibit such a surcharge or fee on transactions using an account from a financial institution located outside of the United States.

This Senate Professional Staff Analysis does not reflect the intent or official position of the bill's introducer or the Florida Senate.

VIII. Summary of Amendments:

None.

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