The Florida Senate

BILL ANALYSIS AND FISCAL IMPACT STATEMENT

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

Prepared By: The Professional Staff of the Commerce Committee

BILL: CS/SB 818

INTRODUCER: Banking and Insurance Committee and Senator Bennett

SUBJECT: Financial Services

DATE: March 11, 2008 REVISED:

	ANALYST	STAFF DIRECTOR	REFERENCE	ACTION
1.	Knudsen	Deffenbaugh	BI	**Fav/CS**
2.	Pugh	Cooper	CM	**Favorable**
3.			GA	
4.				
5.				
6.				

Please see Section VIII. for Additional Information:

A. COMMITTEE SUBSTITUTE..... [x] Statement of Substantial Changes

B. AMENDMENTS........................ [ ] Technical amendments were recommended

[ ] Amendments were recommended

[ ] Significant amendments were recommended

I. Summary:

Committee Substitute for Senate Bill 818 addresses a number of issues related to banking, insurance, and financial instruments. Briefly, the bill:

- Authorizes the sale of optional guaranteed asset protection (GAP) products in conjunction with a motor vehicle installment contract or loan, specifies who may sell them, and establishes requirements for such products. The bill specifies that GAP products are not insurance for purposes of the Florida Insurance Code.
- Defines “debt cancellation product” and specifies that such products may be sold by financial institutions, their subsidiaries, and other business entities authorized by law.
- Defines insurance purchased by a creditor for debt cancellation products as a form of casualty insurance.
- 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 would be the amount of 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.

- 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.
- Raises the minimum proposed capitalization for any proposed bank to $8 million and deletes the differing capitalization for banks in metropolitan areas and those in rural counties. The bill also raises the minimum total capital accounts at opening for a trust company from $2 million to $3 million and sets differing capitalization standards for banks owned by single-bank holding companies and banks owned by multibank holding companies.
- Eliminates the requirement for a bank or trust company to obtain approval from the Office of Financial Regulation (OFR) in order to increase its capital, instead requiring that OFR be notified in writing 15 days before the increase goes into effect.
- Deletes the current prohibition against a bank or trust company issuing capital stock that has a par value greater than $100, thus giving these institutions more flexibility.
- Prohibits financial institutions from issuing or selling stock of the same class that 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.
- Clarifies who can assert dissenter’s rights pursuant to the approval of the sale of stock by a state bank or trust company. 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 same as is applied to corporations.

CS/SB 818 substantially amends the following ss. 520.02, 520.07, 624.605, 627.553, 627.679, 627.681, 655.005, 655.79, 655.947, 655.954, 655.967, 658.21, 658.34, 658.36, and 658.44, F.S.

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)

[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.

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.

The Florida Statutes do not define or reference debt cancellation products. However, the 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 DCC's and DSA's, 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

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[5] See 12 C.F.R. Part 37 (OCC rules); 12 C.F.R. Part 721 (NCUA rules).

[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.

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 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 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 greater than $1 per share, but no more than $100 per share, pursuant to s. 658.34, F.S. Additionally, only with OFR 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, s. 658.36, F.S., also prohibits 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 would result in the creation of 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 <u>federal</u> law, while for a constituent <u>state</u> 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.

[11] Section 627.677(2), F.S.
[12] Section 627.679(1)(b), F.S.
[13] Section 627.681, F.S.

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, and which 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, she or he is paid the amount the bank or trust company calculated as the fair market value. If the 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 contrast to 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 in that form. In *Beal Bank*, 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 accounts) be presumed to be held in a tenancy by the entireties <u>unless</u> the terms and conditions specify otherwise.

III. Effect of Proposed Changes:

Section 1 amends s. 520.02, F.S. The section defines "guaranteed asset protection products" for purposes of The Motor Vehicle Retail Sales Finance Act as a contract term, modification, or

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

addenda to a loan, lease or retail installment contract under which a creditor agrees to waive a customer's liability for payment for some or all of the amount by which the debt exceeds the value of the collateral. The definition states that GAP products are not insurance for purposes of the Florida Insurance Code. This definition will be retroactively applied to GAP products issued prior to CS/SB 818's effective date of October 1, 2008.

Section 2 creates a new subsection (11) in s. 520.07, F.S. The section authorizes GAP products to be sold in conjunction with entering into a new motor vehicle retail installment contract or loan. The GAP product could be sold by motor vehicle retail installment sellers, sales finance companies, retail lessors, and their assignees.

The section also specifies the requirements that a GAP product must comply with in order to be offered. The requirements are:

- Purchase of a GAP product cannot be a condition for making a loan.
- The cost of a GAP product may not exceed the amount of indebtedness it is protecting against.
- All contracts or agreements pertaining to a GAP product are governed by this section.
- A GAP product is an obligation of a person who purchases or acquires the loan contract covering the GAP product.
- Entities providing GAP products shall provide readily understandable disclosure that detail eligibility requirements, conditions, refunds, and exclusions. The disclosures must state that the purchase of the product is optional. The disclosure must be in plain language and in a type-face and size that are easy to read.
- A copy of the executed GAP product must be provided to the buyer. The party selling the GAP product has the burden of proving it provided a copy to the buyer.
- A GAP product that allows the seller to unilaterally modify the contract may not be offered for sale unless:
    - The modification is favorable to the buyer and is made without an additional charge to the buyer; or
    - The buyer is notified of the proposed change and provided a reasonable opportunity to cancel the contract without penalty before the change takes effect.
- If a GAP contract is terminated, unearned fees must be refunded to the buyer if the contract is silent on the issue. However, a GAP contract that specifically does not provide a refund to the buyer may only be offered for sale if that entity also offers the buyer a bona fide option to purchase a comparable GAP contract that provides for a refund. In order to receive a refund, the buyer must notify the entity of the event terminating the contract and request a refund within 90 days after the termination event. A refund is not due to a consumer who receives a benefit under the GAP product.

Section 3 amends s. 624.605, F.S. The bill specifies that insurance for debt-cancellation products is to be considered a form of casualty insurance. Insurance on debt-cancellation products is defined as insurance that a creditor purchases against the risk of financial loss from the use of debt-cancellation products with consumer loans, leases, or retail installment contracts.

The section also contains a definition of "debt-cancellation product" as a contract term or modification to a loan, lease or retail installment contract whereby a creditor agrees to cancel or suspend all or part of a customer's obligation to make payments upon the occurrence of specified events. It can include debt-cancellation contracts, debt suspension agreements, and guaranteed asset-protection contracts, but does not include title insurance. Such products are not insurance for purposes of the Florida Insurance Code. The section authorizes financial institutions, insured depository institutions, their subsidiaries, and other entities specifically authorized by law to sell debt-cancellation products.

Section 4 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 5 amends s. 627.679(1)(b), 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 6 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 7 amends s. 655.005, F.S. This section revises the definition of "financial institution" to include various entities referenced in the financial institutions codes. The definition of "federal financial institution" is amended to refer to the newly amended definition of "financial institution." This section also 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 8 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 of 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 9 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 10 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 11 creates s. 655.967, F.S., allowing state-funded endowments that are funded by a general appropriation act prior to 1990 to maintain funds in state or federal financial institutions. This is intended to overrule a provision in the 1989 General Appropriations Act (line-item #344A in ch. 89-253, L.O.F.) that required funds appropriated for the Cuban-American National Foundation to be kept in a national bank located in Florida.

Section 12 amends s. 658.21(2), F.S., regarding the approval of an application to organize a bank. OFR staff has indicated that the requirements of this bill conform to the capitalization levels the OFR currently requires. This section raises the minimum proposed capitalization for a proposed bank to $8 million and deletes the distinction between banks in a metropolitan area (currently $6 million capitalization) and those in other counties (currently $4 million capitalization).

This section also raises the minimum total capital accounts at opening for a trust company from $2 million to $3 million. It also requires that the organizing directors own or control 25 percent of the total capital accounts at opening or $3 million (instead of the current $2 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 OFR, but may not exceed the amount required for a single bank holding company application specified above. Current law does not contain a standard for multibank holding companies.

Finally, this section also requires 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., related to shares of capital stock. This section 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 CS/SB 818, requires that advance notice be provided to the OFR, if such an increase is imminent. The prohibition against a bank or trust company issuing capital stock with a par value of over $100 per share is deleted.

This section also provides that 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. Currently, the approval of the OFR is required before the bank or trust company can increase its capital.

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. This section states that the fair value of the shares of stock will be determined using the procedures in ss. 607.1326-607.1331, 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 provides an effective date of October 1, 2008.

IV. Constitutional Issues:

A. Municipality/County Mandates Restrictions:

None.

B. Public Records/Open Meetings Issues:

None.

C. Trust Funds Restrictions:

None.

V. Fiscal Impact Statement:

A. Tax/Fee Issues:

None.

B. Private Sector Impact:

CS/SB 818 allows state-chartered financial institutions to more readily sell debt cancellation contracts (DCC's) or debt suspension agreements (DSA's) to their customers, by explicitly providing that such contracts are not insurance and by explicitly allowing the financial institutions to purchase insurance (from an insurance company) against the risk of financial loss from the use of debt cancellation products.

While state chartered financial institutions that maintain sufficient reserves to cover anticipated losses from DCC's and DSA's already can 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.

CS/SB 818 also allows motor vehicle retail installment sellers and related parties to sell optional guaranteed asset protection (GAP), which provides an economic benefit to such sellers, and also establishes requirements for the sale of such products, which help protect consumers.

CS/SB 818 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:

CS/SB 818 is substantially similar to CS/SB 2084 and HB 7087, legislation that was passed during the 2007 Legislative Session, but vetoed by Governor Crist because of a provision that raised the maximum delinquency charge on retail installment contracts from $10 to $25. That provision is not in this bill.

VIII. Additional Information:

A. Committee Substitute – Statement of Substantial Changes:

(Summarizing differences between the Committee Substitute and the prior version of the bill.)

<u>From the Banking and Insurance Committee:</u>
The only difference between the bill as filed and the committee substitute in a corrected reference in <u>section 10</u> to the Federal Truth in Lending Act to incorporate the regulations in effect as of January 31, 2008, rather than as of June 30, 2007. The OFR recommended the amendment to incorporate the most recent version of the federal act.

B. Amendments:

None.