HOUSE OF REPRESENTATIVES STAFF ANALYSIS

BILL #: CS/CS/HB 1091 Banking
SPONSOR(S): Regulatory Affairs Committee; Insurance & Banking Subcommittee; Mayfield
TIED BILLS: **IDEN./SIM. BILLS:** CS/SB 1020

REFERENCE	ACTION	ANALYST	STAFF DIRECTOR or BUDGET/POLICY CHIEF
1) Insurance & Banking Subcommittee	13 Y, 0 N, As CS	Bauer	Cooper
2) Regulatory Affairs Committee	15 Y, 0 N, As CS	Bauer	Hamon

SUMMARY ANALYSIS

The Office of Financial Regulation (OFR) regulates and charters banks, trust companies, credit unions, and other financial institutions pursuant to the Financial Institutions Codes ("Codes"), chapters 655 to 667, Florida Statutes. The OFR ensures Florida-chartered financial institutions' compliance with state and federal requirements for safety and soundness.

This bill amends the following provisions of the Codes:

- Amends the definition of "related interest" to remove the person's family and household members, for purposes of lending limits and certain reporting requirements.
- Prohibits the OFR from issuing a non-emergency cease and desist order to a Florida-chartered financial institution while the financial institution is subject to a federal enforcement proceeding on the same grounds, and provides exceptions.
- Amends the par value statute to clarify that the par value requirement only applies to the settlement of checks between institutions, and provides that institutions may charge fees to cash checks.
- Provides a statement of legislative intent for amending the par value statute.
- Provides that a financial institution is not civilly liable and cannot be sued by a third party for the actions or operations of a borrower solely by virtue of extending a loan or a line of credit to such borrower.

The bill does not have a fiscal impact on state or local government. The bill may have a positive fiscal impact on the private financial sector by allowing Florida-chartered banks to charge check-cashing fees to non-customers, but may result in more fees for consumers if they are not customers of these banks.

The bill provides an effective date of July 1, 2013.

FULL ANALYSIS

I. SUBSTANTIVE ANALYSIS

A. EFFECT OF PROPOSED CHANGES:

The U.S. Dual Banking System

The U.S. dual banking system allows commercial banks to become chartered (organized) under either federal or state law.

- *National banks* are chartered under federal law, i.e., the National Bank Act.[1] Their primary federal regulator is the Office of the Comptroller of the Currency (OCC), an independent agency within the U.S. Department of the Treasury.
- *State-chartered banks* are chartered under the laws of the state in which the bank is headquartered.
  - The primary federal regulator for state banks that are members of the Federal Reserve System is the Board of Governors of the Federal Reserve System (FRB).
  - The primary federal regulator for non-members is the Federal Deposit Insurance Corporation (FDIC).[2]

Current Situation: State Banking Oversight

The Florida Office of Financial Regulation (OFR) charters and regulates entities that engage in financial institution business in Florida, in accordance with the Florida Financial Institutions Codes (Codes) and the Florida Financial Institutions Rules.[3] The specific chapters under the Codes are:

- Chapter 655, F.S. – Financial Institutions Generally
- Chapter 657, F.S. – Credit Unions
- Chapter 658, F.S. – Banks and Trust Companies
- Chapter 660, F.S. – Trust Business
- Chapter 663, F.S. – International Banking
- Chapter 665, F.S. – Associations
- Chapter 665, F.S. – Savings Banks

The OFR does not regulate national banks and banks that are chartered and regulated in other states. In addition, the OFR does not regulate institutions that are chartered and regulated by foreign institutions, except to the extent those foreign institutions seek to engage in the business of banking or trust business in Florida.

The OFR ensures Florida-chartered financial institutions' compliance with state and federal requirements for safety and soundness. While the Codes do not specifically define "safety and soundness," the Codes define "unsafe and unsound practice" as:

> [A]ny practice or conduct found by the office to be contrary to generally accepted standards applicable to a financial institution, or a violation of any prior agreement in writing or order of a state or federal regulatory agency, which practice, conduct, or violation creates the likelihood of loss, insolvency, or dissipation of assets or otherwise prejudices the interest of the financial institution or its depositors or members. In making this determination, the office must consider the size and

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[1] The National Bank Act of 1964 (12 U.S.C. § 24 Seventh) gives enumerated powers and "all such incidental powers as shall be necessary to carry on the business of banking" to nationally chartered banks. To prevent inconsistent or intrusive state regulation from impairing the national system, Congress provided: "No national bank shall be subject to any visitorial powers except as authorized by Federal law." Id. at § 484(a).

[2] 12 U.S.C. §1813(q).

[3] Chapter 69U-100 through 69U-150, F.A.C.

condition of the financial institution, the gravity of the violation, and the prior conduct of the person or institution involved.[4]

Like their federal counterparts, the OFR conducts regular examinations of Florida institutions. The Codes require the OFR to conduct examinations of each Florida financial institution during each 18-month period, although it may examine more frequently based on the institution's risk profile, prior exam history, or significant changes in the institution or its operations. To minimize regulatory burden, the OFR is authorized to accept a federal banking regulator's examination and to enter into joint or concurrent examinations with their federal counterparts as well.[5] The examinations primarily review the institution's condition as to its capital, asset quality, management, earnings, and liquidity, and upon completion of the examination, the regulator presents its findings and recommended corrective measures to the institution.

The OFR may pursue informal, nonpublic actions against a Florida bank that the bank's board of directors voluntary accept. These typically involve a memorandum of understanding (MOU), a board resolution, or a written agreement. For more severe violations, or when examination findings cannot be satisfactorily resolved through informal means, the Codes authorize the OFR to initiate formal enforcement actions, namely, through a cease and desist (C&D) order, a removal and prohibition order, and administrative fines.[6] The FDIC and the Federal Reserve have substantially similar enforcement powers over state-chartered banks pursuant to federal law.[7] It is noted that before a federal banking regulator initiates an enforcement proceeding (specifically, a C&D order, removal and prohibition order, or civil money penalties) against a state bank, it must provide notice to the state regulator of its intent to institute such a proceeding, and must allow the state regulator an opportunity to seek satisfactory corrective action from the state bank.[8] This provision has been interpreted to make "clear that the FDIC must take care not to usurp state banking agencies' regulatory authority over state banks."[9]

The OFR is authorized to pursue a cease and desist order against a state financial institution, subsidiary, service corporation, or financial institution-affiliated party when it has reason to believe that such party is engaging in or has engaged in conduct that is:

(a) An unsafe and unsound practice;
(b) A violation of any law relating to the operation of a financial institution;
(c) A violation of any rule of the Financial Services Commission;
(d) A violation of any order of the OFR;
(e) A breach of any written agreement with the OFR;
(f) A prohibited act or practice pursuant to s. 655.0322; or
(g) A willful failure to provide information or documents to the OFR or any appropriate federal agency, or any of its representatives, upon written request.[10]

According to the OFR, a cease and desist order is the OFR's administrative remedy of last resort when a Florida institution fails to comply, although the institution may voluntarily agree to be subject to a cease and desist order through a public consent order issued by either or both the OFR and the federal regulator.[11]

Since 2002, the OFR has resolved the majority (82%, or 336 of 408 cases) of its administrative actions against Florida-chartered financial institutions *jointly* with the appropriate federal regulator.[12] The

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[4] Section 655.005(1)(y), F.S. For a discussion of the FDIC's approach to unsafe or unsound practices, see FDIC's Risk Management Manual of Examination Policies, Section 15.1, at: http://www.fdic.gov/regulations/safety/manual/section15-1.html (last accessed April 3, 2013).
[5] Section 655.045(1), F.S.
[6] *See* ss. 655.033, 655.037, and 655.041, F.S. Cease and desist orders and removal and prohibition orders may also be issued on an emergency basis.
[7] 12 U.S.C. § 1818(b), (c)(1), and (e).
[8] 18 U.S.C. §1818(m).
[9] *Investment Co. Institute v. FDIC*, 728 F.2d 518, 525 (D.C. Cir. 1984).
[10] Section 655.033(1), F.S.
[11] Information provided by the OFR on April 1, 2013, on file with the Regulatory Affairs Committee staff.
[12] Information provided by the OFR on March 15, 2013, on file with the Regulatory Affairs Committee staff.

following table illustrates the percentage of enforcement actions against Florida-chartered commercial banks since 2002, organized by type. In some instances, only the OFR or only the federal regulator took administrative action against a Florida commercial bank.

	Joint	OFR only	FDIC only	FRB only
Board resolution	74%	9%	11%	6%
MOU	97%	2%	0%	1%
Written Agreement	70%	17%	3%	10%
Consent Order/C&D	88%	4%[13]	8%	0%

Since 2002, only one Florida commercial bank has been subject to separate, but parallel, formal cease and desist actions by both the OFR and the FDIC. It is noted that a Florida bank may contest and litigate a complaint by OFR to initiate a cease and desist proceeding pursuant to the Florida Administrative Procedures Act (ch. 120, F.S.) at the Division of Administrative Hearings. Likewise, a Florida bank but must separately litigate a federal regulator's Notice of Charges in accordance with federal law in a federal administrative proceeding. For example, a Florida bank who contests a Notice of Charges from the FDIC must litigate the matter before the federal Office of Financial Institutions Adjudication, in accordance with the Federal Deposit Insurance Act regulations.[14]

Conference of State Bank Supervisors Accreditation Standards & FDIC Examinations

The Conference of State Bank Supervisors (CSBS) is the national organization of banking regulators from all 50 states. The CSBS Accreditation Program, while voluntary for state regulators, involves a comprehensive review of the critical elements that assure a state banking or mortgage regulator to execute its responsibilities through an investigation of a variety of factors. Currently, 47 state banking departments are accredited by the CSBS. The OFR has been an accredited member of the CSBS State Banking Department Accreditation Program since 1986.[15]

To achieve accreditation, a state banking department must test itself against these criteria and achieve a total score of at least 80%, a score of at least 75% on the two Examination sections, and at least 70% on all other sections.[16] This score incorporates the standards noted below:

- The legal authority to charter, examine, supervise and regulate all state-chartered banks consistent with basic principles of safety and soundness, and protection of the public interest.
- The demonstrated capability to conduct safety and soundness examinations of state-chartered banks within acceptable time limits. This capability should be supported by a combination of active monitoring and review of federal examinations and other methods in a manner consistent with state statutes, safety and soundness and the public interest.
- Specialized capabilities as required in each state to assure safety and soundness of all state-chartered banks and full compliance with statutes.
- Adequate qualified staff with expertise to charter, examine, supervise and regulate all state-chartered banks and to perform other departmental functions and responsibilities.
- A policy, statutory or departmental, which requires an examination at least once every 18 months for CAMELS[17] rated 1 and 2 financial institutions and not less frequently than once every 12 months for CAMELS rated 3, 4, and 5 financial institutions.
- Adequate statutory authority for the department to carry out its duties and responsibilities independently, including authority to take formal enforcement action(s).
- Adequate funding to achieve all above-mentioned criteria.

[13] The OFR indicated that of the four total formal actions solely pursued by the OFR, three of them were settled prior to final agency action. Information on file with the Regulatory Affairs Committee Staff (received April 1, 2013).
[14] FDIA Rules of Practice and Procedure, at 12 C.F.R. pt. 308.
[15] CSBS Department Accreditation, at http://www.csbs.org/development/accreditation/pages/default.aspx (last accessed April 17, 2013).
[16] The total maximum points that a state banking department may attain is 2000.
[17] The CAMELS rating system is a supervisory rating system developed to classify a bank's overall condition, based on the Federal Financial Institutions Examination Council's Uniform Financial Institutions Rating System. CAMELS components are Capital Adequacy, Assets, Management, Earnings, Liquidity, and Sensitivity (such as interest rate risk), and are assessed on a 1 (best) to 5 (worst) rating system. *See* FDIC Financial Institution Letter FIL-105-96 (Dec. 26, 1996).

These criteria are classified into 6 major areas of review and corresponding weight towards the overall score:[18]

Section 1 – Administration & Finance	20%
Section 2 – Personnel	8.5%
Section 3 – Training	11.25%
Section 4 – Examination	42.5%
Section 5 – Supervision	11.5%
Section 6 – Legislative	6.25%

Once accredited, a state banking department is subject to on-site reviews every five years by the CSBS accreditation staff, who may provide recommendations to the state banking department, as well as annual reviews to monitor progress in relation to the CSBS' recommendations. State banking departments who fail to meet the minimum standards may be subject to probation, a show cause procedure, and ultimately termination of accreditation.[19]

One benefit of CSBS accreditation is that it is a significant factor in the FDIC's determination whether to accept a state report of examination of a state bank, in lieu of conducting a separate examination, which can reduce regulatory burden.[20] The FDIC does consider other criteria, in whole or in part, when determining the acceptability of a state report of examination. These criteria include the completeness of the state examination report, the adequacy of supporting documentation maintained by the state regulator, the long-term ability of the state regulator to achieve examination objectives, and the adequacy of any arrangement (formal or informal) or working agreement between a state regulator and the FDIC.[21]

According to the CSBS, the OFR is slated for its next on-site review in 2014.[22] On average, the review process takes between two to three months.[23]

Effect of the bill on state enforcement authority

Section 2 of the bill amends s. 655.033, F.S., to provide that while a state financial institution or related party is subject to a federal enforcement proceeding, the OFR is prohibited from issuing and serving a cease and desist order on the same grounds. The bill provides an exception to preserve OFR's *emergency* cease and desist authority against Florida institutions under s. 655.033(6), F.S., even if a federal enforcement proceeding is pending. The bill also provides that this section does not limit the OFR's examination authority, its ability to enter into joint administrative actions with federal regulators,[24] and to effectuate corrective action before a federal regulator issues a Notice of Charges pursuant to 12 U.S.C. 1818(m).

According to the OFR, the bill's prohibition against dual enforcement would delay its non-emergency enforcement authority while a state financial institution is subject to a federal enforcement proceeding. Given that federal administrative proceedings generally take much longer and involves more expense

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[18] CSBS Department Accreditation, at http://www.csbs.org/development/accreditation/pages/default.aspx (last accessed April 16, 2013). More details about the specific CSBS accreditation criteria are available at CSBS State Banking Department Accreditation Program, at http://www.csbs.org/development/Documents/2013BankAccreditationSEQ.pdf (last accessed April 16, 2013).
[19] *Id.*
[20] Section 317.12 of the FDIC Rules and Regulations implements Section 10(d) of the FDI Act and governs the frequency of examinations for insured state nonmember banks.
[21] Guidelines for Relying on State Examinations, 60 Fed. Reg. 33,206 (June 27, 1995).
[22] Telephonic conversation with CSBS Accreditation, April 18, 2013.
[23] E-mail from CSBS Accreditation, April 19, 2013, on file with the Regulatory Affairs Committee staff.
[24] The word "action" is used instead of "proceeding" to distinguish joint informal resolutions and joint consent orders from formal, contested cease and desist proceedings. As explained above, contested cease and desist proceedings must be litigated in their respective sovereigns – either through a state administrative forum (i.e., the Division of Administrative Hearings) in accordance with the Codes and ch. 120, F.S., the Florida Administrative Procedure Act, or through a federal administrative forum (such as the federal Office of Financial Institution Adjudication) in accordance with federal law.

than Florida administrative litigation, the OFR has opined that the bill's prohibition could exacerbate identified unsafe and unsound practices and possibly result in unnecessary bank failures and financial risks to Florida's consumers.[25] The OFR has also indicated that it, along with the CSBS and the regional office of the FDIC, is unaware of any other states that have such a prohibition against a state enforcement proceeding while a federal enforcement proceeding is pending.

As noted above, the adequacy of a state's statutory authority is one component of CSBS accreditation. According to the CSBS, the outcome of an accreditation review is a matter of an aggregate review of an agency, with enforcement authority being an important component.[26] The CSBS has indicated that failure to have adequate enforcement authority could jeopardize the accreditation of a state banking regulator.[27] Specifically, the CSBS has indicated that the bill's prohibition would negatively affect its evaluation of the OFR's enforcement powers in relation to the Supervision and Legislative components of the CSBS accreditation review.[28] In addition, if the OFR's accreditation were placed on probation, the CSBS has indicated that it may difficult for the OFR to have the probation lifted if a legislative change was needed, since it cannot be as easily or internally corrected as other accreditation components.[29]

Representatives from the FDIC have indicated that if the OFR did lose its accreditation, the FDIC would no longer accept the OFR's examinations.[30] If this took place, Florida-chartered banks could be subject to increased and potentially duplicative examinations.

<u>Current Situation: Lending limits and related interests</u>

According to OCC regulations for national banks, lending limits ensure the safety and soundness of national banks by preventing excessive loans to one person or to related persons that are financially dependent. These limits promote diversification of loans and help ensure equitable access to banking services.[31]

Florida-chartered banks are also subject to lending limits in the Codes:

- *General limitations*: a bank may extend unsecured credit to any person up to 15% of its capital accounts, and up to 25% of its capital accounts for secured credit. For the latter, the Codes specify that the 25% limitation must include the borrower's "related interests."[32]
    - If the bank's total extension of credit to any person (including his or her related interests) exceed 15% of the bank's capital accounts, a majority of the bank's board of directors must approve the loan in advance.
- *Loans to executive officers, directors, and related interests*: banks are prohibited from extending credit of more than $25,000 to any of its executive officers and directors (and their related interests), unless the majority of the board of directors have approved the loan in advance.

To the extent state lending limits are lower than those provided in Regulation O for state banks that are members of the Federal Reserve System, Reg O provides that the state lending limits control.[33]

Currently, s. 655.005(1)(t), F.S., defines "related interest" as:

> [W]ith respect to any person, *the person's spouse, partner, sibling, parent, child, or other individual residing in the same household as the person*. With respect to any person, the term

[25] Information provided by the OFR, received March 22 and April 1, 2013, on file with the Regulatory Affairs Committee staff.
[26] E-mail from CSBS, dated April 17 and 18, 2013, on file with the Regulatory Affairs Committee staff.
[27] Letter from the CSBS to House and Senate bill sponsors, dated April 1, 2013, on file with the Regulatory Affairs Committee staff.
[28] Telephonic conversation with CSBS head of accreditation, April 19, 2013, and e-mail from CSBS, dated April 17 and 18, 2013, on file with the Regulatory Affairs Committee staff.
[29] *Id.*
[30] Telephone conversation with FDIC counsel, April 18, 2013.
[31] 12 C.F.R. 32.1(b)
[32] Section 658.48(1)(a), F.S.
[33] 12 C.F.R. 215.2(i), footnote 2.

means a company, partnership, corporation, or other business organization controlled by the person. A person has control if the person:

1. Owns, controls, or has the power to vote 25 percent or more of any class of voting securities of the organization;
2. Controls in any manner the election of a majority of the directors of the organization; or
3. Has the power to exercise a controlling influence over the management or policies of the organization (emphasis added).

In the 2011 Regular Session, the Legislature enacted CS/HB 1121, relating to financial institutions. The bill made numerous changes to the Banking Codes. Prior to 2011, this term was defined within the context of credit unions' loan powers[34] and lending limits for state banks,[35] and was limited to only any partnership, corporation, or other business organization controlled by a person. As a result of the 2011 legislation, "related interest" was moved to s. 655.005(1)(t), F.S. as a general definition, and was amended to include specified family and household members of a person. The purpose of this change was to stop circumvention of lending limits by executives and stockholders, who used relatives to obtain loans and other financial benefits.[36]

Regulation O contains a similar prohibition for loans to executive officers, directors, and principal shareholders of state and national banks that are members of the Federal Reserve System. Regulation O does state that a principal shareholder is a person with 10% or more of a bank's voting securities, and accounts for shares owned by that person's "immediate family." However, Reg O only considers the person's spouse, minor children, and the person's children residing in the same household, while the Florida provision also includes partners, siblings, parents, or other individuals residing in the same household.

"Related interest" also appears in other provisions of the Codes:

- *Required notice for significant events*: The Codes require financial institutions to provide a written disclosure for certain significant events, including any credit extension to an institution's executive officer and his or her *related interests*, that when combined with all other extensions of credit to that officer, exceed 15% of the institution's capital accounts.[37]
- *Stock subscriptions*: Newly formed financial institutions must provide the OFR with a list of subscribers of the capital stock of a proposed bank or trust company, following the completion of a stock offering. The Codes require that the directors provide information to the OFR regarding persons subscribing to 10% or more of the voting stock or nonvoting convertible stock. This 10% threshold must include the person's *related interests*.[38]
- *Changes in capital*: The Codes require banks and trust companies to provide notice to the OFR upon specified changes in capital. In certain situations where capital accounts have been diminished below regulatory requirements and the bank or trust company cannot reasonably replenish its capital, the Codes permit special stock offering plans subject to OFR's approval. The Codes provide that the OFR shall disapprove a plan that provides unfair or disproportionate benefits to existing shareholders, directors, executive officers, or their *related interests*.[39]

Effect of the bill on "related interest"

Section 1 of the bill amends the definition of "related interest" by restoring it to pre-2011 language. By removing the person's spouse, partner, sibling, parent, child, or other individual residing in the same household as the person from the definition, the bill defines "related interest" to include only *entities* controlled by the person.

The bill may limit the OFR's ability to enforce lending limits against banks, particularly as the limits relate to executives and stockholders.

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[34] Section 657.038, F.S.
[35] Section 658.48, F.S.
[36] *See* Senate Banking & Insurance staff analysis of SB 1332, the Senate companion to CS/HB 1121 (General Session 2011).
[37] Section 658.945(2)(a)5., F.S.
[38] Section 658.235(2), F.S.
[39] Section 658.36(3)(c), F.S.

Check-cashing fees and "par value"

Background: Competitive Equality & Preemption

The U.S. dual banking system is premised on two related doctrines - the competitive equality doctrine and federal preemption. The competitive equality doctrine essentially states that national banks are subject to state laws with regards to their daily course of business, such as their acquisition and transfer of property, their right to collect their debts and their liability to be sued for debts, contracts, usury, and trust powers.[40]

However, while states are generally free to legislate on matters not controlled by federal regulation, the application of state laws to *national* banks is subject to the preemption doctrine. By operation of the U.S. Constitution's Supremacy Clause,[41] federal regulation of a particular subject preempts state regulation related to the same subject. In *Barnett Bank of Marion County, N.A. v. Nelson*, 517 U.S. 25 (1996), for instance, the United States Supreme Court held that a federal statute granting small town banks the authority to sell insurance, preempted a Florida statute which prohibited such sales. The federal Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010 codified the test for "conflict preemption" articulated in the *Barnett Bank* decision. The conflict preemption test asks whether the state law prevents or significantly interferes with the exercise by the national bank's powers.[42]

It is noted that the Codes contain a unique provision that ensures competitive equality for *Florida-chartered* financial institutions. If a state law places a Florida financial institution at a competitive disadvantage with national banks, Section 655.061, F.S. authorizes the OFR to grant Florida banks the authority to make any loan or investment or exercise any power which they could make or exercise as if they were federally chartered financial banks, and provides the entitled to the same privileges and protections granted to federally chartered or regulated banks. In addition, this provision states:

> In issuing an order or rule under this section, the office or commission shall consider the importance of maintaining a competitive dual system of financial institutions and whether such an order or rule is in the public interest.[43]

Par Value Litigation

Since 1992, the Codes require banks to settle checks "at par," or at face value.[44] This means that if an individual presented a check made out to him for $300 to any bank in Florida, the bank is required to provide $300 in funds.

In the past several years, this provision has engendered significant litigation in both state and federal courts by consumers who were charged fees to have checks cashed at banks at which they were not account holders. These cases generally involved two main claims – 1) federal preemption and 2) whether the statute's limitations on fees apply to bank-to-bank transactions,[45] or to the cashing of personal checks.

- Vida Baptista ("Baptista"), sought to cash a check at a Florida branch of JPMorgan Chase, a national bank. While the check was written by a Chase account holder, Baptista was not a Chase account holder, and was accordingly charged a $6 fee by Chase to cash the check

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[40] *National Bank v. Commonwealth*, 9 Wall. 353, 362, 19 L.Ed. 701(1870).
[41] U.S. Const., Art. VI, cl. 2.
[42] 12 U.S.C. §25b(b)(1).
[43] The OFR's orders of general application are publicly available on its agency website. https://real.flofr.com/ConsumerServices/SearchLegalDocuments/LDSearch.aspx (last accessed March 16, 2013).
[44] Section 655.85, F.S. This provision was enacted in 1992. Section 52, ch. 92-303, L.O.F.
[45] The Federal Reserve System operates a nationwide check-clearing system to facilitate the collection and settlement of checks between paying and collecting banks.

immediately. Baptista brought a class action lawsuit against Chase in federal court, asserting the fee violated s. 655.85, F.S. The federal court held that s. 655.85, F.S. applied to fees on personal checks presented by the payee in person. However, in applying the *Barnett Bank*/Dodd-Frank preemption test described above, the federal district and appellate courts ruled in favor of Chase, finding that s. 655.85, F.S., was preempted by the National Bank Act, which allows banks to exercise a range of incidental powers necessary to carry on the business of banking.[46]

The OCC, empowered by the National Bank Act to adopt bank regulations, authorizes national banks to "charge its customers non-interest charges and fees."[47] The OCC has interpreted "customer" to include "any person who presents a check for payment."[48] In light of the OCC's interpretation, the federal court held that *national banks* are not bound by the Florida statute disallowing fees to cash checks in person.[49]

- Baptista also brought a separate class action lawsuit against PNC Bank, a North Carolina state-chartered bank, in a Florida state court, based on grounds similar to those raised in her lawsuit against Chase. Baptista did not hold an account at PNC and was charged a $5 check-cashing fee to cash a check at a Florida branch. The Fifth District Court of Appeal reached the opposite conclusion from the federal courts' decision in the *Baptista v. Chase* lawsuit, and found that a statute was not preempted. The court held that an out-of-state state-chartered bank was <u>not</u> permitted to charge check-cashing fees under the statute.[50] Finding that the statute was not ambiguous, the Fifth DCA found that the statute did not apply only to bank-to-bank transactions.

  Curiously, in an earlier decision, the Fifth DCA had ruled in favor of Bank of America (a national bank) by holding that s. 655.85, F.S. was preempted by federal law.[51] However, when presented with PNC Bank (North Carolina-chartered bank operating in Florida) in the *Baptista* case, the court did not discuss the applicability of the 1997 federal Riegle-Neal Amendments[52] to PNC Bank. This federal legislation gives out-of-state state-chartered banks that operate in multiple states to enjoy the same benefits of federal preemption as national banks.

- On January 2, 2013, a federal district court in Florida ruled in favor of Regions Bank (an Alabama state-chartered bank) in a class action lawsuit similar to both *Baptista* cases.[53] Following the 11th Circuit Court of Appeal's decision in *Baptista v. JPMorgan Chase Bank*, the federal district court found that s. 655.85, F.S., was preempted, and thus inapplicable to *both* national banks and out-of-state state-chartered banks. The court declined to follow the Fifth DCA's opinion to the extent that the Fifth DCA held s. 655.85, F.S. was not preempted,[54] and applied the Riegle-Neal Amendments in favor of Regions Bank. However, the federal court did not address the issue of whether the statute applied only to bank-to-bank transactions or to the cashing of personal checks.

These decisions do not affect the statute's prohibition on *Florida-chartered* banks to charge check-cashing fees, because banks must follow the laws and regulations of their chartering authority.

<u>Effect of the bill on the par value statute</u>

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[46] 12 U.S.C. § 24 (Seventh).
[47] 12 C.F.R. § 7.4002(a).
[48] Cited in *Wells Fargo Bank of Texas, NA v. James*, 321 F.3d 488 (5th Cir.C.A 2003) (holding that Texas par value statute was preempted by the National Bank Act).
[49] *Vida Baptista v. JPMorgan Chase Bank,* 640 F.3d 1194 (11th Cir. C.A. 2011). The U.S. Supreme Court denied Baptista's petition for certiorari review of the federal appellate decision. *Baptista v. JPMorgan Chase Bank, N.A.,* 132 S.Ct. 253 (2011).
[50] *Vida Baptista v. PNC, N.A.,* 91 So.3d 230 (Fla. 5th DCA 2012) (per curiam), *cert. denied*, 133 S.Ct. 895 (2013).
[51] *Britt v. Bank of America, N.A.*, 52 So.3d 809 (Fla. 5th DCA 2011).
[52] 12 U.S.C. § 1831a(j)1.
[53] *Pereira v. Regions Bank*, 2013 WL 265314 (M.D.Fla. 2013).
[54] Id. at footnote 4. *See also Tafflin v. Levitt*, 493 U.S. 455, 465 (1990) (holding that federal courts are "not bound by state court interpretations" of federal law).

Section 3 of the bill amends s. 655.86, F.S., to provide that financial institutions must settle checks at par, but overrides the Fifth DCA's decision in *Baptista* to provide that this requirement only applies to the settlement of checks between banks. The bill provides that banks are not prohibited from charging fees to cash checks presented by payees in person, and thus provides consistency with the federal decisions discussed above. This will provide consistency with the federal laws permitting national banks and out-of-state state-chartered banks operating in Florida to charge check-cashing fees, and will also place Florida-chartered banks on equal footing with national and other state-chartered banks.

Section 4 of the bill provides a statement of legislative intent for Section 3, indicating that the changes clarify the relevant portions of the Codes, relating to the fees imposed by financial institutions.

Current Situation: Lender liability and third-party litigation against financial institutions

Lender liability law generally requires lenders to treat their borrowers fairly, and subjects lending institutions to civil liability for losses and injuries sustained as a result of the lender's actions. In addition, the express terms of contracts governed by the Uniform Commercial Code are subject to the obligation of good faith.[55] In some cases, courts may infer a fiduciary relationship between the lender and the borrower if the facts indicate a relationship of trust.[56] Lenders can be subject to a number of legal claims by borrowers, most commonly under contract and tort theories of breach of contract, bad faith, fraud or misrepresentation, negligence, and tortious interference. Other lender liability claims may include labor violations, environmental violations, wrongful foreclosures, or a variety of civil remedies under federal regulatory statutes such as the Truth in Lending Act.

However, case law provides that lenders are generally not legally responsible for the operations and actions of its borrowers which cause harm to *third parties*.[57] Some exceptions include a joint venture between the borrower and lender or where a lender actively controls the borrower's business (especially as to the election of directors and the influence of day-to-day business affairs and decisions).[58]
In a number of recent medical negligence lawsuits filed against nursing homes in Florida courts, the plaintiffs have named large financial institutions as co-defendants, or have sought to collect a final money judgment against these banks when the plaintiffs were unable to collect from the nursing homes. The plaintiffs alleged that the lenders "colluded to pull money out of nursing home operations."[59] These banks generally provided commercial loans to the nursing homes to finance a variety of operations, such as facility acquisitions. It is noted that the plaintiffs have variously alleged in the different cases that the lender was related to the nursing home as a private equity investor, controlling owner, or through involvement with the nursing facilities through the financial institution's clinical performance division.[60] In two cases resulting in multimillion dollar jury verdicts on behalf of nursing home patient's estates, the bank asserted that it did not have control over patient care and should not be held liable for the medical negligence claim.[61]

Effect of the bill on third-party litigation against financial institutions

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[55] Section 671.203, F.S.
[56] *Barnett Bank v. Hooper*, 498 So.2d 923 (Fla. 1986).
[57] *Armetta v. Clevetrust Realty Inv.*, 359 So.2d 540, 543 (Fla. 4th DCA 1978)("A lender owes no duty to others to supervise the construction and development of projects which it has financed."); *Napolitano v. Sec. First Fed. S&L Assoc.*, 533 So.2d 948 (Fla. 5th DCA 1988) ("Florida law is clear that a lender owes no duty to others to supervise construction which it has financed.").
[58] *Citibank, N.A. v Data Lease Fin. Corp.*, 828 F.2d 686 (11th Cir. 1987), cert. denied, 484. U.S. 1062 (1988).
[59] Stephen Nohlgren, "Tampa law firm wins another big verdict in nursing home lawsuit without a defense," *Tampa Bay Times* (February 8, 2012), at http://www.tampabay.com/news/courts/civil/tampa-law-firm-wins-another-big-verdict-in-nursing-home-lawsuit-without-a/1214647 (last accessed April 17, 2013).
[60] Nursing home litigation filings, received April 15, 2013, on file with the Regulatory Affairs Committee staff.
[61] Stephen Nohlgren, "Who should pay the $200 million for nursing home death? It's complicated," *Tampa Bay Times* (February 4, 2012), at http://www.tampabay.com/news/courts/civil/who-should-pay-the-200-million-for-nursing-home-death-its-complicated/1214062 (last accessed April 17, 2013).

Section 5 of the bill creates a new section in the Codes, s. 655.955, F.S., to provide that a financial institution is not civilly liable and cannot be sued by a third party for the actions or operations of a borrower, *solely by* virtue of extending a loan or a line of credit to such borrower.

It is noted that the bill provides this limited immunity to “financial institutions,” which the Codes define as a *state or federal* savings or thrift association, bank, savings bank, trust company, international bank agency, international banking corporation, international branch, international representative office, international administrative office, international trust company representative office, credit union, or an agreement corporation or Edge Act corporation organized pursuant to the Federal Reserve Act.

It is noted that to the extent third-party litigation is pending against financial institutions in this state at the time of the bill’s effective date, legislation is presumed only to operate prospectively, especially when retrospective operation would impair existing rights.[62]

B. SECTION DIRECTORY:

Section 1. Amends s. 655.005, F.S., to revise the definition of “related interest.”

Section 2. Amends s. 655.033, F.S., to prohibit the OFR from issuing a cease and desist order to a state financial institution while a federal proceeding (cease and desist, temporary cease and desist, or removal and prohibition) is pending against the state institution on the same grounds; provides exceptions.

Section 3. Amends s. 655.85, F.S., to clarify that a financial institution may impose a fee for the settlement of a check under certain circumstances.

Section 4. Provides legislative intent for Section 3 of the bill.

Section 5. Creates s. 655.955, F.S., to provide that a financial institution is not civilly liable and cannot be sued by a third party for the actions or operations of a borrower, solely by virtue of extending a loan or a line of credit to such borrower.

Section 6. Provides an effective date of July 1, 2013.

II. FISCAL ANALYSIS & ECONOMIC IMPACT STATEMENT

A. FISCAL IMPACT ON STATE GOVERNMENT:

1. Revenues:

   The bill does not appear to have any impact on state revenues.

2. Expenditures:

   The bill does not appear to have any impact on state expenditures.

B. FISCAL IMPACT ON LOCAL GOVERNMENTS:

1. Revenues:

   The bill does not appear to have any impact on local government revenues.

2. Expenditures:

   The bill does not appear to have any impact on local government expenditures.

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[62] Art. I, Sec. 10 (“No . . . Law impairing the obligation of contracts shall be passed.”). *See also State Farm Mut. Auto. Ins. Co. v. Laforet*, 658 So.2d 55 (Fla. 1995); *Alamo Rent-A-Car, Inc. v. Mancusi*, 632 So.2d 1352 (Fla. 1994).

C. DIRECT ECONOMIC IMPACT ON PRIVATE SECTOR:

The bill's clarification that all banks may charge check-cashing fees may provide additional revenue for Florida-chartered banks. However, this may also result in more fees for consumers who are not customers of Florida-chartered banks.

The bill's limited immunity for financial institutions against third-party lawsuits may have an indeterminate positive impact for the private sector, as a result of reduced litigation costs.

D. FISCAL COMMENTS:

None.

III. COMMENTS

A. CONSTITUTIONAL ISSUES:

1. Applicability of Municipality/County Mandates Provision:

Not applicable. This bill does not appear to: require counties or municipalities to spend funds or take an action requiring the expenditure of funds; reduce the authority that counties or municipalities have to raise revenues in the aggregate; or reduce the percentage of a state tax shared with counties or municipalities.

2. Other:

None.

B. RULE-MAKING AUTHORITY:

None provided in the bill.

C. DRAFTING ISSUES OR OTHER COMMENTS:

None.

IV. AMENDMENTS/ COMMITTEE SUBSTITUTE CHANGES

On March 19, 2013, the Insurance & Banking Subcommittee considered and adopted a proposed committee substitute (PCS), and reported the PCS favorably as a committee substitute. The PCS made the following changes to the filed version of the bill:

- Removed Section 2 of the filed version of the bill, which prohibited the Office of Financial Regulation from initiating an administrative proceeding while the person is subject to a federal proceeding on the same grounds.
- Removed a portion of Section 1 of the filed version of the bill, which created a definition of "control of a company or bank."
- Removed Section 5 of the filed version of the bill, which conformed a cross-reference.

On April 16, 2013, the Regulatory Affairs Committee considered and adopted two amendments, and reported the bill favorably as a committee substitute. The amendments:

- Prohibited the OFR from issuing a cease and desist order to a state financial institution while the institution is subject to a federal enforcement proceeding on the same grounds, and provided exceptions, and
- Provided that a financial institution is not civilly liable and cannot be sued by a third party for a borrower's actions or operations, solely by virtue of extending a loan or a line of credit to such borrower.

This analysis is drafted to the committee substitute as passed by the Regulatory Affairs Committee.