HOUSE OF REPRESENTATIVES
FINAL BILL ANALYSIS

BILL #:	CS/CS/HB 673	**FINAL HOUSE FLOOR ACTION:**	
SPONSOR(S):	Regulatory Affairs Committee; Government Operations Appropriations Subcommittee; Broxson	118 **Y's**	0 **N's**
COMPANION BILLS:	CS/CS/CS/HB 675; CS/CS/SB 1012; CS/CS/SB 1278	**GOVERNOR'S ACTION:**	Approved

SUMMARY ANALYSIS

CS/CS/HB 673 passed the House on April 28, 2014, as CS/CS/SB 1012 as amended and included CS/CS/HB 631. The Senate concurred in the House amendment to the Senate Bill and subsequently passed the bill as amended on May 1, 2014, with a title amendment. The House concurred in the Senate amendment to the Senate bill and subsequently passed the bill as amended on May 2, 2014.

The bill makes a number of changes to the Financial Institutions Codes (chs. 655-667, F.S.), which cover the regulation and charter process of banks, trust companies, credit unions, and other financial institutions by the Office of Financial Regulation (OFR). The bill also makes a number of changes to ch. 494, F.S., which governs the regulation and licensure of non-depository residential loan originators, mortgage brokers, and mortgage lenders by the OFR.

The bill has an insignificant fiscal impact on revenues deposited into the OFR's Regulatory Trust Fund. The bill's elimination of the $2,000 annual assessment for each international representative office, international administrative office, and international trust company office will amount to a loss of $18,000 in revenue deposited into the Regulatory Trust Fund. The bill's allowance for new fees for late renewal or reinstatement of licensure for loan originators, mortgage brokers, mortgage broker branch office locations, mortgage lenders, and mortgage lender branch offices has a positive, yet indeterminate fiscal impact on state revenues. According to the OFR, the number of mortgage licensees that would use the late renewals and reinstatement capability is unknown.

The bill potentially has a positive impact on the private sector by simplifying regulatory requirements for the residential, non-depository mortgage professionals in Florida. Additionally, the bill allows Florida-chartered financial institutions to charge check-cashing fees to non-customers, which may result in more fees for consumers if they are not customers of these financial institutions.

The bill was approved by the Governor on June 13, 2014, ch. 2014-91, L.O.F., and will become effective on July 1, 2014.

I. SUBSTANTIVE INFORMATION

A. EFFECT OF CHANGES:

Current Situation: Financial Institutions

The Florida Office of Financial Regulation (OFR)'s Division of Financial Institutions 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.[1] 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 667, F.S. – Savings Banks

The OFR does not regulate national banks and banks that are chartered and regulated in other states:

- *National banks* are chartered under federal law, i.e., the National Bank Act. 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.
    - With the enactment of the federal Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010, the Office of Thrift Supervision (formerly the primary federal regulator for savings banks and savings and loans associations), was merged into other federal banking agencies on July 21, 2011.[2] Since then, the Office of the Comptroller of the Currency has assumed primary federal regulatory responsibility over *savings banks and savings and loans associations*, in addition to nationally-chartered banks.
- *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-member state banks is the Federal Deposit Insurance Corporation (FDIC).[3]
- *Federal credit unions* are chartered under the Federal Credit Union Act of 1934. Their primary federal regulator is the National Credit Union Administration (NCUA), which also operates and manages the National Credit Union Share Insurance Fund, which insures deposits for account holders in all federal credit unions and most state-chartered credit unions.[4]
- *International banking entities* enable depository institutions in the United States to offer deposit and loan services to foreign residents and institutions, and are subject to the jurisdiction of the Board of Governors of the Federal Reserve. 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, which requires a Florida charter and compliance with the provisions of chapter 663 of the Codes. Chapter 663 of the Codes set forth a variety of business models, each of which must be separately licensed by the OFR and abide by the permissible activities accorded to each license type.

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:

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[1] Chapters 69U-100 through 69U-150, Florida Administrative Code.
[2] 12 U.S.C. §5412-5413.
[3] 12 U.S.C. §1813(q).
[4] NCUA Share Information Fund Information, Reports, and Statements: http://www.ncua.gov/DataApps/Pages/SI-FAQs.aspx (last accessed February 22, 2014).

> [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 condition of the financial institution, the gravity of the violation, and the prior conduct of the person or institution involved.[5]

Background: Competitive Equality & Preemption

The U.S. dual regulatory system of financial institutions 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.[6]

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,[7] 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 (Dodd-Frank) 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 of the national bank's powers.[8]

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 their nationally chartered counterparts, s. 655.061, F.S., authorizes the OFR to grant Florida financial institutions the authority to make any loan or investment or exercise any power which they could make or exercise as if they were nationally chartered, and provides they are entitled to the same privileges and protections granted to their national counterparts. 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.[9]

Lending limits and related interests

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.[10]

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."[11]

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[5] Section 655.005(1)(y), F.S.
[6] *National Bank v. Commonwealth*, 9 Wall. 353, 362, 19 L.Ed. 701(1870).
[7] U.S. Const., Art. VI, cl. 2.
[8] 12 U.S.C. §25b(b)(1).
[9] The OFR's orders of general application are publicly available on its agency website: https://real.flofr.com/ConsumerServices/SearchLegalDocuments/LDSearch.aspx (last accessed February 13, 2014).
[10] 12 C.F.R. § 32.1(b).
[11] Section 658.48(1)(a), F.S.

- 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, Regulation O provides that the state lending limits control.[12] 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 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 2011, the Legislature enacted legislation amending the Codes.[13] Prior to 2011, "related interest" was defined within the context of credit unions' loan powers[14] and lending limits for state banks,[15] 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.

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, Regulation 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.[16]
- *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*.[17]

[12] 12 C.F.R. § 215.2(i), footnote 2.
[13] Ch. 2011-194, L.O.F.
[14] Section 657.038, F.S.
[15] Section 658.48, F.S.
[16] Section 658.945(2)(a)5., F.S.
[17] Section 658.235(2), F.S.

- *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*.[18]

The bill amends the definition of "related interest" in s. 655.005, F.S., to remove the person's partner, sibling, parent, or other individual residing in the same household as the person, but retains spouses and children and includes other dependents residing in the same household. The bill also provides that "related interest" applies to an individual, company, partnership, corporation, or other business organization that engages in a "common business enterprise" with a person, and sets forth criteria for finding that a "common business enterprise" exists.

Affiliates

Currently, the Codes prohibit certain acts and practices of any "financial institution-affiliated party," which is defined as:

1. A director, officer, employee, or controlling stockholder, other than a financial institution holding company, of, or agent for, a financial institution, subsidiary, or service corporation;
2. Any other person who has filed or is required to file a change-of-control notice with the appropriate state or federal regulatory agency;
3. A stockholder, other than a financial institution holding company, a joint venture partner, or any other person as determined by the office who participates in the affairs of a financial institution, subsidiary, or service corporation; or
4. An independent contractor, including an attorney, appraiser, consultant, or accountant, who knowingly or recklessly participates in:
    a. A violation of any law or regulation;
    b. A breach of fiduciary duty; or
    c. An unsafe and unsound practice,

    which caused or is likely to cause more than a minimal financial loss to, or a significant adverse effect on, the financial institution, subsidiary, or service corporation.[19]

A violation of these prohibited acts and practices, which include various acts of fraud and self-dealing regarding a financial institution, constitute a third-degree felony.[20] In addition, the Codes set forth requirements for financial institution-affiliated parties regarding conflicts of interest, disclosure of personal interest, and restrictions on remuneration, participation in the assets and liabilities of a financial institution, and voting rights.[21] These provisions reinforce the fiduciary duty owed by financial institution-affiliated parties to their principals.

The bill amends s. 655.0322, F.S., to include "affiliates" and "related interest" within the scope of persons subject to the Codes' prohibited acts and practices. According to the OFR, this language is necessary to capture prohibited acts and practices that are committed by affiliates and related interests.[22]

The Codes define "affiliate" as "a holding company of a financial institution established pursuant to state or federal law, a subsidiary or service corporation of such holding company, or a subsidiary or a service corporation of a financial institution."[23] As discussed above, Section 1 of this bill amends the current definition of "related interest."

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[18] Section 658.36(3)(c), F.S.
[19] Section 655.005(1)(j), F.S.
[20] Section 655.0322, F.S.
[21] Section 655.0386, F.S.
[22] Priority Index of DFI Proposed 2014 Legislative Items (received September 16, 2013), on file with the Insurance & Banking Subcommittee staff.
[23] Section 655.005(1)(a), F.S.

OFR enforcement powers

Injunctions

Currently, s. 655.034, F.S., authorizes the OFR to pursue injunctive relief in circuit court whenever a "threatened and impending" violation of the Codes "will cause substantial injury to a state financial institution or its depositors, members, creditors, or stockholders."

The bill amends s. 655.034, F.S., to add language to this injunction authority to provide that a violation of a "formal enforcement action" (as defined by the bill) will also allow the circuit court to have jurisdiction to hear the complaint. Further, this bill removes the "substantial injury" language, and adds language stating that the circuit court has jurisdiction to issue an injunction in order to protect the public's interest in the safety and soundness of the financial institution system.

Disapproval of directors and executive officers

Currently, s. 655.0385, F.S., requires financial institutions to notify the OFR of proposed changes to a board of directors or to the institution's executive officers, and authorizes the OFR to issue a notice of disapproval if the proposed appointment or employment is "not in the best interests of the depositors, the members, or the public."[24]

The bill amends s. 655.0385, F.S., to prohibit a director or executive officer of a state financial institution or affiliate from concurrently serving as a director or officer in a nonaffiliated financial institution or affiliate in the same geographical area or the same major business market area, unless waived by the OFR. According to the OFR, this language is needed to clarify the nature of, and to prohibit, management interlocks between financial institutions (e.g., the same individual serving at different financial institutions in the same market).[25]

Administrative fines

Currently, s. 655.041, F.S., authorizes the OFR to impose administrative fines against any person found to have violated the Codes or any cease and desist order or any written agreement with the OFR. The amounts of the fines range from $2,500 a day to $50,000 a day depending on the egregiousness, intent, and level of harm resulting from the violation to financial institutions, subsidiaries, or service corporations.

The bill amends s. 655.041, F.S., to:

- Provide a violation of any rules adopted under the Codes is also a ground for the OFR to seek administrative fines;
- Provide that a violation of any OFR order (and not just cease and desist orders) is a basis for administrative fines;
- Clarify that the loss resulting from a violation affects affiliates;
- Expand the persons that the OFR may seek fines against; and
- Add language to provide that where there is a violation of an office order or written agreement, fines begin accruing immediately upon the service of a complaint and will continue to do so until the violation is corrected.

Banking business by unauthorized persons

Currently, s. 655.922, F.S., prohibits any person, other than an authorized state or federal financial institution, from engaging in the business of soliciting or receiving funds for deposit, issuing certificates of deposit, or paying checks. A violation of this provision is a third-degree felony. In addition, only financial institutions are authorized to represent themselves to the public as a bank, credit union, trust company, and so on through business names and general advertising. The OFR is authorized to enjoin these violations.

The bill amends s. 655.922, F.S., to prohibit financial institutions from using a name that may mislead consumers or cause confusion as to the identification of the proper legal business entity. It further adds

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[24] Section 655.0385, F.S.

[25] Priority Index of DFI Proposed 2014 Legislative Items (received September 16, 2013), on file with the Insurance & Banking Subcommittee staff.

language that says that the OFR may seek a circuit court order for the annulment or dissolution of a corporation found violating any provision of this section, and also issue and serve an emergency cease and desist order. It also adds that the OFR is not required to determine the consequences that a violation of this section may cause.

Examinations, records, and trade secret documents

Examinations
Currently, s. 655.045, F.S., requires the OFR to examine every state financial institution "during each 18-month period," although it may conduct more frequent examinations based on an institution's risk profile, examination history, or significant changes. The OFR is authorized to coordinate with their federal regulatory counterparts on examinations of state institutions, and may accept a federal regulator's examinations.

The bill amends s. 655.045, F.S., to clarify that the OFR must conduct examinations "at least every 18 months." Furthermore, the bill adds language that says, at least once during each 36 month period beginning July 1, 2014, the office shall conduct an examination of each state financial institution; allowing for a complete examination report not subject to the right of a federal or other non-Florida entity to limit access to the information contained in the report. According to the OFR, this language is needed to coordinate and harmonize the scheduling of bank examinations with their federal regulatory counterparts,[26] including the ability to alternate examinations with the federal regulators and to retain control over the content of examination reports.

Records
Section 655.057, F.S., contains various public records exemptions for information held by the OFR relating to investigations and examinations. In addition, this provision contains recordkeeping requirements and provides for the protection of confidential information used in litigation.

The bill amends s. 655.057, F.S., to provide the following changes that do not involve exemptions from the Public Records Act (ch. 119, F.S.):

- It adds language that says that a person providing information to the OFR pursuant to an investigation, examination, or other supervisory activity is not considered a waiver of privilege or other legal rights in certain proceedings.[27]
- It removes language that required credit unions and mutual associations keep full records of all their members in their principal office where there business is transacted, thereby allowing such information to be held elsewhere.
- It adds language that clarifies who has the right to copy membership or shareholder records.

Trade secret documents
Currently, the Codes do not contain a public records exemption for trade secret documents held by the OFR. However, CS/CS/SB 1278, the public records bill linked to this bill, creates a public records exemption for certain examination documents containing "proprietary business information that is a trade secret, as defined in s. 655.059(2), F.S."

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[26] Priority Index of DFI Proposed 2014 Legislative Items (received September 16, 2013), on file with the Insurance & Banking Subcommittee staff.

[27] It is noted that s. 90.507, F.S., of the Florida Evidence Code provides that a privilege against the disclosure of a confidential matter or communication waives such privilege if the person *voluntarily* discloses or makes the communication when he or she does not have a reasonable expectation of privacy, or *consents* to disclosure of, any significant part of the matter or communications. In addition, federal financial regulators have consistently taken the view that because they can compel privileged information pursuant to their supervisory authority (including the use of subpoenas), submission of privilege information to a supervisory authority is not voluntary and therefore does not result in a privilege waiver. *See* Confidential Treatment of Privileged Information, 77 FR 39617, 39619 (Jul. 5, 2012) (codified at 12 C.F.R. part 1070, subpart D).

The bill creates s. 655.0591, F.S., to establish a procedure for persons required to submit documents to the OFR who claim such documents contain trade secrets. The bill requires that a notice of trade secret be filed with the OFR or to the Department of Financial Services when submission of documents contains trade secrets, and that failure to file a notice is considered a waiver of any claim that the information is a trade secret. Moreover, the submitting party will have to include an affidavit certifying under oath to the truth of statements contained within this section. It further provides rules which state whether a document certified as a trade secret may or may not be disclosed.[28]

Florida Control of Money Laundering in Financial Institutions Act
Section 655.50, F.S., is the Florida Control of Money Laundering in Financial Institutions Act, which incorporates federal recordkeeping and reporting requirements for financial institutions, and sets forth administrative remedies, criminal sanctions, and civil money penalties for violations.

These requirements are enforced at the federal level by the Financial Crimes Enforcement Network (FinCEN), which is a bureau within the U.S. Department of the Treasury and whose mission is to "safeguard the financial system from illicit use and combat money laundering and promote national security through the collection, analysis, and dissemination of financial intelligence and strategic use of financial authorities."[29] FinCEN enforces the Currency and Foreign Transactions Reporting Act of 1970 (commonly referred to as the "Bank Secrecy Act" or "BSA"), which requires U.S. financial institutions to assist U.S. government agencies to detect and prevent money laundering. The BSA is sometimes referred to as an "anti-money laundering" law ("AML") or jointly as "BSA/AML."[30] The BSA was amended by Title III of the USA PATRIOT Act of 2001 to include additional measures to prevent, detect, and prosecute terrorist-related activities and international money laundering. The BSA requires financial institutions to keep records of cash purchases of negotiable instruments, file reports of cash transactions exceeding $10,000 (daily aggregate amount), and to file suspicious activity reports that might signify money laundering, tax evasion, or other criminal activities. Additionally, the Office of Foreign Assets Control (OFAC), another bureau housed within the U.S. Treasury, administers and enforces economic sanctions and embargoes against targeted countries and groups of individuals engaging in terrorism, narcotics trafficking, and other threats to the national security, foreign policy or economic interests of the United States.[31] OFAC regulations prohibit financial institutions from doing businesses with individuals owned or controlled by, or acting for or on behalf of, targeted countries and groups that are Specially Designated Nationals.

The bill amends the Florida Control of Money Laundering in Financial Institutions Act to include the BSA/AML provisions relating to terrorist financing as enacted by the USA PATRIOT Act of 2001. It also adds language requiring financial institutions to have a BSA/AML compliance officer who is responsible for the institution's BSA/AML policies and procedures. Further, it adds that the financial institution's board of directors is responsible for the efficacy of the BSA/AML program. It also creates a definition for the term "suspicious activity," adding that a suspicious activity report made under this section is entitled to the same confidentiality provided under the BSA/AML regulations.[32]

The bill conforms cross-references in ss. 655.037, 658.21, 658.235, 663.02, 663.306, 665.033, 665.034, 667.006, and 667.008, F.S., to reflect the bill's inclusion of terrorist financing provisions within s. 655.50, F.S.

Par Value & Settlement of Checks

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[28] It is noted that s. 624.4213, F.S., of the Insurance Code currently contains a nearly identical statute regarding trade secrets for information submitted to the Department of Financial Services or the Office of Insurance Regulation that the submitting person claims contains a trade secret.
[29] FinCEN, "What We Do," at http://www.fincen.gov/about_fincen/wwd/ (last accessed January 21, 2014).
[30] FinCEN, "FinCEN's Mandate from Congress / Bank Secrecy Act," at http://www.fincen.gov/statutes_regs/bsa/ (last accessed January 21, 2014).
[31] U.S. Department of the Treasury, About Office of Financial Assets Control: http://www.treasury.gov/about/organizational-structure/offices/Pages/Office-of-Foreign-Assets-Control.aspx (last accessed February 12, 2014).
[32] 31 C.F.R. § 1020.320 (reports by banks of suspicious transactions).

Since 1992, s. 655.85, F.S., has required financial institutions to settle checks "at par," or at face value.[33] This means that if an individual presented a check made out to him for $300 to any financial institution in Florida, the financial institution is required to provide $300 in funds.

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 – federal preemption and whether the statute's limitations on fees apply to bank-to-bank transactions[34] 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 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.[35]

  The OCC, empowered by the National Bank Act to adopt bank regulations, authorizes national banks to "charge its customers non-interest charges and fees."[36] The OCC has interpreted "customer" to include "any person who presents a check for payment."[37] 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.[38]

- 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 *Baptista v. Chase*, holding that the statute was not preempted and that an out-of-state state-chartered bank was <u>not</u> permitted to charge check-cashing fees under the statute.[39] 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 ruled in favor of Bank of America (a national bank) by holding that s. 655.85, F.S., <u>was</u> preempted by federal law.[40] 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[41] to PNC Bank, which grant the benefits of federal preemption to out-of-state state-chartered banks operating in multiple states.

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[33] Section 655.85, F.S. This provision was enacted in 1992. Section 52, ch. 92-303, L.O.F.
[34] The Federal Reserve System operates a nationwide check-clearing system to facilitate the collection and settlement of checks between paying and collecting banks.
[35] 12 U.S.C. § 24 (Seventh).
[36] 12 C.F.R. § 7.4002(a).
[37] 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).
[38] *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).
[39] *Vida Baptista v. PNC, N.A.,* 91 So.3d 230 (Fla. 5th DCA 2012) (per curiam), *cert. denied*, 133 S.Ct. 895 (2013).
[40] *Britt v. Bank of America, N.A.*, 52 So.3d 809 (Fla. 5th DCA 2011).
[41] 12 U.S.C. § 1831a(j)1.

- 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.[42] 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,[43] 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* financial institutions to charge check-cashing fees, because financial institutions must follow the laws and regulations of their chartering authority.

Effect of the bill on the par value statute

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 paying and remitting institutions, not between financial institutions and customers. The bill provides that financial institutions 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 nationally chartered and out-of-state state-chartered financial institutions operating in Florida to charge check-cashing fees, and will also place Florida-chartered financial institutions on equal footing with national and other state-chartered institutions.

Section 13 of the bill provides a statement of legislative intent for this change, indicating that the amendment clarifies the relevant portions of the Codes, relating to the fees imposed by financial institutions.

Credit Unions

Authority to establish or relocate branch offices of a Florida credit union

Currently, s. 657.008, F.S., allows Florida credit unions to establish or relocate branch offices only if the credit union is operating in a safe and sound manner, if its board has determined that such branches is reasonably necessary to furnish service to its members, and if the credit union has provided 30 days' prior written notification to the OFR. Thus, Florida credit unions that do not meet these criteria cannot establish or relocate branch offices, even if the establishment or relocation of a branch would be in the best interests of the credit union and its members. This has placed Florida credit unions at a competitive disadvantage with their federally chartered counterparts, who are permitted under the Federal Credit Union Act and the National Credit Union Administration's regulations to establish or relocate branches, simply if its directors determine that such action would be in the best interest of the federal credit union's members.

In 2008, the OFR issued an Order of General Application (OGA) to authorize Florida credit unions (who were ineligible for the written notification process) to apply to establish or relocate branch offices if their boards of directors determined such branches were reasonably necessary, was in the best interest of the credit union and its members, and was consistent with all business and regulatory compliance matters for safety and soundness considerations. The OGA also set forth required information for applications for authority to establish or relocate branch offices of a Florida credit union.[44]

The bill amends s. 657.008, F.S., to codify the 2008 OGA permitting Florida credit union branching. It provides conditions under which a credit union may maintain branches without requiring prior OFR examination and approval. It adds language that provides requirements and criteria for a credit union office to meet before establishing or relocating a branch.

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[42] *Pereira v. Regions Bank*, 2013 WL 265314 (M.D.Fla. 2013).

[43] 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).

[44] OFR Order of General Application, *In Re: Applications for Authority to Establish or Relocate a Branch Office of a Florida State-Chartered Credit Union* (issued Aug. 21, 2008), on file with the Insurance & Banking Subcommittee staff.

Activities of directors, officers, committee members, employees, and agents of credit unions
Currently, the Codes grant general authority to the OFR to disapprove proposed directors or officers at any Florida financial institution "if the competence, experience, character, or integrity of the individual to be appointed or employed indicates that it is not in the best interests of the depositors, the members, or the public to permit the individual to be employed by or associated with the state financial institution."[45] Additionally, s. 657.028, F.S., sets forth specific grounds that disqualify proposed officers, directors, or committee members from serving at a Florida credit union, such as specified criminal convictions.

The bill amends s. 657.028, F.S., to add a criterion relating to whether a person may serve in an official capacity with a credit union. The bill provides having defaulted on a debt or obligation to a financial institution, which results in a material loss to the financial institution, is a ground for disapproval. The bill also makes technical drafting changes and conforms s. 657.028, F.S., to the bill's changes to the Money Laundering and Terrorist Financing Act.

Employee benefit plans for Florida credit unions
Currently, Florida credit unions are permitted to exercise the general powers granted to corporations, so long as those powers are not limited by the Codes.[46] To the extent there is no conflict with the Codes, a Florida credit union could "pay pensions and establish pension plans…and benefit or incentive plans for any or all of its current or former directors, officers, [and] employees."[47] However, while the Codes set forth permissible investments for Florida credit unions, the Codes currently do not have an exception for investments in credit union employee benefit plans and limits the insurance coverage that a Florida credit union may provide its directors, officers, and employees to "any liability arising out of such person's capacity or status with the credit union."[48] Additionally, the Codes prohibit elected officers and directors of Florida credit unions from receiving compensation for their services, but do not define "compensation" for these "voluntary" officials. In contrast, NCUA regulations permit federal credit unions to provide certain types of insurance and employee benefits (including retirement benefits) to their officials, and excludes certain types of insurance from the definition of "compensation" as applied to federal credit unions. This has placed Florida credit unions at a competitive disadvantage, particularly in terms of their ability to attract and retain experienced and qualified executive officials and employees due to the lack of a parallel allowance in the Codes.

In 2010, the OFR issued an OGA to authorize Florida credit unions to make investments for employee benefit plans and to fund premiums for health and long-term care insurance benefit plans, so long as these plans are reasonable in light of the credit union's size and financial condition and the employee's duties, do not create a unsafe or unsound condition for the credit union; comply with all applicable Florida and federal law; and are approved by the boards and by the OFR before the benefit plan is implemented.[49]

The bill amends s. 657.041, F.S., to codify the 2010 OGA's allowance to Florida credit unions to provide their officers and directors with employee benefit plans and specified insurance benefit plans. It adds language which permits, with prior approval of the credit union and the office, to pay health and accident insurance premiums and to fund employee benefit plans under certain circumstances. Such coverage will cease upon the insured person's leaving office without residual benefits other than from pending claims.

Permissible activities for out-of-state financial institutions
The bill amends s. 655.921, F.S., to provide that out-of-state financial institutions may file suit in any state court to collect a security interest in collateral, without being subject to the Codes. According to the OFR, this provision is to clarify permissible activities for out-of-state trust companies and business trusts, since this statute is focused on general banking issues. Although the bill does not define "business trust," chapter

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[45] Section 655.0385(3), F.S.
[46] Sections 607.0302 and 657.03(1), F.S.
[47] Section 607.0302(15), F.S.
[48] Section 657.041(2), F.S.
[49] OFR Order of General Application, *In Re: Credit Unions – Employee and Volunteer Officials Benefit Plans* (issued November 5, 2010), on file with the Insurance & Banking Subcommittee staff.

609, F.S. addresses common-law declarations of trust (which are also known as business trusts or Massachusetts trusts), which are often used to securitize mortgages for the secondary market and a financial institution is often designated as the trustee.[50] Section 609.05, F.S., requires an entity organized under ch. 609, F.S., to obtain a permit from the OFR before any person may offer to sell a unit or share of such trust. However, ch. 609, F.S., is generally written in the context of entities organized under Florida law, and does not address business trusts organized under the laws of other states.[51]

The bill amends s. 655.921, F.S., to provide that out-of-state business trusts that own pools of mortgages and pursue foreclosure actions in Florida courts are not considered to be engaging in trust business in Florida.[52]

Trust business
The bill amends the definition of "trust business" in s. 658.12, F.S., to provide that trust business means acting as a fiduciary for compensation that the OFR does not consider "de minimis." The OFR has indicated that it has received inquiries on behalf of individuals engaging in estate and trust planning activities, whereby fiduciaries serve as trustees with only minimal compensation and expense reimbursement. In these situations, the OFR has opined that such individuals are not engaging in the trust business as professional fiduciaries, and the bill's language provides clarification to that effect.[53]

Bank loans not exceeding $50,000
The bill repeals s. 658.49, F.S., which currently authorizes banks to lend or to extend credit up to $50,000 in principal and on which banks may charge simple interest up to 18%, computed in accordance with the usury statute, and to collect specified charges and costs.[54] According to the Florida Bankers Association (FBA), national banks are not subject to the same lending limitation,[55] which raises a competitive equality issue for Florida-chartered banks. The bill also amends ss. 665.013 and 667.003, F.S., to conform cross-references to this provision.

Annual assessments for international bank offices
Currently, the Codes require international bank agencies to pay semiannual assessments in amounts determined by commission rule.[56] These semiannual assessments are calculated in a manner so as to the cover the OFR's costs incurred in connection with the supervision of international banking activities.[57] In addition, the Codes require each international representative office, international administrative office, or international trust company representative office to pay an annual assessment in the amount of $2,000, payable on or before January 31 of each year to the OFR.[58]

The bill removes the requirement in s. 663.12, F.S., for international representative office, international administrative office, or international trust company representative office to pay an annual assessment in the amount of $2,000, payable on or before January 31 of each year to the OFR. According to the OFR, the current semiannual assessments imposed on all international bank offices are sufficient and adequate to cover the OFR's supervision costs.[59]

Local governments and financial institutions
In 2002, the Florida Legislature enacted the Florida Fair Lending Act (part IV, ch. 494, F.S.) to impose similar or more stringent restrictions on high-cost home loans than those found in the federal Home

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[50] E-mail from the OFR (received September 20, 2013), on file with the Insurance & Banking Subcommittee staff.
[51] *Id.*
[52] Priority Index of DFI Proposed 2014 Legislative Items (received September 16, 2013), on file with the Insurance & Banking Subcommittee staff.
[53] *Id.*
[54] The last time this loan statute has been amended was in 1992. Chapter 92-303, L.O.F.
[55] FBA letter to the OFR (dated November 22, 2013), on file with the Insurance & Banking Subcommittee staff.
[56] Rule 69U-140.020, F.A.C. (regarding semiannual assessments for international banking agencies).
[57] Section 663.12(2), F.S.
[58] *Id.*
[59] Telephone conversation with the OFR (February 12, 2014).

Ownership and Equity Protection Act (HOEPA) at the time of enactment.[60] This act is administratively enforced by the OFR.[61] This act includes a general rule of preemption in s. 494.00797, F.S., which prohibits counties and municipalities from enacting and enforcing local laws regarding financial or lending activities upon certain persons or entities, such as those subject to the regulatory jurisdiction of the OFR or enumerated federal banking regulators, or are authorized by Congress to engage in secondary market mortgage transactions.[62] Section 53 of this bill repeals the rule of preemption in s. 494.00797, F.S.

This bill creates s. 655.017, F.S., to provide a general rule of preemption within the Codes. Subsection (1) is substantially similar to the general rule of preemption in s. 494.00797, F.S., except that the bill does not include the Office of Thrift Supervision (formerly the primary federal regulator for savings banks and savings and loans association) as a federal banking regulator, since it has been merged into other federal banking agencies in July 2011 by operation of Dodd-Frank,[63] and the bill includes the Board of Governors of the Federal Reserve System as a federal banking regulator.

Subsection (2) provides that counties and municipalities are not prevented from engaging in civil investigations or initiating civil or administrative proceedings to enforce any non-preempted state or local laws, rules, and ordinances. However, the bill provides that the OFR has sole exclusive jurisdiction to initiate appropriate proceedings, if the OFR determines a local investigation or proceeding is either based on a local law that is preempted, or "directly and specifically regulates the manner, content, or terms and conditions of any financial transaction or account related thereto, as may be authorized for financial institutions to engage in, or prevents, significantly interferes with, or alters the exercise of powers granted to a financial institution under the financial institutions codes or by any applicable federal law or regulation." This preemption standard is substantially similar to the *Barnett Bank* federal standard, as codified in Dodd-Frank, for preempting state consumer financial laws.[64]

Additionally, subsection (3) provides that this section does not limit or restrict the powers of the Department of Legal Affairs or law enforcement agencies in this state to commence civil or criminal proceedings, as applicable. This preserves the police powers of these entities and reinforces the fact that the OFR does not have jurisdiction over criminal proceedings.

The bill also amends s. 655.948, F.S., the notice of significant events statute, to require financial institutions to notify the OFR within 30 days of any civil investigation or any civil or administrative proceeding initiated by counties or municipalities against the financial institution or its subsidiary or service corporation. The bill provides a safe harbor for reporting entities that make a good faith effort to fulfill this disclosure requirement.

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.[65] In some cases, courts may infer a fiduciary relationship between the lender and the borrower if the facts indicate a relationship of trust.[66] 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.

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[60] Ch. 2002-57, L.O.F.
[61] Section 494.00795, F.S.
[62] It appears that the general preemption rule was proposed in the 2002 Florida Fair Lending Act to provide lenders with some regulatory uniformity, due to the existence of varying local anti-predatory lending ordinances at the time. *See* Senate Staff Analysis of CS/SB 2262 (dated March 5, 2002).
[63] 12 U.S.C. §§ 5412-5413.
[64] 12 U.S.C. § 25b(b); *Barnett Bank*, 517 U.S. 25.
[65] Section 671.203, F.S.
[66] *Barnett Bank v. Hooper*, 498 So.2d 923 (Fla. 1986).

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*.[67] 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).[68]

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."[69] These lenders 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.[70] 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.[71]

The bill creates a new section in the Codes, s. 655.955, F.S., to provide that a financial institution is not civilly liable to 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 preserves the ability of state agencies to conduct an investigation or to bring a civil or administrative action to enforce state or federal laws against a financial institution.

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 retroactive application would impair existing rights.[72]

Current Situation: Loan Originators, Mortgage Brokers, and Mortgage Lenders (ch. 494, F.S.)

The OFR's Division of Consumer Finance is responsible for enforcing and administering ch. 494, F.S. (the Act), which governs the regulation of non-depository residential loan originators, mortgage brokers, and mortgage lenders. The following is a brief description of the various licenses under the Act:

- *Loan originator*: This license is required for an individual who, directly or indirectly, solicits or offers to solicit a mortgage loan, accepts or offers to accept an application for a mortgage loan, negotiates or offers to negotiate the terms or conditions of a new or existing mortgage loan on behalf of a borrower or lender, processes a mortgage loan application, or negotiates or offers to negotiate the sale of an existing mortgage loan to a noninstitutional investor for compensation or gain. The term includes the activities of a loan originator as defined by the Secure and Fair Enforcement for Mortgage Licensing Act of 2008 (P.L. 110-289, codified at 12 U.S.C. 5101 et seq., "S.A.F.E.").
- *Mortgage broker*: This license is required for an entity conducting loan originator activities through one or more licensed loan originators employed by the mortgage broker or as independent contractors to the mortgage broker.[73]

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[67] *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.").
[68] *Citibank, N.A. v Data Lease Fin. Corp.*, 828 F.2d 686 (11th Cir. 1987), cert. denied, 484. U.S. 1062 (1988).
[69] 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 14, 2014).
[70] Nursing home litigation filings, received April 15, 2013 and March 31, 2014, on file with the Regulatory Affairs Committee staff.
[71] 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 14, 2014).
[72] 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).
[73] Section 494.001(21), F.S.

- *Mortgage lender*: This license is required for an entity making a mortgage loan for compensation or gain, directly or indirectly, or selling or offering to sell a mortgage loan to a non-institutional investor. Making a mortgage loan means closing a mortgage loan in a person's name, advancing funds, offering to advance funds, or making a commitment to advance funds to an applicant for a mortgage loan.[74]
- *Mortgage lender servicer*: This licensing endorsement is required for any mortgage lender licensee who services a mortgage loan. "Servicing a mortgage loan" means to receive, cause to be received, or transferred for another, installment payments of principal, interest, or other payments pursuant to a mortgage loan. A "servicing endorsement" means authorizing a mortgage lender to service a loan for more than 4 months. A mortgage lender servicer may also conduct those activities described under Mortgage Lender without the need for two separate licenses.[75]
- *Branch licenses:* This license is required for company licensees who conduct business at locations other than the main license holder's principal place of business: (a) The address of which appears on business cards, stationery, or advertising used by the licensee in connection with business conducted under this chapter; (b) At which the licensee's name, advertising or promotional materials, or signage suggests that mortgage loans are originated or negotiated. (c) At which mortgage loans are originated or negotiated by a licensee.[76]

Secure and Fair Enforcement for Mortgage Licensing Act of 2008 (S.A.F.E.)

In 2008, Congress enacted the Housing and Economic Recovery Act. Title V of this act is the Secure and Fair Enforcement for Mortgage Licensing Act (S.A.F.E.).[77] The intent of S.A.F.E. was to provide greater accountability and regulation of *individual* loan originators and to enhance consumer protections by establishing minimum licensure and registration requirements and a national registry for consumer to inquire into the credentials and disciplinary history of such loan originators. S.A.F.E. requires non-depository mortgage loan originators to be state-licensed in accordance with the following minimum standards of S.A.F.E.:

- Criminal history background checks and specified disqualifying periods for certain convictions and pleas;
- Credit background checks for "financial responsibility" determination;
- No loan originator license revocation in any state;
- Pre-licensure education and testing;
- Continuing education;
- States must also establish a net worth, surety bond, or recovery fund; and
- All states must licensure mortgage loan originators through the Nationwide Mortgage Licensing System & Registry ("NMLS").

S.A.F.E. required all states to implement these minimum licensure and regulatory standards and for the U.S. Department of Housing and Urban Development (HUD) to determine whether each state met the federally mandated minimums. In response, the Florida Legislature enacted CS/CS/SB 2226 in 2009, which substantially amended the Act to bring Florida into compliance with S.A.F.E.[78]

Nationwide Mortgage Licensing System (NMLS)[79]

NMLS is the sole system of licensure for mortgage companies for 54 state agencies and the sole system of licensure for Mortgage Loan Originators (MLOs) for 58 state and territorial agencies. The NMLS is also the system of record for many other non-depository, financial services licensing or registration frameworks for participating state agencies, and provided operational uniformity for companies and individuals seeking to apply for, amend, renew and surrender license authorities managed through NMLS by 58 state or territorial governmental agencies. NMLS itself does not grant or deny license authority.

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[74] Section 494.001(19), (22), F.S.
[75] Sections 494.001(33), (34); 494.00611(1)(e), F.S.
[76] Sections 494.001(3); 494.000036; 494.0066, F.S.
[77] Section 494.001(16), F.S.
[78] Chapter 2009-241, L.O.F.
[79] The Act refers to NMLS as "the registry," which is defined at s. 494.001(31), F.S.

NMLS was created by the Conference of State Bank Supervisors (CSBS) and the American Association of Residential Mortgage Regulators[1] and began operations in January 2008. It is owned and operated by the State Regulatory Registry LLC,[2] a wholly owned subsidiary of CSBS.[80]

Dodd-Frank & the U.S. Consumer Financial Protection Bureau

The Dodd-Frank act has widely been described as the most expansive financial regulatory legislation since the 1930s, and was formed with the intent "to focus directly on consumers, rather than on bank safety and soundness or on monetary policy."[81]

Title X of Dodd-Frank created the Consumer Financial Protection Bureau (CFPB) as an independent bureau housed within the Federal Reserve System. Dodd-Frank:

- Designated the CFPB broad authority to examine and enforce consumer protection regulations over all mortgage-related businesses, large non-bank financial companies, and banks and credit unions with assets greater than $10 billion;
- Granted broad authority to the CFPB to write regulations to protect consumers from unfair and deceptive financial products, acts, or practices; and
- Consolidated and transferred most federal consumer financial protection authority under the CFPB's jurisdiction, including[82]:
  - Real Estate Settlement and Procedures Act (RESPA)
  - Truth in Lending Act (TILA)
  - Home Ownership and Equity Protection Act (HOEPA)
  - Home Mortgage Disclosure Act (HMDA)
  - HUD's regulations promulgated under S.A.F.E.

Title XIV of Dodd-Frank, also known as the Mortgage Reform and Anti-Predatory Lending Act, made significant changes to mortgage loan origination and lending standards, to be discussed below. The CFPB has issued several mortgage regulations implementing the changes to the various federal laws above. [83]

Regulation X of RESPA states that "state laws that are inconsistent with RESPA or this part are preempted to the extent of the inconsistency. However, RESPA and these regulations do not annul, alter, affect, or exempt any person subject to their provisions from complying with the laws of any State with respect to settlement practices, except to the extent of the inconsistency." However, a state law or regulation that provides greater protection to consumers is not an inconsistency.[84] This "only if consistent" preemption standard also applies to TILA, although to a more limited extent.

<u>Effect of the Bill on Loan Originators, Mortgage Brokers, and Mortgage Lenders (ch. 494, F.S.)</u>

License renewals

Currently, mortgage licensees in Florida must submit a renewal request through NMLS from November 1 to December 31 every year, and meet other renewal requirements (completion of continuing education requirements, payment of applicable renewal fees, and authorization to run a new criminal background check and credit report check). According to the NMLS, 48 out of 60 state licensing authorities allow for late renewals/reactivations, with varying late fees and deadlines.[85] However, following the S.A.F.E.

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[80] "About NMLS," at http://mortgage.nationwidelicensingsystem.org/about/Pages/default.aspx (last accessed February 4, 2014).
[81] "Creating the Consumer Bureau," at http://www.consumerfinance.gov/the-bureau/creatingthebureau/ (last accessed February 6, 2014).
[82] Dodd-Frank required the Secretary of the U.S. Treasury to establish a designated transfer date by which the CFPB would receive certain rulemaking, supervision, and enforcement powers from seven existing federal agencies. The Treasury Secretary established July 11, 2011, or one year after the enactment of Dodd-Frank, as the designated transfer date. See 75 FR 57272 (Sept. 20, 2010) and 76 FR 43569 (July 21, 2011).
[83] CFPB "Mortgage Rules at a Glance," at http://www.consumerfinance.gov/mortgage-rules-at-a-glance/ (last accessed February 7, 2014).
[84] 24 C.F.R. 3500.13 (relation to state laws).
[85] NMLS Renewal Deadlines Chart (accessed February 6, 2014), on file with the Insurance & Banking Subcommittee staff.

implementation legislation in 2009, Florida does not allow for late renewals, so that licenses that have not been renewed by December 31 will automatically expire and persons desiring to continue in the mortgage industry must submit a new initial application.[86] Branch office licenses must also be renewed annually at the time the main license is renewed.[87]

The bill's language for late renewals, which has been modeled after several other state lending laws, provides an additional 60 days to renew all mortgage license types. As a result, all licensees who do not renew before March 1[88] will be placed in a "failed to renew" status, and will be required to pay a reinstatement fee outside of the registry to reactivate the license. The new reinstatement fees range from $150 to $475, depending on the type of license being reinstated. However, licensees who do not complete the renewal process before March 1 will be placed in a "terminated-expired" status and will have to submit new initial applications if they desire to continue doing mortgage business in Florida.

Indirect owners of a mortgage company
Currently, the Act requires "control persons" of a mortgage company (broker or lender) to be fingerprinted and screened for their criminal background history and credit reports to determine their fitness to be on a company license.[89] Such persons possess the power to direct the management or policies of a company, whether through the 10% or more ownership of securities or capital contribution, by contract, or otherwise.[90] However, the NMLS Company Form asks applicants to disclose "are there any *indirect owners* of the entity required to be reported?"[91] According to the OFR, the NMLS uniform application form uses a 25% ownership threshold, and the Act's lack of a definition of "indirect owner" creates a disconnect from the definition of "control person," especially for large mortgage lender or broker companies with complex corporate structures.[92] As such, the bill creates a definition of "indirect owner" which closely parallels the definition of "control person," but uses a 25% ownership threshold.

Joint and concurrent examinations
Currently, the Act authorizes the OFR to conduct intermittent examinations of any licensee or other person, and allows the OFR to recover travel and per diem out-of-state examination costs from the licensee.[93] The bill authorizes the OFR to conduct joint or concurrent examinations with other state or federal regulatory agencies and furnish copies of all examinations to an appropriate regulator, if said regulator agrees to maintain the confidentiality requirements applicable to such examinations pursuant to chs. 119 and 494, F.S.[94] The OFR is also authorized to accept an examination from an appropriate regulator.

Administrative penalty for pre-licensure examination misconduct
Currently, all loan originator applicants seeking licensure must abide by the NMLS Rules of Conduct for Test Takers, which prohibits misconduct, assistance and the use of study materials during pre-licensure

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[86] *See* Rules 69V-40.0313, 69V-40.0322, and 69V-40.0612, F.A.C.
[87] Sections 494.0036 and 494.0066, F.S.
[88] The NMLS provides that the reinstatement period will be open from January 1st through February 28th. .NMLS Renewal Period End and Reinstatement, at http://mortgage.nationwidelicensingsystem.org/Pages/default.aspx (last accessed February 6, 2014).
[89] Sections 494.00321 and 494.0067, F.S.
[90] Section 494.001(6), F.S.
[91] NMLS Company Form, at http://mortgage.nationwidelicensingsystem.org/licensees/resources/LicenseeResources/NMLS% (last accessed February 6, 2014).
[92] E-mail with the OFR (January 31, 2014), on file with the Insurance & Banking Subcommittee staff.
[93] Section 494.0012(3), F.S.
[94] The Public Records Act (ch. 119, F.S.) contains an agency-specific exemption for the OFR, in which any information that the OFR *receives* from other state or federal regulatory, administrative, or criminal justice agencies that confidential or exempt in accordance with the laws of the other agency. Additionally, this exemption provides confidentiality for any information that the OFR *receives or develops* as part of a joint or multiagency examination or investigation with these other agencies and that the OFR may obtain and use this information in accordance with a joint or multiagency agreement, except to any information that would otherwise be public if the OFR independently conducted an investigation or examination under Florida law. Section 119.0712(3), F.S. Section 494.00125, F.S., contains a similar regulatory information-sharing exemption and allows the OFR to share confidential and exempt information to any law enforcement or regulatory agency.

examinations.[95] The NMLS Rules of Conduct provide that test center representatives may report any alleged violations to the state(s) in which the applicant is seeking licensure.

The bill makes it a ground for administrative action (denial of licensure, action against an existing license, or administrative fines) by the OFR when a mortgage loan originator applicant violates the NMLS Rules of Conduct in connection with a pre-licensing examination.

Arbitration

The bill repeals s. 494.0028, F.S., relating to arbitration. Currently, this provision authorizes arbitration between noninstitutional investors or borrowers and a mortgage lender or broker regarding mortgage broker agreements, servicing agreements, loan applications, or purchase agreements. Currently, the Act allows the noninstitutional investor or borrower to elect arbitration before the American Arbitration Association or other approved arbitration forum, and provides that any election under this section is irrevocable.

However, Dodd-Frank amended the federal Truth in Lending Act to prohibit creditors from including mandatory arbitration terms or any other non-judicial procedure in residential mortgages and open-end consumer credit secured by principal dwellings. The CFPB's implementing rule took effect January 10, 2014. This federal prohibition does not apply to certain time-share plans or for a home equity line of credit secured by the consumer's principal dwelling.[96]

Mortgage call reports

Due to a S.A.F.E. requirement, the Act requires mortgage broker and mortgage lender licensees to file "reports of condition" to the NMLS, in such form and containing such information as NMLS may require.[97] NMLS refers to these as "mortgage call reports," and these reports involve:

- *Residential mortgage loan activity information* (application, closed loan, individual loan originator, line of credit, and repurchase information by state), which must be submitted quarterly (within 45 days of the end of every calendar quarter), and
- *Financial condition* (financial information at the company level), which NMLS requires to be filed annually with the company's fiscal year end.[98]

In order to clarify the OFR's authority to enforce the timely filing of the mortgage call report, the bill authorizes the Financial Services Commission to prescribe by rule the timeframe by which mortgage broker and mortgage lender licensees must file the reports of condition, which the bill also defines as synonymous with the NMLS Mortgage Call Report.

Provisions of the Act affected by Dodd-Frank changes

The Act currently authorizes the OFR to enforce the provisions of the Real Estate Settlement Procedures Act and the Truth in Lending Act and any regulations adopted thereunder, and to pursue administrative fines and license sanctions against a licensee (or person required to be licensed).[99] However, in light of the significant changes to these federal laws, reenactment of this provision is necessary for the OFR to enforce these federal changes that have been adopted after the last time the Florida Legislature reenacted s. 494.00255(1)(m), F.S.[100] As a general rule, a cross-reference to a specific statute incorporates the language of the referenced statute as it existed *at the time* the reference was enacted, unaffected by any

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[95] NMLS Rules of Conduct for Test Takers, at http://mortgage.nationwidelicensingsystem.org/profreq/Documents/Test%20Taker%20Rules%20of%20Conduct.pdf (last accessed February 6, 2014).

[96] Section 1414 of Dodd-Frank; 78 FR 11279 (Feb. 15, 2013), finalizing a proposal issued on August 17, 2012 (77 FR 55271 (Sept. 7, 2012) (2012 Loan Originator Proposal)), amending 12 C.F.R. Parts 1026 (Regulation Z). The amendment to Reg Z that prohibits arbitration is effective June 1, 2013.

[97] Section 1505(e) of S.A.F.E.; Sections 494.004(3) and 494.0067(13), F.S.

[98] NMLS Mortgage Call Report, at http://mortgage.nationwidelicensingsystem.org/slr/common/mcr/Pages/default.aspx (last accessed February 6, 2014).

[99] Section 494.00255(1)(m), F.S.

[100] It appears that the last time the Act readopted RESPA and TILA was in the 2011 legislative session (s. 14 of ch. 2011-071, L.O.F.).

subsequent amendments to or repeal of the incorporated statute.[101] The Legislature may adopt provisions of federal statutes and administrative rules made by a federal administrative body "that are in existence and in effect at the time the legislature acts, but it would be an unconstitutional delegation of legislative power for the legislature to adopt in advance any federal act or the ruling of any federal administrative body that Congress or such administrative body might see fit to adopt in the future.[102]

The bill also amends or removes provisions in the Act that are potentially inconsistent or redundant with the new changes to RESPA and TILA.

The bill amends the definition of "loan origination fee." Currently, it is defined as the total compensation from any source received by a mortgage broker acting as a loan originator, and requires any payment for processing the mortgage loan application must be included in the fee and paid to the mortgage broker.[103] However, Dodd-Frank and CFPB implementing regulations now prohibit loan originators from receiving compensation that varies based on the terms of a loan (other than the amount of principal), and provides for certain exceptions. This is intended to prohibit yield spread premiums or other similar compensation based on terms (including rate) that would cause a loan originator to "steer" borrowers to particular mortgage products.[104] Additionally, Dodd-Frank created new requirements for "qualified mortgages" – a mortgage which would have certain characteristics and requirements and, if those required features are met, the loan would be given either a "safe harbor" or "rebuttable presumption" status. One of the requirements is a 3 percent cap on points and fees for loan amounts that are $100,000 or greater. Lesser loan amounts also have fee cap restrictions. Due to Florida's requirement for the processing fee to be part of the origination fee, mortgage broker businesses must include this fee towards the 3 percent cap. If this fee was not required to be part of the origination fee, it would not have to be included unless the processing company being used was affiliated with the creditor and/or mortgage broker. The inclusion of processing fees, more than likely from contract processing companies, may result in mortgage broker businesses no longer utilizing the services of a contract processor and attempting to process files on their own. The unintended consequence of this decision may result in a loss of checks and balances on a file and potential harm to the consumer.[105] The bill amends the definition of "loan origination fee" to remove payment for processing a mortgage application.

The bill amends s. 494.0038, F.S., relating to loan origination fees and disclosures. Currently, the Act prohibits loan origination fees unless there has been a written, signed mortgage brokerage agreement between the broker and the borrower that contain certain disclosures. The Act requires that at least 3 business days before the execution of a closing or settlement statement, the broker must provide a written disclosure. In addition, the bill amends s. 494.004, F.S., relating to requirements of licensees, to:

- Remove certain notification requirements relating to mortgage loan transaction, including the requirement that each licensee must notify a borrower of any material change in the terms of a mortgage loan previously offered to the borrower within 3 business days of being made aware of the change by the mortgage lender; and
- Remove language giving the borrower the ability to waive the right to receive such a notice under certain circumstances.

These disclosures are already required by RESPA and the CFPB implementing regulations, which provide for simplified disclosures effective August 1, 2015, and also provide when re-disclosure is required (such as an annual percentage rate increase of 1/8%).[106] Accordingly, the bill:

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[101] See *Overstreet v. Blum,* 227 So. 2d 197 (Fla. 1969); *Hecht v. Shaw*, 151 So. 333 (1933).
[102] *Florida Industrial Commission v. State*, 155 Fla. 772, 21 So.2d 599 (1945). *See also Freimuth v. State*, 272 So.2d 473 (Fla.1972); *State v. Camil*, 279 So.2d 832 (Fla.1973).
[103] Section 494.001(16), F.S.
[104] Section 1403 of Dodd-Frank; effective January 1, 2014.
[105] FAMP bill analysis of HB 623 (received January 28, 2014), on file with the Insurance & Banking Subcommittee staff.
[106] *Id.*; see also Integrated Mortgage Disclosures Under RESPA (Regulation X) and TILA (Regulation Z), 78 FR 79730 (December 31, 2013).

- Removes language related to loan origination fees between a borrower to a mortgage broker, the requirement for a written mortgage broker agreement describing the services to be provided by the broker, and the execution requirements for such an agreement; and
- Removes the requirement that a disclosure must be furnished in writing at the time an adjustable rate mortgage loan is offered to the borrower and whenever the terms of the adjustable rate mortgage loan offered materially change prior to closing.

The bill repeals s. 494.00421, F.S., relating to fees earned upon obtaining a bona fide commitment. New federal laws and regulations do not allow most fees before closing to be charged or collected from the borrower, including a commitment fee. Under TILA's loan originator compensation requirements, a mortgage broker is not permitted to receive a fee for services rendered prior to the culmination of a transaction. Due to this requirement, a contract for fees between a mortgage broker and a borrower is weakened, since federal requirements do not permit fees to be obtained if a transaction fails to close.[107]

The bill amends s. 494.0067, F.S., relating to requirements of mortgage lenders, to:

- Remove language that is currently found in federal law under 24 CFR 3500.7 and 12 CFR 1026.19;
- Remove the requirement that a mortgage lender provide an applicant for a mortgage loan a good faith estimate of the costs the applicant can expect to pay in obtaining a mortgage loan and the delivery requirements of the documents associated with this estimate;
- Remove the requirement that a disclosure related to an adjustable rate mortgage loan and any changes associated with the terms of such loan occur prior to closing be provided to the applicant by the mortgage lender as well as the process for which such notification is furnished by the lender;
- Remove the requirement that a mortgage lender, in every mortgage transaction, notify the borrower of any material changes in the terms of a mortgage loan previously offered to the borrower as well as the process for which such notification is furnished; and
- Remove the requirement that a licensee bears the burden of proof that a notification was provided to and accepted by the borrower and removes the right of a borrower to waive receipt of the notice of a material change.

The bill repeals s. 494.0068, F.S., relating to loan application process, which set forth required disclosures for mortgage lenders. However, federal law already provides for mandatory disclosures under Regulation X of RESPA.[108]

The bill amends s. 494.007, F.S., relating to the commitment process, to remove language related to the amount of the commitment fee from the disclosure in writing a mortgage lender must issue if a commitment is issued, in order to align with federal law.

The bill amends s. 494.0073, F.S., relating to mortgage lender when acting as a mortgage broker, to deletes a cross-reference (s. 494.004(2), F.S., regarding the 3-day notice of material change), which this bill deletes.

Servicing capabilities

Currently, a mortgage lender may close loans in its own name, but may not service the loan without a "servicing endorsement" (authorization), which currently requires a minimum net worth of $250,000 (versus a minimum net worth of $63,000 for mortgage lenders who do not seek a servicing endorsement).[109] According to industry advocates, mortgage lenders have sometimes faced difficulties fulfilling the requirements necessary to transfer servicing rights within the current 4-month timeframe.[110] The bill amends s. 494.0067, F.S., to permit mortgage lenders to service loans for up to 6 months without a servicing endorsement.

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[107] FAMP bill analysis of HB 673 (received January 28, 2014), on file with the Insurance & Banking Subcommittee staff.
[108] 12 CFR § 1026.4.
[109] Section 494.00611(2)(f), F.S.
[110] FAMP bill analysis of HB 631 (received January 28, 2014), on file with the Insurance & Banking Subcommittee staff.

High-cost loans / Florida Fair Lending Act

Part IV of the Act is the Florida Fair Lending Act, which provides certain consumer protections for high-cost home loans (which are typically subprime, equity-based mortgages), and is administratively enforced by the OFR.

In January 2013, the CFPB issued its final rule amending Regulation Z (TILA) by expanding the types of mortgage loans that are subject to the protections of the Home Ownership and Equity Protections Act of 1994 (HOEPA), revising and expanding the tests for coverage under HOEPA, and imposing additional restrictions on mortgages that are covered by HOEPA, including a pre-loan counseling requirement. The new rules became effective on January 10, 2014.[111] HOEPA changes include the following requirements for high-cost mortgages:

- Balloon payments are generally banned;
- Prepayment penalties, financing points, mortgage broker points fees, and negative amortization are banned;
- Late fees are restricted to four percent of the payment that is past due, fees for providing payoff statements are restricted, and fees for loan modification or payment deferral are banned.
- Creditors originating HELOCs are required to assess consumers' ability to repay; equity-based lending is eliminated;
- Creditors and mortgage brokers are prohibited from recommending or encouraging a consumer to default on a loan or debt to be refinanced by a high-cost mortgage; and
- Before making a high-cost mortgage, creditors are required to obtain confirmation from a federally certified or approved homeownership counselor that the consumer has received counseling on the advisability of the mortgage.

Due to these changes, the bill repeals part IV, ch. 494, F.S., because federal law will generally provide broader protections than Florida law with regard to high-cost mortgages.[112] It is noted that part IV, ch. 494, F.S., differs from federal law by allowing borrowers to cure the default for high-cost loans in certain circumstances and by providing that any material violation of the Fair Lending Act shall result in the forfeiture of the entire interest charged in the high-cost loan, but there are no such corresponding consumer protections in the federal law.[113]

Loans Under Florida Uniform Land Sales Practices Law

The bill repeals s. 494.008, F.S., relating to the Loans Under Florida Uniform Land Sales Practices Law. This provision was enacted in 1977[114] and provides notice and recording requirements for mortgage loans with face amount of $35,000 or less and is secured by vacant land before the loan can be sold to a mortgagee (other than a financial institution). According to FAMP, this is an obsolete and rarely used provision.[115] According to the Uniform Law Commission, the Model Land Sales Practices Act was promulgated in 1966 and provides regulations for the promotional sale of land. Florida is one of only nine states that have adopted this model act.[116]

Other

The bill amends s. 494.00611, F.S., relating to mortgage lender license to correct a cross-reference relating to the principal loan originator for a mortgage lender license.

II. FISCAL ANALYSIS & ECONOMIC IMPACT STATEMENT

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[111] 78 FR 6855 (January 31, 2013). See also ss. 1431-1432 of Dodd-Frank.
[112] FAMP bill analysis of HB 631 (received January 28, 2014), on file with the Insurance & Banking Subcommittee staff.
[113] See ss. 494.00794 and 494.00796; F.S.; Florida Alliance for Consumer Protection White Paper on HB 631 (received February 11, 2014), on file with the Insurance & Banking Subcommittee staff.
[114] Section 3, ch. 77-397, L.O.F.
[115] FAMP bill analysis of HB 413, on file with the Insurance & Banking Subcommittee staff.
[116] Uniform Law Commission, "Legislative Fact Sheet – Land Sales Practices," at http://uniformlaws.org/LegislativeFactSheet.aspx?title=Land Sales Practices (last accessed on February 7, 2014).

A. FISCAL IMPACT ON STATE GOVERNMENT:

1. Revenues:

The OFR indicates that the loss of the $2,000 annual payment by each international representative office, international administrative office, and international trust company office will have an insignificant fiscal impact of $18,000 deposited into the Regulatory Trust Fund within OFR.[117]

The bill allows for new fees for late renewal or reinstatement of licensure for loan originators, mortgage brokers, mortgage broker branch office locations, mortgage lenders, and mortgage lender branch offices. The OFR indicates that revenues could potentially increase based on the number of mortgage license reinstatements sought after December 31 of each year. Reinstatement fees range from $150 to $475 outside of the current renewal fee, depending on the type of license being reinstated. According to the OFR, a projection on the number of potential license reinstatements sought is unknown; the fiscal impact on revenues is positive, yet indeterminate.[118]

2. Expenditures:

The OFR indicates that additional expenditures are possible based on the number of mortgage license reinstatements sought after December 31 of each year. The increased expenditures would consist of additional workload for existing staff to take the time to electronically notify licensees that their renewal deadline has been missed. In addition, effects of the bill will require minimal configuration changes to the OFR's Regulatory Enforcement and Licensing (REAL) System. According to the OFR, a projection on the number of potential license reinstatements sought is currently unknown; therefore an exact fiscal impact is indeterminate at this time.[119] However, the OFR indicates that any additional workload, as well as any technology configuration changes as a result of this legislation, can be absorbed within their current resources and their current operations and maintenance contract for the REAL system.[120]

B. FISCAL IMPACT ON LOCAL GOVERNMENTS:

1. Revenues:

None.

2. Expenditures:

None.

C. DIRECT ECONOMIC IMPACT ON PRIVATE SECTOR:

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, which may result in more fees for consumers if they are not customers of these banks.

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[117] Email correspondence with the Office of Financial Regulation (February 21, 2014), on file with the Government Operations Appropriations Subcommittee.

[118] OFR's analysis of HB 631 (received February 4, 2014), on file with the Insurance & Banking Subcommittee.

[119] *Id.*

[120] *Id.*

The bill allows expired licensees to renew their licenses with payment of reactivation fees, instead of having to file a new application for licensure. According to the OFR, an exact fiscal impact is indeterminate as the OFR cannot project how many licensees will use this reactivation option.[121]

The bill's allowance for late license renewals and regulatory streamlining may be beneficial to the residential, non-depository mortgage industry in Florida.

D. FISCAL COMMENTS:

According to the OFR, there are currently nine international offices (seven international representative offices and two international administrative offices) that would be affected by the bill's elimination of the $2,000 annual assessment on international offices. The loss of the $2,000 annual payment by these nine international offices represents a loss of $18,000 to the OFR's Regulatory Trust Fund.

[121] *Id.*