

**HOUSE OF REPRESENTATIVES
FINAL BILL ANALYSIS**

BILL #:	CS/HB 703	FINAL HOUSE FLOOR ACTION:	
SPONSOR(S):	Insurance & Banking Subcommittee; Broxson	112 Y's	0 N's
COMPANION BILLS:	CS/CS/SB 806	GOVERNOR'S ACTION:	Approved

SUMMARY ANALYSIS

CS/HB 703 passed the House on April 24, 2015, as CS/CS/SB 806.

The Office of Financial Regulation (OFR) charters and regulates banks, trust companies, credit unions, international banking entities, 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.

The bill makes a number of minor clarifying changes to the Codes and streamlines several OFR regulatory processes. Specifically, the bill:

- Amends the definition of a financial institution's "main office";
- Authorizes the electronic payment of assessments and clarifies payment deadlines;
- Eliminates the requirement that appraisal costs be approved by the OFR;
- Clarifies the definition of "executive officer";
- Corrects a cross-reference for trust service offices;
- Provides a uniform due date for annual certifications of capital accounts required of international banking corporations; and
- Provides that international banking entities operating in Florida are not required to comply with civil subpoenas for the production of books and records that are maintained outside of the United States and are not in the possession, control, or custody of the international banking entity established in Florida.

The bill has an insignificant fiscal impact on state revenues and expenditures, and may have a positive impact on the private sector.

The bill was approved by the Governor on May 21, 2015, ch. 2015-64, L.O.F., and will become effective on October 1, 2015.

I. SUBSTANTIVE INFORMATION

A. EFFECT OF CHANGES:

Current Situation

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, adopted by the Financial Services Commission.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. – Capital Stock Associations
- Chapter 667, F.S. – Savings Banks

As of June 30, 2014, the Division of Financial Institutions licenses and regulates 254 state-chartered financial institutions for safety and soundness.²

- 132 banks
- 72 credit unions
- 25 international bank offices
- 12 trust companies

Under the U.S. dual banking system, banks may be chartered under either state or federal law:

- *National banks* are chartered under federal law (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, 2011.³ 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).⁴

¹ Chs. 69U-100 through 69U-150, Fla. Admin. Code. Pursuant to s. 20.121(3)(a), F.S., the Financial Services Commission (the Governor and Cabinet) serves as the agency head for purposes of rulemaking and appoints the OFR's Commissioner, who serves as the agency head for purposes of final agency action for all areas within the OFR's regulatory authority.

² OFFICE OF FINANCIAL REGULATION, *Fast Facts* (2nd ed., Dec. 2014), <http://flofr.com/StaticPages/documents/FastFacts2015.pdf>

³ 12 U.S.C. §5412-5413.

⁴ 12 U.S.C. §1813(q).

Credit unions may also be chartered under either state or federal law. *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.⁵

Additionally, *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. *International banking corporations* (IBCs) are organized and licensed under the laws of a foreign country and are supervised by the central bank or other bank regulatory authority of such country.⁶ IBCs may operate through a variety of international banking entities located in Florida that transact business on behalf of the IBCs in accordance with the permissible activities prescribed for each license type under ch. 663, F.S.:

- International bank agencies;
- International representative offices;
- International trust company representative offices;
- International administrative offices; and
- International branches.

In order to transact business in Florida, these international banking entities must be separately licensed by the OFR and must abide by the permissible activities accorded to each license type.

Section 663.02, F.S., provides in general that international banking corporations having offices in Florida are subject to the provisions of ch. 655, F.S., as though such corporations were state banks or trust companies. Further, s. 663.02, F.S., provides that neither an international bank agency nor an international branch shall have any greater right under, or by virtue of s. 663.02, F.S., than is granted to banks organized under the laws of this state. Section 663.02, F.S., provides that it is the intent of the Legislature that the following provisions are applicable to such entities:

- Section 655.031, F.S., relating to administrative enforcement guidelines;
- Section 655.032, F.S., relating to investigations, subpoenas, hearings, and witnesses;
- Section 655.0321, F.S., relating to hearings, proceedings, related documents, and restricted access;
- Section 655.033, F.S., relating to cease and desist orders;
- Section 655.037, F.S., relating to removal by the office of an officer, director, committee member, employee, or other person;
- Section 655.041, F.S., relating to administrative fines and enforcement; and
- Section 655.50, F.S., relating to the control of money laundering and terrorist financing; and any law for which the penalty is increased under s. 775.31, F.S., for facilitating or furthering terrorism.

⁵ NATIONAL CREDIT UNION ADMINISTRATION, *Share Information Fund Information, Reports, and Statements: FAQs*, <http://www.ncua.gov/DataApps/Pages/SI-FAQs.aspx> (last visited Feb. 22, 2015).

⁶ s. 663.01(6), F.S.

Books and Records of International Banking Entities

Currently, s. 655.059, F.S., limits access to the books and records of a financial institution to only certain individuals and entities, such as authorized regulatory agencies and persons authorized by the financial institution's board of directors. The statute also permits inspection and examination of books and records of books and records "as compelled by a court of competent jurisdiction, pursuant to a subpoena issued pursuant to the Florida Rules of Civil Procedure, the Florida Rules of Criminal Procedure, or the Federal Rules of Civil Procedure, or pursuant to a subpoena issued in accordance with state or federal law."⁷

As a matter of general jurisdictional principle in Florida, s. 48.193, F.S., provides a list of acts which will subject a person to the jurisdiction of the courts of this state. Such acts include, among other acts, "operating, conducting, engaging in, or carrying on a business or business venture in this state or having an office or agency in this state," "committing a tortious act within this state," and "breaching a contract in this state by failing to perform acts required by the contract to be performed in this state."

Discovery under 28 U.S.C. § 1782 in *Chevron v. Banco Pichincha*

28 U.S.C. § 1782 is a federal statute that allows a foreign litigant to request a U.S. federal district court to issue an appointment to take testimony and obtain documents from an American witness. Section 1782 is meant to facilitate fact-finding in international litigation and offer the United States' judicial system as an example for other countries.⁸

This discovery tool was addressed a 2012 district court order issued in an environmental lawsuit between a group of Ecuadorian residents and Chevron Corporation.⁹ The litigation occurred in a court in Ecuador, and involved numerous allegations of corruption and fraud by both parties, as well as bribery of the court and an expert witness. Nevertheless, the Ecuadorian court awarded an \$18.2 billion judgment against Chevron. In a subsequent international arbitration claim, Chevron alleged that Ecuador colluded with the plaintiffs to impose an improper damage award against Chevron and to shift the Ecuadorian government's own liability.

In its §1782 application to the U.S. District Court, Southern District of Florida, Chevron sought to conduct discovery from nonparty Banco Pichincha, C.A.'s Miami Agency (Banco Pichincha Miami) for use in the Ecuadorian and international arbitration cases. Chevron sought all information related to certain Banco Pichincha accounts and related discovery, in an effort to prove the plaintiffs' illicit payments to the expert.¹⁰ Banco Pichincha Miami opposed the discovery on a number of grounds, including that it had already produced the documents within its possession, custody, or control, and that any other responsive documents were located in Ecuador and were not in its control. It also argued that the discovery would require Banco Pichincha Miami to violate the privacy laws of Ecuador, and that comity considerations¹¹ mandate that the request be denied. Banco Pichincha Miami suggested that Chevron should use the letters rogatory¹² process in Ecuador, with which the bank could comply. The magistrate judge found that 28 U.S.C. s. 1782 the relevant discretionary factors articulated in case law weighed in Chevron's favor, and recommended that Chevron be permitted to subpoena the bank

⁷ s. 655.059(1)(e), F.S.

⁸ Tony Abdollahi, *The Hague Convention: A Medium for International Discovery*, 40 N.C. J. INT'L L. & COM. REG., 771, 798 (2015). Available at: <http://www.law.unc.edu/journals/ncilj/issues/volume40/issue-3-spring-2015/>

⁹ *In re Chevron Corp.*, 2012 WL 3636925 (S.D. Fla. 2012).

¹⁰ David Adams, *Chevron seeks bank records in Ecuador environmental suit*, REUTERS (May 4, 2012, 8:48 PM), <http://www.reuters.com/article/2012/05/05/us-usa-lawsuit-chevron-idUSBRE84401A20120505>

¹¹ "As a general matter, comity refers to the spirit of cooperation in which a domestic tribunal approaches the resolution of cases touching on the laws and interest of other sovereign states." *In re Chevron*, at 12.

¹² A letter rogatory is a formal request from a court to a foreign court for some kind of judicial assistance, typically in effecting service of process or obtaining evidence, in the absence of a treaty or other agreement. See U.S. DEPARTMENT OF STATE, *Legal Considerations: Preparation of Letters Rogatory*, <http://travel.state.gov/content/travel/english/legal-considerations/judicial/obtaining-evidence/preparation-letters-rogatory.html>

records from Banco Pichincha Miami.¹³

New York Separate Entity Rule in Motorola Credit Corp. v. Standard Chartered

The New York separate entity rule is a common law doctrine under which each branch of a bank is treated as a separate entity (i.e., as if each branch were a distinct bank) for purposes of garnishment and attachment of assets. For example, under the separate entity rule, a judgment creditor in New York could not attach or garnish assets held in a bank branch in France, even if that bank also had a branch in New York.¹⁴ The rule functions as a limiting principle in the context of international banking, particularly in situations involving attempts to restrain assets held in a garnishee bank's foreign branches. The historical rationales for the rule are the importance of international banking comity, to protect banks from being subject to double liability and competing claims in multiple countries, and to avoid the burden of having to monitor and determine the status of bank accounts in other branches.¹⁵

The New York separate entity rule was recently applied in *Motorola Credit Corp. v. Standard Chartered Bank* by that state's highest court. In 2003, Motorola Credit Corporation (Motorola) obtained a \$2.1 billion judgment and a subsequent \$1 billion punitive damage award in 2006 against several members of the Uzan family for alleged loan fraud.¹⁶ The Uzans subsequently went to great lengths to avoid satisfying the judgments, were held in contempt, and made subject to arrest upon entry to the United States.¹⁷ As part of Motorola's efforts to enforce these money judgments, Motorola served a restraining order on the New York branch of Standard Chartered Bank (SCB), a foreign bank incorporated and headquartered in the United Kingdom, which held roughly \$30 million in Uzan-related assets.¹⁸ SCB complied with the order and froze the Uzans' assets at the SCB branch in the United Arab Emirates. Subsequently, SCB sought relief from the restraining order under New York's separate entity rule.

The New York Court of Appeals held that the separate entity rule applied and prevented Motorola from ordering SCB from restraining the Uzans' assets held in foreign SCB branches. The court noted that SCB's efforts to comply with the restraining order resulted in regulatory and financial repercussions in other countries, and put SCB in the position of having to comply with contradictory directives of multiple nations. Such circumstances, in the estimation of the Court, "would result in serious consequences in the realm of international banking to the detriment of New York's preeminence in global financial affairs."¹⁹

Currently, Florida law does not have a doctrine such as the separate entity rule, whether in the context of garnishment and attachment of assets or in discovery matters.

Effect of the Bill

The bill clarifies and streamlines several regulatory processes in the Codes for Florida-chartered financial institutions:

¹³ The U.S. district judge adopted the magistrate's report and recommendations on Feb. 28, 2013.

¹⁴ Geoffrey Sant, *The Rejection of the Separate Entity Rule Validates the Separate Entity Rule*, 65 SMUL. REV. 813 (2012).

¹⁵ *Motorola Credit Corp. v. Standard Chartered Bank*, 24 N.Y.3d 149, 159 (2014).

¹⁶ *Motorola Credit Corp. v. Uzan*, 274 F.Supp.2d 481, 490 (S.D.N.Y. 2003); *Motorola Credit Corp. v. Uzan*, 413 F.Supp.2d 346 (S.D.N.Y. 2006).

¹⁷ *Motorola Credit Corp. v. Standard Chartered Bank*, 24 N.Y.3d 149 at 156-157 (2014).

¹⁸ *Id.* at 157.

¹⁹ *Id.* at 163.

Main Office Designation

Currently, s. 665.005(1)(q), F.S., defines the “main office” or “principal office” of a financial institution to mean only the location designated in a financial institution’s articles of incorporation or bylaws. When a financial institution seeks to re-designate the location of its main office, it must file an amendment to its articles of incorporation or bylaws and obtain the OFR’s approval.²⁰ Additionally, banks and trust companies must obtain the OFR’s approval to relocate their main offices.²¹

The bill amends the definition of “main office” to include a subsequently re-designated location by way of a relocation application filed with the OFR, and thus eliminates the need to refile or amend its articles of incorporation and provide those to the OFR for approval. According to the OFR, this change would provide an easier, streamlined process for re-designating an institution’s main office.²²

It is noted that this change does not affect state-chartered credit unions. Current law provides that a credit union may change its “principal place of business” by filing an amendment to its bylaws and obtaining the OFR’s approval. Credit unions are not required to file relocation applications with the OFR.²³

Assessments

Currently, s. 655.047, F.S., requires every state financial institution to pay semiannual assessments to the OFR to cover the costs of regulation and supervision. Assessments are based on each institution’s total assets reflected on the statement of condition on the last business day in December and the last business day in June every year.²⁴ Currently, the Codes do not recognize the ability to pay semiannual assessments electronically, by wire transfer or automated clearinghouse, although the OFR does currently provide this benefit to its chartered financial institutions.²⁵ In addition, the Codes specify that semiannual assessments paid by mail must be postmarked on or before January 31 and July 31 each year.

Because most of the semiannual assessment payments are made to the OFR electronically, the bill codifies this practice into s. 655.047(2), F.S., and clarifies that the due date of *receipt* of these payments is on or before January 31 and July 31 of each year, rather than “postmarked by” such date. The bill retains the option to mail payments to the OFR, but specifies that mailed payments must also be *received* by January 31 and July 31 every year, not postmarked.

Appraisals

Currently, s. 655.60, F.S., authorizes the OFR to require a financial institution to complete an appraisal of real estate or other property held by any state financial institution for certain reasons, such as when specific facts or information (with respect to real estate or other property held, secured loans, or lending), or in the OFR’s opinion, the state financial institution’s policies, practices, operating results,

²⁰ ss. 655.043 and 658.23(6), F.S. (banks and trust companies). Banks and trust corporations may be formed as corporations or, under specified conditions, as limited liability companies in this state. *See* s. 658.16, F.S. Credit unions do not use articles of incorporations since they are cooperative, nonprofit associations, as opposed to corporations. *See* s. 657.003, F.S.

²¹ Section 658.26(2), F.S., and Rules 69U-105.208 and 69U-105.406, F.A.C., set forth the requirements and procedures for relocating the main office of a bank or trust company.

²² Office of Financial Regulation, Agency Analysis of 2015 House Bill 703, p. 4 (Feb. 19, 2015). It is noted that the Florida Business Corporation Act (ch. 607, F.S.) separately requires every corporation authorized to transact business in this state to designate its principal office in its articles of incorporation, and thereafter kept current in a sworn annual report filed with the Department of State. *See* ss. 607.01401(20) and 607.1622, F.S.

²³ ss. 657.008(1) and 657.0061, F.S. and Rule 69U-110.006(4), Fla. Admin. Code.

²⁴ Assessment amounts and related matters are addressed in the following statutes and rules: s. 658.73(1), F.S. and Rule 69U-120.730, F.A.C. (banks and trust companies); s. 657.053, F.S. and Rule 69U-110.053, F.A.C. (credit unions); s. 663.12(2), F.S. and Rule 69U-140.020, F.A.C. (international banks).

²⁵ Office of Financial Regulation, Agency Analysis of 2015 House Bill 703, pp. 2, 4 (Feb. 19, 2015).

and trends give evidence that the state financial institution's appraisals or evaluations of ability to make payments may be excessive. Other indicators that could trigger a mandatory appraisal include evidence that the institution's lending or investment may be marginal, or that real estate held by the or assets secured by real estate are overvalued. If the OFR requires an appraisal, then the statute requires that the appraisal must be made by a licensed or certified appraiser selected by the OFR (unless otherwise ordered by the OFR), and also requires the OFR to first approve a statement of costs for such appraisal before the financial institution may pay for it.

However, in many situations, the OFR has found the requirement for regulatory approval of appraisal costs to be burdensome for financial institutions because of the resulting delay to the appraisal process. Additionally, financial institutions would likely have already contracted for the appraisal by the time the OFR reviews the statement of costs.²⁶

The bill removes the requirement that the OFR pre-approve appraisal costs. This is consistent with the goals of s. 655.001(2)(h), F.S., which states that the Codes should promote the opportunity of financial institutions' management to exercise their business judgment in conducting the affairs of the institution. However, the bill does *not* modify the requirements that the financial institution still furnish copies of required appraisals to the OFR and that the appraisals be conducted by licensed or certified appraisers. Additionally, the bill retains the statutory authority for the OFR to accept appraisals required by other regulatory or insuring agencies or corporations.

Applications for authority to organize banks or trust companies

Currently, the Codes' general definition of "executive officer" contains a presumption that certain named executives, including the president and the chief executive officer are executive officers, unless excluded from major policymaking functions by board resolution or by the institution's bylaws, as well as actual non-participation in those major policymaking functions by the individual.²⁷

One of the requirements to apply for authority to organize a state bank or trust company is to provide the OFR with certain financial, business, and biographical information of each proposed director, *chief executive officer (if other than the president)*, and trust officer.²⁸ Because the listing of non-president chief executive officer is confusing and duplicative of the Codes' general definition of "executive officer," the bill removes these terms from s. 658.19(1)(f), F.S., and replaces them with the term "executive officer," which includes both president and chief executive officer.

Trust service offices

Section 660.33(1), F.S., authorizes trust companies to maintain one or more trust service offices at the location of any state or federally chartered bank, association, or credit union that is organized under Florida or federal law and with its principal place of doing business in Florida. However, this provision contains an obsolete cross-reference to s. 660.32, F.S., which was repealed in 1992.²⁹

The bill replaces that obsolete cross-reference with s. 658.26, F.S., which is the applicable cross-reference that authorizes trust companies to have principal offices and branch trust companies.

²⁶ *Id.* at p. 3; 2015 Legislative Proposal from OFR Division of Financial Institutions, p. 5 (Dec. 16, 2014).

²⁷ s. 655.005(1)(g), F.S.

²⁸ s. 658.19(1)(f), F.S.

²⁹ Ch. 92-303, Laws of Fla.

Certification of capital accounts for international banking corporations

Currently, s. 663.08, F.S., requires licensed international banking corporations with offices in Florida to certify its capital accounts both before opening an office in this state and annually thereafter so long as a bank office is maintained in this state. However, the statute does not contain a specific due date for these annual certifications. This results in the OFR receiving the annual certifications at various times throughout the year and causes confusion for the institutions.³⁰

The bill amends this statute to set a uniform annual deadline of “on or before June 30” for all international banking corporations to submit their required certification of capital accounts. The change provides clarity to international banking corporations, and will allow the OFR to better manage its review of certifications.³¹

Enforcement of Civil Subpoenas on International Banking Entities

Following the *Chevron* and *Motorola* decisions summarized above, representatives of IBCs have expressed concern that their Florida-based international banking entities could be subject to court orders to produce books and records held in other countries that the Florida-based entity does not control.

The bill creates s. 663.021, F.S., to provide that an international representative office, international banking agency international branch office, international trust company representative office, or international administrative office is not required to produce books or records, pertaining to an investment or deposit account or loan of a customer of the international banking corporation’s offices, that are located outside of the United States or its territories in response to a subpoena relating to a civil matter if such books or records are maintained outside the United States or its territories and are not in the possession, control, or custody of the corporation’s office, agency, or branch established in this state.

The bill specifies that this provision only applies to a subpoena issued pursuant to Florida or Federal Rules of Procedure, or other similar law or rule of civil procedure in another state. Further, this section does not apply to a subpoena issued by or on behalf of a federal, state, or local government law enforcement agency, administrative or regulatory agency, legislative body, or grand jury. This provision would not limit the power of the OFR to access all books and records in the exercise of its regulatory and supervisory powers. When an account is established or maintained outside of the U.S. or its territories, production of books and records would be conducted pursuant to letters rogatory or in accordance with any applicable

Reenactments

For the purpose of incorporating the changes made by the bill, the bill reenacts the following provisions of the Florida Statutes:

- Section 8 of the bill reenacts subsection 655.960(8), F.S.
- Section 9 of the bill reenacts paragraph 663.302(1)(a), F.S.
- Section 10 of the bill reenacts subsection 658.165(1), F.S.
- Section 11 of the bill reenacts subsection 665.013(3), F.S.
- Section 12 of the bill reenacts subsection 667.003(3), F.S.
- Section 13 of the bill reenacts subsection 658.12(4), F.S.

II. FISCAL ANALYSIS & ECONOMIC IMPACT STATEMENT

³⁰ Office of Financial Regulation, Agency Analysis of 2015 House Bill 703. (Feb. 19, 2015)

³¹ *Id.*

A. FISCAL IMPACT ON STATE GOVERNMENT:

1. Revenues:

According to the OFR, the bill may have an insignificant negative fiscal impact on revenues deposited into the Financial Institutions Regulatory Trust Fund. The bill clarifies the date that statutorily required financial assessments are due. The OFR indicates that the clarification of the due date will likely create a potential reduction in fine collection from non-compliance.³² However, the loss in revenue would likely not exceed \$9,900 in any given year. Fines collected from late filed financial institution assessments from 2012 through 2014 are as follows.³³

Semi-Annual Assessment Date	Number of Late Filed Financial Institution Assessments	Revenue Collection
June 30, 2012	10	\$ 6,100
December 31, 2012	5	\$ 3,800
June 30, 2013	3	\$ 2,100
December 31, 2013	3	\$ 3,900
June 30, 2014	4	\$ 2,000
December 31, 2014	4	\$ 1,200

2. Expenditures:

The OFR indicates the bill has a potential positive, yet indeterminate fiscal impact on state expenditures caused by the streamlining of processes, resulting in potential savings of staff time within the OFR.

B. FISCAL IMPACT ON LOCAL GOVERNMENTS:

1. Revenues:

None.

2. Expenditures:

None.

C. DIRECT ECONOMIC IMPACT ON PRIVATE SECTOR:

The bill may have an indeterminate positive impact on the private sector due to process improvements, reduction in paperwork requirements and costs, and decreased compliance and litigation costs due to bill's clarification of several provisions.³⁴

D. FISCAL COMMENTS:

None.

³² *Id.*

³³ Email correspondence with the Office of Financial Regulation (Mar. 3, 2015) on file with the Government Operations Appropriations Subcommittee.

³⁴ Office of Financial Regulation, Agency Analysis of 2015 House Bill 703 (Feb. 19, 2015).