

**HOUSE OF REPRESENTATIVES  
FINAL BILL ANALYSIS**

<b>BILL #:</b>	CS/HB 1233	<b>FINAL HOUSE FLOOR ACTION:</b>	
<b>SPONSOR(S):</b>	Insurance & Banking Subcommittee; Stevenson and others	113 Y's	0 N's
<b>COMPANION BILLS:</b>	CS/SB 1490	<b>GOVERNOR'S ACTION:</b>	Approved

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**SUMMARY ANALYSIS**

CS/HB 1233 passed the House on February 24, 2016, and subsequently passed the Senate on March 9, 2016.

The Office of Financial Regulation (OFR) charters and regulates entities that engage in financial institution business in Florida, in accordance with the Florida Financial Institutions Codes (Codes). The OFR ensures Florida-chartered financial institutions' compliance with state and federal requirements for safety and soundness through regular examinations. These examinations measure the institutions' financial condition, and culminate in a highly confidential examination report, which in some instances, may result in a corrective or enforcement action. Currently, the Codes generally provide that OFR records related to investigations and reports of examination, operations, or condition are confidential and exempt from public records disclosure, with certain exceptions. One such exception states that the OFR is not prevented or restricted from furnishing records or information to "any other state, federal, or foreign agency responsible for the regulation or supervision of financial institutions, including Federal Home Loan Banks." However, the current statute does not clearly require or mandate that the OFR provide these records or information to those agencies or to the Federal Home Loan Banks (FHLBs). Secondly, the FHLBs are actually not federal financial institution regulators, resulting in some uncertainty regarding the OFR's ability to share confidential supervisory information with the FHLBs. While the OFR currently has information-sharing agreements with other federal financial institution regulators, it does not have any such agreements with the FHLBs.

Congress created the FHLB System as a government-sponsored enterprise to provide liquidity support to the housing finance market and to promote community investment at the local level. It is comprised of 11 district FHLBs, which are wholly owned by members (financial institutions who make long-term mortgage loans and meet certain requirements), under the supervision of the Federal Housing Finance Agency (FHFA). In order to be eligible for FHLB membership, federal law requires that the institution agree that state and federal examination reports be provided to the FHLBs in order to determine its financial condition.

Due to this FHLB eligibility requirement and the ambiguity in the Codes, the bill clarifies that the OFR is not prevented or restricted from providing otherwise confidential information to any state, federal, or foreign agency responsible for the regulation or supervision of financial institutions. Secondly, the bill authorizes the OFR to furnish information to the FHLBs regarding its member institutions, in accordance with an information-sharing agreement between the FHLBs and the OFR. The bill requires the FHLBs and the OFR to execute the agreement by August 1, 2016.

The bill has no impact on local and state governments. It may have a positive impact to the private sector.

The bill was approved by the Governor on March 25, 2016, ch. 2016-144, L.O.F., and will become effective on July 1, 2016.

## I. SUBSTANTIVE INFORMATION

### A. EFFECT OF CHANGES:

#### Current Situation

##### The U.S. Dual Banking System

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

- *National banks* are chartered under federal law, i.e., the National Bank Act.<sup>1</sup> Their primary federal regulator is the Office of the Comptroller of the Currency (OCC), an independent agency within the U.S. Department of the Treasury.
- *State-chartered banks* are chartered under the laws of the state in which the bank is headquartered.
  - The primary federal regulator for state banks that are members of the Federal Reserve System is the Board of Governors of the Federal Reserve System (FRB).
  - The primary federal regulator for non-FRB member banks is the Federal Deposit Insurance Corporation (FDIC).<sup>2</sup>
- *Credit unions* may also be either state or federally chartered. Their primary federal regulator is the National Credit Union Administration.

In Florida, the Office of Financial Regulation (OFR) charters and regulates entities that engage in financial institution business in Florida, in accordance with the Florida Financial Institutions Codes (Codes) and the Florida Financial Institutions Rules.<sup>3</sup> The OFR does not regulate financial institutions that are nationally chartered or chartered in other states. In addition, the OFR does not regulate institutions that are chartered and regulated by foreign institutions, except to the extent those foreign institutions seek to engage in the business of banking or trust business in Florida.

The OFR ensures Florida-chartered financial institutions' compliance with state and federal requirements for safety and soundness.<sup>4</sup> Like their federal counterparts, the OFR conducts regular examinations of Florida institutions. The Codes require the OFR to conduct examinations of each Florida financial institution during each 18-month period, although it may examine more frequently based on the institution's risk profile, prior exam history, or significant changes in the institution or its operations.<sup>5</sup> The examinations primarily review the institution's condition as to its Capital, Asset Quality, Management, Earnings, Liquidity, and Sensitivity (such as interest rate risk), based on a uniform supervisory rating system (CAMELS) that is used by state and federal financial institution regulators to classify a financial institution's overall condition.<sup>6</sup> Upon completion of the examination, the regulator presents its findings and recommended corrective measures to the institution through a highly confidential examination report.<sup>7</sup>

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<sup>1</sup> The National Bank Act of 1964 (12 U.S.C. § 24 Seventh) gives enumerated powers and "all such incidental powers as shall be necessary to carry on the business of banking" to nationally chartered banks.

<sup>2</sup> 12 U.S.C. §1813(q).

<sup>3</sup> Chs. 655, 657, 658, 660, 663, 665, and 667, F.S.; ch. 69U-100 through 69U-150, F.A.C.

<sup>4</sup> While the Codes do not specifically define "safety and soundness," s. 655.005(1)(y), F.S., defines "unsafe and unsound practice" as: [A]ny practice or conduct found by the office to be contrary to generally accepted standards applicable to a financial institution, or a violation of any prior agreement in writing or order of a state or federal regulatory agency, which practice, conduct, or violation creates the likelihood of loss, insolvency, or dissipation of assets or otherwise prejudices the interest of the financial institution or its depositors or members. In making this determination, the office must consider the size and condition of the financial institution, the gravity of the violation, and the prior conduct of the person or institution involved.

<sup>5</sup> s. 655.045(1), F.S.

<sup>6</sup> CAMELS is based on the Federal Financial Institutions Examination Council's Uniform Financial Institutions Rating System. Institutions are assessed on a 1 (best) to 5 (worst) rating system. See FDIC Financial Institution Letter FIL-105-96 (Dec. 26, 1996).

<sup>7</sup> s. 655.057(12)(a), F.S.

## Confidentiality of Records and Information Held by the OFR

Currently, s. 655.057, F.S., governs the confidentiality of records and information relating to investigations, informal enforcement actions, trade secrets, and reports of examination, operations, or condition, including working papers of the OFR or any state or federal agency responsible for the regulation or supervision of financial institutions in Florida. It generally provides that OFR records related to investigations and reports of examination, operations, or condition are confidential and exempt from public records disclosure, with certain exceptions, such as publishing reports required by federal law or reporting suspected criminal activity to appropriate law enforcement and prosecutorial agencies.<sup>8</sup>

Another such exception is in subsection (5), which provides that the statute does not prevent or restrict the OFR from “[f]urnishing records or information to any other state, federal, or foreign agency responsible for the regulation or supervision of financial institutions, *including Federal Home Loan Banks*” (emphasis added). However, the current statute does not clearly require or mandate that the OFR provide these records or information to those agencies or to the Federal Home Loan Banks (FHLBs).

The OFR routinely shares confidential supervisory information with other federal and state agencies that are responsible for the regulation and supervision of financial institutions (such as the FDIC, the National Credit Union Administration, or the Financial Crimes Enforcement Network<sup>9</sup>), in accordance with memoranda of understanding (MOUs) that acknowledge the existing framework of federal and state laws and regulations which uniformly respect the confidential treatment that the documents or information would receive under the submitting agency’s applicable confidentiality laws.<sup>10</sup> In particular, OFR reports of examination, described above, routinely contain confidential supervisory information obtained from other bank regulators, and the OFR is obligated to protect such information pursuant to federal confidentiality restrictions and these MOUs. Willful release of confidential information is a violation of s. 655.057(13), F.S., a third-degree felony. Similar federal criminal sanctions may also apply if confidential supervisory information owned by federal financial institution regulators is improperly released.

Despite the statute’s inclusion of FHLBs as permissive recipients of confidential supervisory information along with other federal bank regulators, the FHLBs are actually *not* federal agencies responsible for the regulation of financial institutions,<sup>11</sup> but are eleven separate corporations owned by eligible financial institution members that collectively make up the FHLB System.<sup>12</sup> As a result, there is some uncertainty regarding the OFR’s ability to share information with the FHLBs under s. 655.057, F.S. The OFR does not currently have an MOU with the FHLBs.

### Federal Home Loan Banks

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<sup>8</sup> In addition, s. 119.0712(3), F.S., contains an OFR-specific public records exemption for any information received from or jointly developed with other state or federal regulatory, administrative, or criminal justice agencies.

<sup>9</sup> FinCEN is a bureau of the U.S. Department of Treasury that safeguards the U.S. financial system from illicit use, money laundering, and terrorist financing through the collection, analysis, and dissemination of financial intelligence and strategic use of financial authorities. It administers portions of the federal Bank Secrecy Act and anti-money laundering regulations, which were significantly enhanced by the U.S. Patriot Act of 2001. The Codes and federal law require the OFR to monitor and assess state-chartered financial institutions’ compliance with these laws, subject to significant federal confidentiality restrictions.

<sup>10</sup> *See, e.g.*, s. 655.057(9), F.S.; 12 C.F.R. pts. 261 and 309.

<sup>11</sup> Originally, the FHLBs were overseen by a FHLB Board, which was later abolished by the federal Financial Institutions Reform, Recovery, and Enforcement Act of 1989, and replaced by an independent agency, the Federal Housing Finance Board. In 2008, the Federal Housing Finance Agency became the successor regulatory agency with expanded legal and regulatory authority over government-sponsored enterprises Fannie Mae, Freddie Mac, and the FHLBs.

<sup>12</sup> In 1992, FHLBs were added to s. 655.057(5), F.S., as a permissible recipient of confidential information from the OFR, possibly as a result of the federal 1989 FIRREA amendments. Ch. 92-303, Laws of Fla.

In 1932, Congress created the FHLB System as a government-sponsored enterprise in order to provide liquidity to “building and loan institutions” and to support residential mortgage lending and community investment at a local level.<sup>13</sup> The FHLB System plays a critical role in the continuous flow of funds to the residential mortgage market. These funds originate with the sale of debt securities (i.e., consolidated obligations) in the capital markets. The proceeds of these sales are then loaned to member financial institutions, which in turn provide mortgage credit to homebuyers. While the Federal Home Loan Bank System mandate reflects a public purpose, each FHLB is privately capitalized and does not receive any taxpayer assistance.

Unlike the FDIC or the OCC, the FHLB System is not a federal regulatory agency, but is composed of eleven regional cooperative banks that are entirely owned by over 7,400 members, who are insured depositories like state or nationally chartered commercial banks, thrifts, and credit unions, in addition to insurance companies and community development financial institutions, that meet certain eligibility requirements. Each member is a shareholder in one of the regional FHLBs, which are privately capitalized, separate corporate entities operating in a cooperative structure.<sup>14</sup> Currently, 208 members of the FHLB of Atlanta are located in Florida, of which at least 124 are Florida banks and credit unions chartered and supervised by the OFR.<sup>15</sup>

Each regional FHLB is an individual corporate entity, which must meet strict management and capitalization criteria befitting its status as a government-sponsored enterprise. The federal regulator charged with overseeing the FHLBs is the Federal Housing Finance Agency (FHFA), and is thus considered a “federal agency responsible for the regulation of financial institutions” that the OFR is authorized by s. 655.057, F.S., to share certain confidential information. However, the OFR currently does not have a MOU with the FHFA.<sup>16</sup>

#### *FHLB Membership Eligibility & Information*

In order to be considered eligible for FHLB membership, federal law requires the institution to demonstrate compliance with certain financial condition requirements by providing documentation such as regulatory financial reports, financial statements, and regulatory examination reports.<sup>17</sup> Each potential member must agree to certain conditions, including that reports of examination by local, state, or federal agencies may be furnished by such authorities to the FHLB or the FHFA upon request.<sup>18</sup> According to the OFR, however, the laws pertaining to FHLBs do not address or protect the ownership or confidentiality of any information it may obtain from a state agency,<sup>19</sup> should a FHLB or the FHFA receive a Freedom of Information Act (FOIA) request.<sup>20</sup>

#### **Effect of the Bill**

The bill amends s. 655.057, F.S., to clarify that OFR is not prevented or restricted from providing otherwise confidential information to any state, federal, or foreign agency responsible for the regulation or supervision of financial institutions. By, removing “including any Federal Home Loan Banks” from this provision, the bill correctly reflects the FHLBs’ status as not being a federal financial institution

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<sup>13</sup> FHLBanks, *History of Service*, at [http://www.fhlab-of.com/ofweb\\_userWeb/pageBuilder/mission--history-29](http://www.fhlab-of.com/ofweb_userWeb/pageBuilder/mission--history-29) (last visited Jan. 20, 2016).

<sup>14</sup> FHLBANKS, *Membership*, at [http://www.fhlab-of.com/ofweb\\_userWeb/pageBuilder/membership-32;jsessionid=7E92B18976B5D8609412906D810258BB](http://www.fhlab-of.com/ofweb_userWeb/pageBuilder/membership-32;jsessionid=7E92B18976B5D8609412906D810258BB) (last visited Jan. 20, 2016).

<sup>15</sup> FHLBANK ATLANTA, *Find a Member Near You*, <http://corp.fhlabatl.com/find-member/> (search conducted Jan. 21, 2016).

<sup>16</sup> Office of Financial Regulation, Agency Analysis of 2016 House Bill 1233 (“OFR Analysis”), p. 5 (Jan. 21, 2016).

<sup>17</sup> 12 U.S.C. § 1424(a)(2)(B) and § 1263.6(a)(4); 12 C.F.R. § 1263.11.

<sup>18</sup> 12 C.F.R. § 1263.31(b).

<sup>19</sup> OFR Analysis, p. 5.

<sup>20</sup> FOIA does not apply to “matters that are...contained in or related to examination, operating, or condition reports prepared by, or on behalf of, or for the use of an *agency* responsible for the regulation or supervision of financial institutions.” 5 U.S.C. § 522(b)(8). For purposes of FOIA, “agency” means authorities of the government of the United States (excluding its territories and possessions), but not of the states themselves.

regulator. Secondly, the bill authorizes the OFR to furnish information to the FHLBs regarding its member institutions, in accordance with an information-sharing agreement between the FHLBs and the OFR. The bill requires the FHLBs and the OFR to execute the agreement by August 1, 2016.

## II. FISCAL ANALYSIS & ECONOMIC IMPACT STATEMENT

### A. FISCAL IMPACT ON STATE GOVERNMENT:

1. Revenues:

None.

2. Expenditures:

According to the OFR, the bill should not have a fiscal impact to OFR.<sup>21</sup>

### B. FISCAL IMPACT ON LOCAL GOVERNMENTS:

1. Revenues:

None.

2. Expenditures:

None.

### C. DIRECT ECONOMIC IMPACT ON PRIVATE SECTOR:

Indeterminate but positive. The bill's clarification of the OFR's ability to share information with the FHLBs may expedite or facilitate financial institutions' new membership in the FHLBs and continued supervision by the FHFA.

### D. FISCAL COMMENTS:

None.

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<sup>21</sup> Email from Meredith Hinshelwood, Deputy Director of Governmental Relations, Office of Financial Regulation, RE: OFR Bill Analysis for HB 1233, regarding fiscal impact of committee substitute (Feb. 4, 2016).