

HOUSE OF REPRESENTATIVES STAFF ANALYSIS

BILL #: CS/CS/HB 145 Financial Transactions

SPONSOR(S): Regulatory Affairs Committee; Insurance & Banking Subcommittee; McGhee

TIED BILLS: **IDEN./SIM. BILLS:** CS/SB 260

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

SUMMARY ANALYSIS

Credit Card Surcharge Fees for Private Schools: Currently, s. 501.0117, F.S., prohibits sellers and lessors in sales or lease transactions from imposing a surcharge on a consumer for paying for goods or services with a credit card instead of cash, check, or similar means. Certain higher education institutions are exempt from this prohibition, and permitted to charge convenience fees for tuition, fees, or other student account charges that a student or family pays with a credit card, so long as the convenience fee does not exceed the total cost charged by the credit card company to the institution. The bill amends s. 501.0117, F.S., to similarly exempt private schools from the credit card surcharge prohibition.

Referral Fees Paid by Consumer Finance Lenders: The Florida Consumer Finance Act (ch. 516, F.S.), enforced by the Office of Financial Regulation (OFR), sets forth maximum interest rates (starting at 18 percent per annum) for loans of money, credit, goods, or a provision of a line of credit up to \$25,000. In addition, ch. 516, F.S., authorizes the OFR to take administrative action for certain prohibited practices, including paying money or anything else of value, either directly or indirectly, to any person as compensation, inducement, or reward for referring a loan applicant to a licensed consumer finance lender. The bill amends s. 516.07, F.S., to permit a licensed consumer finance lender to pay a referral fee to such third parties, only if such amount is not charged directly or indirectly to the borrower.

Transfers of Funds: *Funds transfers* are generally large, rapid money transfers between commercial entities and may involve numerous intermediate entities. The rights and obligations of these commercial parties involved in a funds transfer are primarily governed by ch. 670, F.S. (the Act), which codifies the Uniform Commercial Code Article 4A. On the other hand, the federal Electronic Funds Transfer Act (EFTA) governs *electronic funds transfers*, which are initiated through certain electronic means, such as direct deposits and telephone transfers, for the purpose of having a financial institution debit or credit a *consumer's* account. The primary purpose of the EFTA is to provide individual consumer rights. Both the Act and the EFTA may apply to a transfer, depending on how the transaction is structured. In 2013, the EFTA was amended to add consumer protections for transfers of funds (known as *remittance transfers*) sent from U.S. consumers to recipients (individuals or businesses) in other countries. As a result, there is uncertainty as to the current Act's applicability to certain types of remittance transfers. The bill amends s. 670.108, F.S., to clarify that the Act applies to funds transfers that are remittance transfers under the EFTA, unless the remittance transfer is also an electronic funds transfer under the EFTA. The bill also provides that the federal EFTA will preempt the Act in the event any inconsistency exists between the Act and the EFTA regarding a funds transfer.

Cancellation of Mortgages: Currently, once a borrower fully repays his or her mortgage securing property in Florida, s. 701.03, F.S., requires the lender to cancel the mortgage within 60 days of payment, regardless whether the mortgage is closed-end or open-end. The bill amends s. 701.03, F.S., to require a lender to cancel a mortgage within 45 days of satisfaction. In the case of an open-end mortgage, the bill requires a lender to cancel the mortgage within 45 days of satisfaction and receipt of the borrower's written notice of intent to close the mortgage. The bill does not apply to future or existing open-end mortgages unless otherwise stated in the loan agreement.

The bill does not appear to have a fiscal impact on state and local governments. The bill may have a positive fiscal impact on the private sector.

The bill is effective on July 1, 2016, and applies prospectively to all remittance transfers made on or after July 1, 2016.

FULL ANALYSIS

I. SUBSTANTIVE ANALYSIS

A. EFFECT OF PROPOSED CHANGES:

Section 1: Credit Card Surcharge Fees

Section 501.0117, F.S., prohibits sellers and lessors in sales and lease transactions from imposing surcharges on buyers or lessees who elect to use credit cards as payment. The statute defines “surcharge” as “any additional amount imposed at the time of a sale or lease transaction by the seller or lessor that increases the charge to the buyer or lessee for the privilege of using a credit card to make payment.” This prohibition does not apply to discounts for inducing payment in cash, check, or other non-credit card forms of payment.¹ Violation of this statute is a second-degree misdemeanor, and the Office of the Attorney General may also investigate violations of this statute pursuant to its authority under the Unfair & Deceptive Trade Practices Act (ch. 501, pt. II, F.S.).

Currently, state agencies, the judicial branch, and units of local government are authorized to charge a convenience fee for the use of a credit card; however, the convenience fee cannot exceed the total cost incurred.² Additionally, in 2010, the Legislature exempted William L. Boyd, IV, Florida resident access grant eligible higher education institutions³ from this prohibition, and permitted to charge convenience fees for tuition, fees, or other student account charges that a student or family pays with a credit card, so long as the convenience fee does not exceed the total cost charged by the credit card company to the institution, essentially allowing these institutions to recoup the costs associated with using a credit card from students and their families.⁴ According to proponents, Florida is only one of nine states which still prohibits convenience fees for tuition and services paid by credit card at nonpublic schools.⁵

Section 1 of the bill amends s. 501.0117, F.S., to exempt private schools, as defined in s. 1001.01, F.S.,⁶ from the prohibition against credit card surcharge fees to a student or family paying tuition fees or other student account charges by credit card.

Section 2: Referral Fees Paid by Consumer Finance Lenders

The Division of Consumer Finance of the Florida Office of Financial Regulation (OFR) is responsible for the licensure and regulation of nondepository financial service entities and individuals. One of the regulatory programs, administered by OFR, is the Florida Consumer Finance Act (ch. 516, F.S.), which sets forth licensing requirements for consumer finance lenders and the terms and conditions under which a consumer finance loan is permitted in Florida. Ch. 516, F.S., sets forth maximum interest rates for a consumer finance loan, which is a loan of money, credit, goods, or a provision of a line of credit, in

¹ It is noted that the U.S. Court of Appeals for the Eleventh Circuit recently held that s. 501.0117, F.S. (specifically, its allowance for cash discounts vis-à-vis the prohibition on credit card surcharges), is unconstitutional for violating businesses’ First Amendment commercial speech rights. *Dana’s Railroad Supply, et al., v. Attorney General, State of Fla.*, 807. F.3d 1235 (11th Cir. 2015); *rehrg en banc denied*, -- F.3d --, (11th Cir. Jan. 13, 2016).

² s. 215.322, F.S.

³ s. 1009.98, F.S.

⁴ Ch. 2010-219, Laws of Fla.

⁵ FLORIDA CATHOLIC CONFERENCE & FLORIDA CONFERENCE OF CATHOLIC BISHOPS, *White Paper: Convenience-Fee Access*, p. 1 (Nov. 3, 2015), on file with the Regulatory Affairs Committee staff.

⁶ A “private school” is a nonpublic school defined as an individual, association, copartnership, or corporation, or department, division, or section of such organizations, that designates itself as an educational center that includes kindergarten or a higher grade or as an elementary, secondary, business, technical, or trade school below college level or any organization that provides instructional services that meet the intent of s. 1003.01(13) or that gives preemployment or supplementary training in technology or in fields of trade or industry or that offers academic, literary, or career training below college level, or any combination of the above, including an institution that performs the functions of the above schools through correspondence or extension, except those licensed under the provisions of chapter 1005. A private school may be a parochial, religious, denominational, for-profit, or nonprofit school. This definition does not include home education programs conducted in accordance with s. 1002.41.

an amount or to a value of \$25,000 or less at an interest rate greater than 18 percent per annum.⁷ In addition, ch. 516, F.S., provides the grounds for denial of a license or other disciplinary action by the OFR. In particular, s. 516.07(1)(k), F.S., provides that it is grounds for administrative action, for any person to pay money or anything else of value, either directly or indirectly, to any person as compensation, inducement, or reward for referring a loan applicant to a licensed consumer finance lender.

Section 2 of the bill amends s. 516.07, F.S., to permit a licensed consumer finance lender to pay money or anything else of value, directly or indirectly, to any person as compensation, inducement, or reward for referring loan applicants to a licensee, only if such amount is not charged directly or indirectly to the borrower.

Section 3: Transfers of Funds

Individuals and businesses alike rely on transfers of bank funds to efficiently satisfy payment obligations of all sizes. Two bodies of law apply to funds transfers, electronic funds transfers, and remittance transfers: the federal Electronic Funds Transfer Act and the Uniform Commercial Code's Article 4A, as adopted by the states.

Federal Electronic Funds Transfer Act

In 1978, Congress enacted the federal Electronic Funds Transfers Act (EFTA) to protect individual consumers when they use electronic funds transfers.⁸ Under the EFTA, *electronic funds transfers* mean any transfer of funds initiated through certain electronic means for the purpose of having a financial institution debit or credit a consumer's account.⁹ Electronic funds transfers include transfers made by automated teller machines (ATMs), direct deposits, gift cards, overdrafts, point of sale transfers, and telephone transfers, but does *not* include transactions originated by paper instruments (such as checks) and certain other transfers set forth in the EFTA. The EFTA covers topics such as disclosure of fees and limits, error resolution procedures, liability, preauthorized transfers, and receipts.

Uniform Commercial Code Article 4A & Ch. 670, F.S.

In 1989, the Uniform Law Commission finalized Uniform Commercial Code (UCC) Article 4A for the states' adoption, and described it as an essential statutory backdrop to promote uniformity, efficiency, and certainty by governing the rights and obligations among the commercial participants in funds transfers and allocating the risk of loss for unauthorized or improperly executed payment orders. At the time UCC Article 4A was originally drafted, it was intended to govern large, rapid money transfers (typically wholesale wire transfers) between the commercial parties to a funds transfer, keeping in mind that the primary objective of the EFTA is the provision of individual consumer rights.¹⁰

A majority of the states have adopted UCC Article 4A. In 1991, the Florida Legislature adopted the UCC Article 4A through the enactment of ch. 670, F.S. (the Act), relating to funds transfers.¹¹ The Act defines "*funds transfers*" as a series of transactions that begin with the originator's *payment order* (an unconditional instruction to a bank to pay a fixed amount), made for the purpose of making payment to the beneficiary of the order.¹² The funds transfer transaction includes the relationship between intermediary banks that execute and settle the payment order, and concludes upon the ultimate, actual payment to the beneficiary. A basic example of a funds transfer, as effectuated by Alpha Corporation's payment order, is described below:

⁷ Section 516.01(2), F.S.

⁸ The EFTA is codified at 15 U.S.C. 1693 et seq. The EFTA is implemented in the Federal Reserve Board of Governors' Regulation E, at 12 C.F.R. pt. 1005.

⁹ 15 U.S.C. §1693a(7).

¹⁰ 15 U.S.C. §1693(b). See also UNIFORM LAW COMMISSION, *Why States Should Adopt UCC Article 4A*, at

<http://www.uniformlaws.org/Narrative.aspx?title=Why%20States%20Should%20Adopt%20UCC%20Article%204A> (last viewed Sept. 28, 2015).

¹¹ Ch. 91-70, Laws of Fla.

¹² ss. 670.103(1)(c) and 670.104(1), F.S.

Alpha Corp. First Bank Second Bank Beta Corp.
(originator/sender) → (originator's bank) → (receiving bank) → (beneficiary)

Frequently, the EFTA may partially apply to a funds transfer because the transfer is intended to credit a *consumer's* account in a financial institution. In these cases, the Act does *not* apply to the funds transfer to the extent it is governed by the EFTA.¹³

Remittance Transfers

According to World Bank data, the United States is the number one sender of international remittances, accounting for nearly a quarter of remittances (23.3%).¹⁴ Several studies from the mid- to late 2000s estimated that \$12-42 billion in monetary transfers were made from the U.S. to family and friends abroad.¹⁵

Although remittances can be sent through depository institutions (such as an automated clearinghouse transaction or a wire transfer), a large number of U.S. remittance transfers are sent through money transmitters, which are primarily regulated by state money transmitter laws requiring licensure and examination by their state banking and financial regulators. In Florida, ch. 560, F.S., governs non-bank money services businesses, which include "money transmitters" who receive and transmit currency or monetary value through a broad range of means within the U.S. or to or from the U.S.¹⁶ However, ch. 560, F.S., is a regulatory statute setting forth licensure, examination, recordkeeping, and reporting requirements for money transmitters and is administratively enforced by the Office of Financial Regulation, but does not contain specific consumer protections or private remedies.¹⁷

On the federal level, wire transfers and transfers sent by money transmitters have generally fallen outside of the scope of the EFTA and its implementing rule, Regulation E. Until 2010, no federal consumer protection law directly regulated foreign remittance transfers, which can be sent through depository institutions as well as money transmitters. In 2010, the federal Dodd-Frank Wall Street Reform and Consumer Protection Act (Pub. L. 111-203, H.R. 4173, commonly referred to as "Dodd-Frank") was signed into law. Among many changes to federal financial regulatory law, Dodd-Frank amended the EFTA to create new compliance requirements for *remittance transfers*.¹⁸ A remittance transfer is:

- an electronic transfer of funds requested by a consumer sender, regardless of whether the remittance transfer is also an electronic funds transfer under the EFTA,
- initiated by a remittance transfer provider (a person or financial institution that provides this service for a consumer in the normal course of its business), and
- sent to a designated recipient (which can be either an individual or business), located in a foreign country.

Similar to the other consumer protections in the EFTA, these new remittance regulations require certain protections for the sending consumer, including disclosures, error resolution procedures, cancellation and refund policies, and a remittance transfer provider's liability for the acts of its agents.

¹³ s. 670.108, F.S.; Business Law Section of the Florida Bar, *White Paper in support of the proposed amendment to UCC Section 670.108*, p. 1 (on file with the Insurance & Banking Subcommittee staff).

¹⁴ PEW RESEARCH CENTER, *Remittance Flows Worldwide in 2012*, <http://www.pewsocialtrends.org/2014/02/20/remittance-map/>

¹⁵ Electronic Fund Transfers (Regulation E); Final Rule and Proposed Rule, 77 Fed. Reg. 6195 (issued Feb. 7, 2012) (codified at 12 C.F.R. pt. 1005).

¹⁶ s. 560.103(23), F.S.

¹⁷ Ch. 560, F.S., does require money transmitter licensees to maintain a corporate surety bond or a collateral deposit to ensure a source of recovery for aggrieved claimants. Section 560.209, F.S.

¹⁸ Section 1073 of Dodd-Frank created Section 919 of the EFTA, relating to remittance transfers. Section 919 is codified at 15 U.S.C. §1693o-1. Dodd-Frank transferred EFTA rulemaking authority from the Federal Reserve Board to the CFPB. The CFPB's remittance transfer rule became effective on October 28, 2013. The CFPB's final remittance transfer rule was codified as new subpart B to Regulation E, 12 C.F.R. §§ 1005.30-1005.36.

Under the EFTA, not all remittance transfers qualify as an “electronic funds transfer”, raising questions about the applicability of the EFTA. This could occur, for example, if the transfer permits payment in cash and does not instruct nor authorize a financial institution to credit a consumer account in a financial institution. The Uniform Law Commission expressed concern that absent a change to UCC Article 4A, there could be legal uncertainty for some remittance transfers currently governed by Article 4A, particularly for industry participants.¹⁹ The Consumer Financial Protection Bureau (CFPB), in its proposed remittance transfer rules (Regulation E), also noted the uncertainty raised for traditional cash-based remittances sent through money transmitters (which have not been covered by the EFTA) and international wire transfers, which are not electronic funds transfers.²⁰

In 2012, the Uniform Law Commission proposed an amendment to UCC Article 4A, which a majority of states have adopted.²¹ The amendment provides an affirmative statement of the Act’s applicability to remittance transfers that are *not* electronic funds transfers under the EFTA. Without this amendment, neither the federal EFTA nor UCC Article 4A (as codified in the Act) will apply to some aspects of remittance transfers, and the result would be no statutory rules for remittance transfers that may involve mistaken addresses or payees, duties of intermediaries and other issues beyond the initial sending of the transfer.²²

Section 3 of the bill adopts the Uniform Law Commission’s 2012 amendment, and amends s. 670.108, F.S., to clarify that the Act applies to funds transfers that are remittance transfers as defined in the EFTA, *unless* the remittance transfer is an electronic funds transfer (which will be covered by federal law). The bill provides that if there is any inconsistency between a funds transfer under the Act and the EFTA, the EFTA will govern the inconsistency. This parallels language in the EFTA stating that state law is preempted only if it is inconsistent with the EFTA or Regulation E, and then only to the extent of the inconsistency.²³

Section 4: Cancellation of Mortgages

Currently, a lender must cancel a mortgage within 60 days after it has been paid off.²⁴ The statute is silent as to different types of mortgages, such as open-end mortgages and home equity lines of credit, and does not provide any exceptions. “Open-end mortgages” are not defined in the Florida Statutes, but are generally understood in the financial services industry to allow borrowers to pay down the balance and then draw credit back up to the maximum limit as needed, in contrast to “closed-end mortgages” that disburse the entire loan amount upfront to or on behalf of the borrower and do not allow future redraws of credit.²⁵

According to the Florida Bankers Association, open-end lines of credit provide flexibility to consumers by allowing continual access to their home equity by paying off the mortgage in full and then re-accessing the equity when and if needed by the consumer. Under current law, lenders must cancel “any mortgage” upon payoff and must release the lien without exception. This undermines the purpose

¹⁹ UNIFORM LAW COMMISSION, *UCC Article 4A Amendments (2012) Summary*, at

[http://www.uniformlaws.org/ActSummary.aspx?title=UCC%20Article%204A%20Amendments%20\(2012\)](http://www.uniformlaws.org/ActSummary.aspx?title=UCC%20Article%204A%20Amendments%20(2012))

²⁰ Electronic Fund Transfers (Regulation E); Final Rule and Proposed Rule, 77 Fed. Reg. 6211-6212 (issued Feb. 7, 2012) (codified at 12 C.F.R. pt. 1005).

²¹ UNIFORM LAW COMMISSION, *UCC Article 4A Amendments (2012): Enactment Status Map*, at [http://www.uniformlaws.org/Act.aspx?title=UCC Article 4A Amendments \(2012\)](http://www.uniformlaws.org/Act.aspx?title=UCC Article 4A Amendments (2012)) (last viewed Sept. 30, 2015).

²² See footnote 12, above.

²³ 15 U.S.C. §1693q.

²⁴ s. 701.03, F.S.

²⁵ CONSUMER FINANCIAL PROTECTION BUREAU, *Ask CFPB: What is a second mortgage loan or “junior-lien”?*, at <http://www.consumerfinance.gov/askcfpb/105/what-is-a-second-mortgage-loan-or-junior-lien.html> (last viewed Sept. 29, 2015).

Additionally, Regulation Z, which implements the federal Truth in Lending Act, defines “open-end credit” as “consumer credit extended by a credit under a plan in which: (i) The creditor reasonably contemplates repeated transactions; (ii) The creditor may impose a finance charge from time to time on an outstanding unpaid balance; and (iii) The amount of credit that may be extended to the consumer during the term of the plan (up to any limit set by the creditor) is generally made available to the extent that any outstanding balance is repaid. 12 C.F.R. § 226.2(20).

of open-end mortgages and creates costly and burdensome work for both the consumer and the lender each time the consumer seeks new access to credit secured by the home.²⁶

Surrounding states such as Alabama, Georgia, Mississippi, and North Carolina have laws requiring that open-end mortgages and similar lines of credit be cancelled only upon the borrower's full payment and written notice to the lender that he or she wishes to terminate the open-end mortgage.²⁷

Section 4 of the bill amends s. 701.03, F.S., to clarify that a mortgagee or assignee's duty to cancel a mortgage is triggered upon 45 days of satisfaction of the mortgage. The bill also provides that this section does not apply to any future or existing open-end mortgages, unless otherwise stated in the loan agreement. If the the borrower provides written notice (after full payoff) that he or she intends to close the open-end mortgage, the lender must cancel the open-end mortgage within 45 days after receiving the notice as if it were any other type of mortgage.

B. SECTION DIRECTORY:

Section 1. Amends s. 501.0117, F.S., relating to credit cards; transactions in which seller or lessor prohibited from imposing surcharge; penalty.

Section 2. Amends s. 516.07, F.S., relating to grounds for denial of license or for disciplinary action.

Section 3. Amends 670.108, F.S., relating to the exclusion of consumer transactions governed by federal law.

Section 4. Amends s. 701.03, F.S., relating to cancellation of mortgages.

Section 5. Provides that the bill applies to all remittance transfers made on or after July 1, 2016.

Section 6. Provides an effective date of July 1, 2016.

II. FISCAL ANALYSIS & ECONOMIC IMPACT STATEMENT

A. FISCAL IMPACT ON STATE GOVERNMENT:

1. Revenues:

None.

2. Expenditures:

None.

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 allowance for convenience fees to be charged by private schools may benefit private schools in controlling operational costs; however, these costs will be passed on to students and

²⁶ E-mail from the Florida Bankers Association, RE: HB 145 – Financial Transactions, regarding background of Section 2 (Sept. 28, 2015).

²⁷ Ala. Code 1975 §35-10-26; Ga. Code Ann. § 44-14-3; Miss. Code Ann. § 89-5-21; N.C.G.S.A. § 45-36.9.

families paying for tuition and other specified student account charges by credit card at private schools.

- The bill's allowance for referral fees to be paid by consumer finance lenders (so long as they are not charged to the borrower) may promote consumer finance loans in Florida.
- The bill's clarification of the coverage of the Act to remittance transfers may provide greater transactional and operational efficiency for remittance transfer providers and intermediary institutions.
- The bill's allowance for open-end mortgages to remain open after a borrower pays it off may reduce administrative costs for lenders and borrowers, and the bill's reduction in the timeframe for lenders to cancel a mortgage may benefit borrowers.

D. FISCAL COMMENTS:

None.

III. COMMENTS

A. CONSTITUTIONAL ISSUES:

1. Applicability of Municipality/County Mandates Provision:

Not applicable. This bill does not appear to affect county or municipal governments.

2. Other:

None.

B. RULE-MAKING AUTHORITY:

None provided in the bill.

C. DRAFTING ISSUES OR OTHER COMMENTS:

Section 2 of the bill requires that mortgages be cancelled within 45 days of satisfaction, and in the case of open-ended mortgages, receipt of the borrower's intent to close the open-ended mortgage. However, lines 73-75 state that "[t]his section does not apply to any future or existing open-ended mortgage unless otherwise stated in the loan agreement." While this was intended to clarify the prospective application of the changes to s. 701.03, F.S., the language could create uncertainty as to a lender's cancellation obligations if a loan agreement is silent. It is anticipated that the Senate companion, CS/SB 260, will be amended in committee to clarify the prospective application and to address loan agreements that specify procedures for cancellation of mortgages. A floor amendment with substantially similar language would clarify the House bill.

IV. AMENDMENTS/ COMMITTEE SUBSTITUTE CHANGES

On November 4, 2015, the Insurance & Banking Subcommittee considered and adopted one amendment and reported the bill favorably as a committee substitute. The amendment clarified the bill's effective date of July 1, 2016 to provide that it applies prospectively to all remittance transfers and mortgages made on or after that date.

On January 14, 2016, the Regulatory Affairs Committee considered and adopted a strike-all amendment and reported the bill favorably as a committee substitute. The strike-all amendment retained the provisions of the bill, and:

- Amended s. 501.0117, F.S., to exempt private schools from the prohibition against credit card surcharge fees to a student or family paying tuition fees or other student account charges by credit card;
- Amended s. 516.07, F.S., to allow licensed consumer finance lenders to pay compensation to any person for referring loan applicants to a licensee, only if such amount is not charged directly or indirectly to the borrower;

- Amended s. 701.03, F.S., to require a lender to cancel a mortgage within 45 days, instead of 60 days, of satisfaction. In the case of an open-ended mortgage, the amendment requires the lender to cancel the mortgage within 45 days of satisfaction and receipt of the borrower's written notice of intent to close the mortgage;
- Provided that the changes do not apply to any existing or future open-ended mortgage, unless otherwise stated in the loan agreement; and
- Clarified the bill's effective date of July 1, 2016 to apply prospectively to all remittance transfers made on or after that date.

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