The Florida Senate

BILL ANALYSIS AND FISCAL IMPACT STATEMENT

(This document is based on the provisions contained in the legislation as of the latest date listed below.)

Prepared By: The Professional Staff of the Committee on Commerce and Tourism

BILL:	SB 1482
INTRODUCER:	Senator Garcia and Latvala
SUBJECT:	Transactions with Foreign Financial Institutions
DATE:	March 31, 2017
REVISED:	

	ANALYST	STAFF DIRECTOR	REFERENCE	ACTION
1.	Johnson	Knudson	BI	**Favorable**
2.	Little	McKay	CM	**Favorable**
3.			RC	

I. Summary:

SB 1482 mandates certain reporting requirements on Florida-chartered financial institutions that maintain correspondent or payable-through accounts with any foreign financial institution owned by a country under a U.S. Treasury sanctions program. The Florida-chartered financial institution must identify and report the source of every transaction that passes through the foreign correspondent account to their state regulator, the Office of Financial Regulation.

The bill also requires the Florida-chartered financial institution to certify that the source does not involve any "confiscated property" as defined in the Cuban Liberty and Democratic Solidarity Act of 1996 (Libertad Act). For purposes of the Libertad Act, the term "confiscated" means:

- The nationalization, expropriation, or other seizure by the Cuban Government or ownership or control of property, on or after January 1, 1959, without the property having been returned or adequate and effective compensation provided; or without the claim to the property having been settled pursuant to an international claims settlement agreement or other mutually accepted settlement procedure; and
- The repudiation by the Cuban Government of, the default by the Cuban Government on, or the failure of the Cuban Government to pay, on or after January 1, 1959, a debt of any enterprise which has been nationalized, expropriated, or otherwise taken by the Cuban Government; a debt which is a charge on property nationalized, expropriated, or otherwise taken by the Cuban Government; or a debt which is incurred by the Cuban Government in satisfaction or settlement of a confiscated property claim.

The Office of Financial Regulation charters and regulates entities that engage in financial institution business in Florida, in accordance with the Florida Financial Institutions Codes, and ensures Florida-chartered financial institutions comply with safety and soundness provisions and federal requirements, such as the federal Bank Secrecy Act of 1970 and economic and trade sanctions administered by the U.S. Treasury.

The bill has an indeterminate fiscal impact on the Office of Financial Regulation.

II. Present Situation:

The global financial system, trade flows, and economic development rely on correspondent banking relationships. Correspondent banking is the provision of banking services between two unrelated financial institutions, whether domestic or international. Correspondent banking relationships are essential to the function of the U.S. and international financial system, facilitating everything from remittances, development, trade finance, and economic development.

Foreign correspondent accounts are a gateway into the U.S. financial system by facilitating everything from remittances, development, trade finance, and economic development. To protect this system from abuse, U.S. financial institutions must comply with the BSA provisions, which are designed to prevent, detect, and prosecute terrorism activities and international money laundering and the sanctions programs administered by the Treasury Department's Office of Foreign Assets Control (OFAC).

Federal Bank Secrecy Act of 1970 (BSA)

The BSA established the regulatory framework to prevent and detect money laundering. This legislation was in response to growing concerns regarding money being "laundered" to conceal illegal activity, including the crimes that generate the money itself, such as drug trafficking. The 2001 USA PATRIOT ACT strengthened provisions of the BSA.[1] The 2001 law included additional measures to prevent, detect, and prosecute terrorism activities and international money laundering. One of the central goals of the USA PATRIOT ACT is to protect access to the U.S. financial system by requiring certain records, reports, and due diligence programs for foreign correspondent accounts. The BSA requires traditional banks and other entities, as defined by federal regulations, to establish written anti-money laundering (AML) programs, maintain certain records, and file reports that have a high degree of usefulness in criminal and regulatory proceedings.

The Financial Crimes Enforcement Network (FinCEN), a bureau of the Treasury Department, is responsible for administering the BSA in furtherance of its mission to safeguard the U.S. financial system from illicit use. The Federal Banking Agencies (FBAs) have the responsibility and authority to conduct examinations of depository institutions for compliance with the BSA and OFAC requirements in order to ensure the safety and soundness of the U.S. financial system. Together, these agencies are responsible for implementing the regulatory and supervisory framework that is essential for promoting compliance with these obligations and keeping the U.S. banking system safe and sound. Federal and state banking regulators also oversee these recordkeeping and reporting requirements as part of their respective examination duties.

In addition, if Treasury finds "reasonable grounds" exist for concluding that a non-U.S. jurisdiction or any financial institution operating outside of the U.S. is of "primary money laundering concern," Treasury may subject U.S. financial institutions to special measures,

[1] Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism Act of 2001 (USA PATRIOT ACT) Pub. L. No. 107-56.

including prohibitions or conditions on opening or maintaining certain correspondent or payable-through accounts.[2] Specifically, the BSA/AML laws require U.S. financial institutions to take certain customer identification and due diligence measures regarding correspondent and payable-through accounts, if the Treasury determines a transaction that involves jurisdictions outside of the U.S. is of "primary money laundering concern."[3] Federal and state banking regulators also oversee these recordkeeping and reporting requirements as part of their respective examination duties.

FinCEN has estimated there are approximately 300 banks in the U.S. that provide correspondent banking services to foreign financial institutions. When these U.S. banks receive funds or instructions for a funds transfer from a foreign correspondent bank, they likely do not have a relationship with the originator of the payment. For this reason, conducting appropriate due diligence on the foreign correspondent bank is critical to managing the vulnerability associated with this product. The complexity and volume of transactions that flow through U.S. correspondent accounts, coupled with the varying (often limited) recordkeeping requirements of funds transfer systems in different countries, increase the likelihood that some correspondent accounts can be exploited to facilitate the flow of illicit proceeds into or through the U.S. financial system.[4]

The U.S. financial institutions that maintain correspondent accounts for foreign financial institutions (FFIs) are required to establish appropriate, specific, and risk-based due diligence policies, procedures, and processes that are designed to assess and manage the risks inherent with these relationships. To comply with their legal obligations, U.S. depository institutions must monitor transactions related to these accounts to detect and report suspicious activities. These policies, procedures, and processes will depend on the level of risk posed by the correspondent FFI. Such risks can vary depending on the FFI's strategic profile, including its size and geographic locations, the products and services it offers, and the markets and customer bases it serves.[5]

The Office of Foreign Assets Control (OFAC) and U.S. Sanctions Programs

The OFAC administers and enforces numerous economic and trade sanctions, based on U.S. foreign policy and national security goals against targeted foreign countries and regimes, terrorists, international narcotics traffickers, those engaged in activities related to the proliferation of weapons of mass destruction, and other threats to the United States' national security, foreign policy, or economy. The OFAC acts under Presidential wartime and national emergency powers, as well as various authorities granted by specific legislation, to impose

[2] 31 U.S.C. s. 5318A(e)(1)(B) and (C). A "correspondent account" is defined as an account established to receive deposits from, make payments on behalf of a foreign financial institution, or handle other financial transactions related to such institution."Payable-through account" means an account, including a transaction account (as defined in section 19(b)(1)(C) of the Federal Reserve Act), opened at a depository institution by a foreign financial institution by means of which the foreign financial institution permits its customers to engage, either directly or through a subaccount, in banking activities usual in connection with the business of banking in the United States.
[3] 31 U.S.C. s. 5318A(b).
[4] U.S. Treasury, *2015 National Money Laundering Risk Assessment, available at* https://www.treasury.gov. (last viewed Mar. 23, 2017).
[5]See https://www.treasury.gov/press-center/press-releases/Documents/Foreign%20Correspondent%20Banking%20Fact%20Sheet.pdf (last viewed Mar. 30, 2017).

controls on transactions and to freeze assets under U.S. jurisdiction. These sanctions can be either comprehensive or selective, as well as program-based (e.g., counter narcotics trafficking, counterterrorism, or cyber-related) or geographically targeted, using the blocking of assets and trade restrictions to accomplish foreign policy and national security goals. Currently, the OFAC administers over 20 country-specific sanctions programs, including Cuba.[6]

The OFAC regulations are broad in scope. Unlike the BSA, the laws and OFAC-issued regulations apply not only to U.S. banks, their domestic branches, agencies, and international banking facilities, but also to their foreign branches, and often overseas offices and subsidiaries. All U.S. persons (including U.S. citizens and permanent resident aliens regardless of where they are located) and entities within the U.S., all U.S. incorporated entities and their foreign branches must comply with the OFAC regulations. U.S. persons, including U.S. financial institutions, are required to "block" (freeze) targeted property which means that title to the blocked property remains with the target, but the exercise of powers and privileges normally associated with ownership is prohibited without the OFAC's authorization. Blocking immediately imposes an across-the-board prohibition against transfers or dealings of any kind with regard to the property.[7] If a bank knows or has reason to know that a target is party to a transaction, the bank's processing of the transaction would be unlawful.[8]

In addition, the OFAC regulations prohibit financial institutions from doing business with specific individuals, groups, and entities that are owned or controlled by, or acting for or on behalf of, targeted countries, known as the Specially Designated Nationals (SDNs) and Blocked Persons List. The OFAC can designate individuals and entities as SDNs and Blocked Persons, regardless whether their country of residence is listed as a state sponsor of terrorism.

U.S. Embargo against Cuba Legislation and Recent Events

Since the 1960s, the United States has maintained an embargo on Cuba that restricts trade, travel, and financial transactions through various laws, regulations, and presidential proclamations.

Trading with the Enemy Act of 1917 (TWEA)

The TWEA grants the President broad authority to impose embargoes on foreign countries during times of war and grants this authority during times of a presidentially declared national emergency. The International Emergency Economic Powers Act of 1977 amended section 5(b) of TWEA, again limiting the President's embargo authority to times of war, but allowing the President's continued exercise of his national emergency authority with respect to the ongoing Cuba embargo. This act required that the President determine on an annual basis whether maintaining the Cuba embargo is in the national interest of the United States.

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[6] For a list of current OFAC sanctions programs, see U.S. Department of the Treasury, *Resource Center: Sanctions Programs and Country Information*, at: https://www.treasury.gov/resource-center/sanctions/Programs/Pages/Programs.aspx (last visited March 30, 2017).

[7] U.S. Department of the Treasury, *OFAC FAQs: General Questions*, at https://www.treasury.gov/resource-center/faqs/Sanctions/Pages/faq_general.aspx#basic (last visited March 30, 2017).

[8] U.S. Department of the Treasury, *OFAC FAQs: Sanctions Compliance – Additional Questions from Financial Institutions #44 and 45,* https://www.treasury.gov/resource-center/faqs/Sanctions/Pages/faq_compliance.aspx#other_fi (last visited March 30, 2017).

The Cuban Assets Control Regulations (CACR), which the Treasury issued in 1963 under the President's authority under TWEA and the Foreign Assistance Act, define "confiscated property"[9] and prohibits U.S. nationals,[10] permanent resident aliens, and U.S. agencies from knowingly making a loan, extending credit or providing other financing for the purpose of financing transactions involving "confiscated property" the claim to which is owned by a U.S. national, except for financing by a U.S. national owning such a claim for a transaction permitted under U.S. law.[11]

Cuban Liberty and Democratic Solidarity Act of 1996 (Libertad Act)

The Libertad Act defines and codifies the embargo as it was in effect on March 1, 1996. The Libertad Act authorizes the President to suspend the embargo only if he or she determines that a transition Cuban government is in power. In addition, the Libertad Act prohibits U.S. persons, permanent resident aliens, and U.S. agencies from knowingly financing any transactions involving property of U.S. nationals confiscated by the Cuban government. The Libertad Act permits U.S. nationals to file suit in U.S. courts against persons trafficking in such confiscated property (this authority has been suspended by the President since enactment).[12] Claims of U.S. nationals against the Cuban government may be certified under Title V of the International Claims Settlement Act of 1949 to the Foreign Claims Settlement Commission within the U.S. Department of Justice. Since its inception, the commission has approved almost $2 billion awards for claims against the Cuban government. However, the U.S. has not settled these claims with Cuba.

Recent Events

On December 17, 2014, President Obama announced a major shift in U.S. policy on Cuba intended to increase engagement between the two countries. Specifically, the administration's new policy called for establishing diplomatic relations with Cuba, authorizing expanded commercial sales and exports from the United States of certain goods and services, and facilitating authorized financial transactions between the United States and Cuba. On May 29, 2016, the U.S. removed Cuba from the terrorism list.

Subsequently, the U.S. government has made a series of regulatory changes to the CACR since the administration announced its new Cuba policy. These regulatory changes have eased restrictions on travel, financial services, and trade with Cuba. In the area of financial services, the federal Department of Treasury has modified the CACRs[13] to allow credit and debit cards

[9]31 C.F.R. ss. 515.311(b) and 515.336.

[10]The term U.S. national generally includes: (1) A subject or citizen of the United States or any person who has been domiciled in or a permanent resident of the United States; (2) A United States partnership, association, corporation, or other organization; (3) Any organization's office or other sub-unit that is located within the United States; (4) Any person to the extent that such person was or has been acting or purporting to act directly or indirectly for the benefit or on behalf of any national of the United States; (5) Any other person who there is reasonable cause to believe is a "national," as so defined. *See* 31 C.F.R. s. 515.302.

[11]31 C.F.R. s. 515.208.

[12] Claims of U.S. nationals against the Cuban government may be certified under Title V of the International Claims Settlement Act of 1949 to the Foreign Claims Settlement Commission within the U.S. Department of Justice. Since its inception, the commission has approved almost $2 billion awards for claims against the Cuban government. However, the U.S. has not settled these claims with Cuba.

[13] 31 C.F.R. s. 515.584.

issued by U.S. banks to be used in Cuba. Treasury has also modified the regulations to allow U.S. banking institutions to open and maintain bank accounts in the United States for Cuban nationals in Cuba to use for authorized transactions.

Further, U.S. banking institutions may process payments in which Cuba or a Cuban national has an interest. These changes authorize funds transfers from a bank outside the U.S. that pass through one or more U.S. financial institutions before being transferred to a bank outside the U.S., where neither the originator nor the beneficiary is a person subject to U.S. jurisdiction.[14] A U.S. banking institution may process U.S. dollar monetary instruments, including cash and travelers' checks, presented indirectly by Cuban financial institutions. Additionally, correspondent accounts at third-country financial institutions used for such transactions may now be denominated in U.S. dollars.[15] United States banking institutions may process transactions originating and terminating outside of the U.S. if neither the originator nor the beneficiary is a person subject to U.S. jurisdiction.

In July 2015, subsequent to the CACR changes, a Florida-chartered financial institution, Stonegate Bank, announced it was establishing a correspondent banking relationship with Banco Internacional de Comercio, a bank owned by the Cuban government. To date, Stonegate Bank's correspondent relationship with Banco Internacional de Comercio is strictly limited to U.S. embassy business.[16]

The Florida Office of Financial Regulation (OFR)

The OFR charters and regulates entities that engage in financial institution business in Florida, in accordance with the Florida Financial Institutions Codes (Codes), and ensures Florida-chartered financial institutions comply with state and federal requirements for safety and soundness, as well as the BSA. In addition, the OFR regulates international banking corporations (IBCs) that transact business in Florida. The OFR does not regulate federally chartered financial institutions or financial institutions that are chartered and regulated in other states. In addition, the OFR does not regulate institutions that are chartered and regulated by foreign institutions, except to the extent those foreign institutions seek to engage in the business of banking or trust business in Florida, pursuant to ch. 663, F.S.

State Regulations for Correspondent Accounts and Payable-Through Accounts, and Transactions Relating to Iran or Terrorism

Each financial institution chartered in Florida that maintains a correspondent account or a payable-through account with an FFI must establish due diligence policies, procedures, and controls reasonably designed to detect whether the United States Secretary of the Treasury has found that the foreign financial institution knowingly:[17]

a) Facilitates the efforts of the Government of Iran, including efforts of Iran's Revolutionary Guard Corps, to acquire or develop weapons of mass destruction or their delivery systems;

[14] 31 C.F.R. s. 515.584(d).
[15] 31 C.F.R. s. 515.584(g).
[16] Mimi Whitefield, *Broward's Stonegate Bank makes a banking breakthrough in Cuba*, MIAMI HERALD (Jul. 22, 2015), http://www.miamiherald.com/news/business/article28072318.html (last visited Mar. 30, 2017).
[17] Section 655.968, F.S.

b) Provides support for an organization designated by the United States as a foreign terrorist organization;
c) Facilitates the activities of a person who is subject to financial sanctions pursuant to a resolution of the United Nations Security Council imposing sanctions on Iran;
d) Engages in money laundering to carry out any activity in this list;
e) Facilitates efforts by the Central Bank of Iran or any other Iranian financial institution to carry out an activity in this list; or
f) Facilitates a significant transaction or provides significant financial services for Iran's Revolutionary Guard Corps or its agents or affiliates, or any financial institution, whose property or interests in property are blocked pursuant to federal law in connection with Iran's proliferation of weapons of mass destruction, or delivery systems for those weapons, or Iran's support for international terrorism.

Additionally, each Florida-chartered financial institution must:

- Annually certify that the financial institution has adopted and substantially complies with the due diligence policies, procedures, and controls required by s. 655.968, F.S., and the rules adopted thereunder;[18] and
- Certify that to the best knowledge of the financial institution, the financial institution does not maintain a correspondent account or a payable-through account with an FFI that knowingly engages in any act described above.[19]

Florida Control of Money Laundering in Financial Institutions Act

The Florida Control of Money Laundering in Financial Institutions Act codifies federal BSA/AML recordkeeping and reporting requirements for Florida-chartered financial institutions, and sets forth administrative remedies, criminal sanctions, and civil money penalties that are enforced by the OFR.[20] In 2014, the Legislature amended the act to codify the requirements of the Federal USA PATRIOT Act and the Office of Foreign Asset Control, which allows the OFR to enforce these provisions.

Competitive Equality

The Codes contain a unique provision that ensures competitive equality for Florida-chartered financial institutions with their nationally-chartered counterparts. If a state law places a Florida-chartered financial institution at a competitive disadvantage with their nationally chartered counterparts, the codes authorizes the OFR to grant Florida-chartered 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.[21] 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.

[18] *See* Rule 69U-100.964, F.A.C.
[19] Section 655.968(4), F.S.
[20] Section 655.50, F.S.
[21] Section 655.061, F.S.

III. Effect of Proposed Changes:

Section 1 creates s. 655.969, F.S., to require Florida-chartered financial institutions that maintain correspondent or payable-through accounts with any foreign financial institution owned by a country under a U.S. Treasury sanctions program to identify and report the source of every transaction that passes through the foreign correspondent account to the OFR within 5 business days.

The bill also requires the Florida-chartered financial institution to certify that the source does not involve any "confiscated property" as defined in the Libertad Act. For purposes of the Libertad Act, the term "confiscated" means:

- The nationalization, expropriation, or other seizure by the Cuban Government or ownership or control of property, on or after January 1, 1959, without the property having been returned or adequate and effective compensation provided; or without the claim to the property having been settled pursuant to an international claims settlement agreement or other mutually accepted settlement procedure; and
- The repudiation by the Cuban Government of, the default by the Cuban Government on, or the failure of the Cuban Government to pay, on or after January 1, 1959, a debt of any enterprise which has been nationalized, expropriated, or otherwise taken by the Cuban Government; a debt which is a charge on property nationalized, expropriated, or otherwise taken by the Cuban Government; or a debt which is incurred by the Cuban Government in satisfaction or settlement of a confiscated property claim. [22]

The term "property" means:

- Any property (including patents, copyrights, trademarks, and any other form of intellectual property), whether real, personal, or mixed, and any present, future; or
- Contingent right, security, or other interest therein, including any leasehold interest.[23]

Section 2 provides the bill takes effect July 1, 2017.

IV. Constitutional Issues:

A. Municipality/County Mandates Restrictions:

None.

B. Public Records/Open Meetings Issues:

None.

C. Trust Funds Restrictions:

None.

[22] 22 U.S.C. s. 6023(4).
[23] 22 U.S.C. s. 6023(12). The definition of "property" excludes real property used for residential purposes unless, as of March 12, 1996, the claim to the property is held by a U.S. national and the claim has been certified under title V of the International Claims Settlement Act or the property is occupied by an official of the Cuban Government or the ruling political party in Cuba.

D. Other Constitutional Issues:

Two federal decisions have addressed state legislation regarding Florida-Cuba relations:

In 2008, Florida enacted amendments to the Florida Sellers of Travel Act, which placed restrictions on travel businesses in Florida, as well as businesses providing services to individuals traveling to or sending humanitarian aid to families in certain designated "terrorist states." In *ABC Charters, Inc. v. Bronson*, 519 F.Supp. 2d 1272 (S.D. Fla. 2008), a federal district court found that the law was aimed principally, if not solely, to travel to Cuba. The court enjoined enforcement of the Travel Act Amendments, concluding they will likely be found unconstitutional under the Foreign Affairs Provisions, the Supremacy Clause, the Foreign Commerce Clause, and the Interstate Commerce Clause of the U.S. Constitution.

In 2012, Florida enacted a "Cuba amendment" to s. 287.4725, F.S., to prohibit companies engaged in business operations in Cuba from bidding on, submitting a proposal for, or entering into or renewing a contract with an agency or local governmental entity for goods or services of $1 million or more. In *Odebrecht Const., Inc. v. Secretary*, Fla. Dep't of Transp., 715 F.3d 1268 (11th Cir. 2013), the Eleventh Circuit Court of Appeals affirmed an injunction prohibiting enforcement of the Cuba Amendment. The court found that the Cuba Amendment was preempted by extensive federal statutory and administrative sanctions and would undermine the President's discretionary authority concerning federal policy toward Cuba.

The bill may implicate the same constitutional considerations as the statutes enjoined in the *ABC Charters* and *Odebrecht* decisions.

V. Fiscal Impact Statement:

A. Tax/Fee Issues:

None.

B. Private Sector Impact:

Indeterminate impact on affected financial institutions.

C. Government Sector Impact:

According to the OFR, the fiscal impact of the bill is indeterminate. Expenditures will be required to review and analyze documentation submitted, assess compliance with statute, and take action, if necessary, regarding non-compliance.[24]

[24] Office of Financial Regulation, *SB 1482 Analysis* (Mar. 16, 2017) (on file with Senate Banking and Insurance Committee).

VI. Technical Deficiencies:

The OFR provided the following comments:

- The term "foreign financial institutions owned by a country under a sanctions program administered by the U.S. Department of Treasury" is ambiguous. First, "sanctions program" is not defined, and thus it is unclear how financial institutions will be able to identify the applicable accounts and comply with the requirements. Further, it is unclear whether "owned by" means chartered by that foreign country, or applies to only "state-owned" institutions.
- While the legislation appears to be specifically aimed at any correspondent account that touches or is associated with Cuba, as drafted, each state-chartered financial institution will have to identify and report the source of any transaction that runs through any correspondent account that it maintains with every institution in any country under a sanctions program, regardless of whether that country is Cuba. The requirement that the source of the transactions be certified is problematic insofar as state-chartered financial institutions are given no guidance to identify the "source of the transaction," a term which is not defined.
- The legislation fails to provide specific agency action related to the collection of the information. The legislation fails to provide any purpose for reporting, and does not provide any protocol or guidance to the OFR regarding further required efforts, if any, once the information is received. The legislation does not provide for a public record exemption related to the reporting, although the information required to be reported may be the books and records of a financial institution. Financial institutions are required to keep their books and records confidential pursuant to s. 655.059, F.S.[25]

VII. Related Issues:

None.

VIII. Statutes Affected:

This bill creates section 655.969 of the Florida Statutes

IX. Additional Information:

A. Committee Substitute – Statement of Changes:
(Summarizing differences between the Committee Substitute and the prior version of the bill.)

None.

B. Amendments:

None.

[25] *Id.*