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: CS/SB 542

INTRODUCER: Commerce and Tourism and Senator Ingoglia

SUBJECT: Boards of Directors of Banks

DATE: January 24, 2024 REVISED:

	ANALYST	STAFF DIRECTOR	REFERENCE	ACTION
1.	Moody	Knudson	BI	**Favorable**
2.	McMillan	McKay	CM	**Fav/CS**
3.			RC	

Please see Section IX. for Additional Information:

COMMITTEE SUBSTITUTE - Substantial Changes

I. Summary:

CS/SB 542 prohibits any person who served as an executive officer or director of a financial institution within the 5 year period before the date such financial institution became insolvent, from serving as an executive officer or director of any state financial institution for 5 years after the date of such insolvency.

Any person who is disqualified under the aforementioned prohibition, is also prohibited from having direct or indirect control over the selection or appointment of an executive officer or director to any state financial institution through contact, trust, or by operation of law during such disqualification period. However, the prohibitions in the bill do not apply when an executive officer or director demonstrates to the Office of Financial Regulation (OFR), and the OFR determines, that the actions or omissions of such executive officer or director were not a contributing cause to the insolvency.

The bill takes effect upon becoming a law.

II. Present Situation:

A bank fails when it must be closed, which generally happens when a bank becomes insolvent because it is unable to meet its monetary obligations.[1] The Federal Deposit Insurance Corporation (FDIC) reports that there have been 566 bank failures from 2001 through 2023,[2] five of which were in 2023.[3]

Dual Oversight of Depository Institutions

An institution must have a federal or state charter to accept deposits. Banks are chartered and regulated as national banks by the Office of the Comptroller of the Currency within the U.S. Department of the Treasury or as state banks by a state regulator.[4]

The Florida Financial Institutions Codes apply to all state-authorized or state-chartered financial banks, trust companies, credit unions and related entities.[5] The Office of Financial Regulation (OFR) licenses and regulates 200 financial entities, including 69 state-chartered banks as of June 2023.[6] There are also 26 nationally-chartered banks and 3 federally-chartered savings institutions operating in Florida as of September 2023.[7]

Due to federal preemptions, a state's regulatory powers in relation to federally chartered institutions is limited. However, the state may exercise powers within their exceptions to exclusive federal visitorial authority. Such exceptions are those recognized by federal law and courts of law, or exceptions created by the U.S. Congress.[8] Banks chartered by the OFR must become members of the Federal Reserve or obtain insurance from the Federal Deposit Insurance Corporation.[9] Thus, state-chartered banks are subject to a dual-regulatory system.[10]

The OFR must examine the condition of each state-chartered financial institution at least every 18 months, and may conduct more frequent examinations as needed that are based on risks associated with a licensee, such as prior examination results or significant operational changes.[11]

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[1] The FDIC, *When a Bank Fails – Facts for Depositors, Creditors, and Borrowers*, July 28, 2014, *available at* FDIC: When a Bank Fails - Facts for Depositors, Creditors, and Borrowers (last visited Jan. 24, 2024) (hereinafter cited as "FDIC: When a Bank Fails – Facts for Depositors, Creditors, and Borrowers).

[2] The FDIC, *Bank Failures in Brief – Summary 2001 through 2023*, Nov. 3, 2023, *available at* FDIC: Bank Failures in Brief (last visited Jan. 24, 2024).

[3] The five banks are: (a) Citizens Bank on November 3, 2023, (b) Heartland Tri-State Bank on July 28, 2023, (c) First Republic Bank on May 1, 2023, (d) Signature Bank on March 12, 2023, and (e) Silicon Valley Bank on March 10, 2023. The FDIC, *Failed Bank List*, Oct. 1, 2000, *available at* FDIC: Failed Bank List (last visited Jan. 24, 2024).

[4] Congressional Research Service, *Introduction to Financial Services: Banking*, p. 1, Jan. 5, 2023, *available at* https://crsreports.congress.gov/product/pdf/IF/IF10035 (last visited Jan. 24, 2024).

[5] Section 655.005(1)(k), F.S., states that the Financial Institutions Codes includes: Ch. 655, financial institutions generally; Ch. 657, credit unions; Ch. 658, banks and trust companies; Ch. 660, trust business; Ch. 662, family trust companies; Ch. 663, international banking; Ch. 665, relating to associations; and Ch. 667, savings banks.

[6] The OFR, *Fast Facts* (2023 ed.), *available at* FastFacts.pdf (flofr.gov) (last visited Jan. 24, 2024).

[7] The FDIC, *FDIC State Tables*, Aug. 31, 2022, *available at* FDIC: State Tables (last visited Jan. 24, 2024).

[8] 12 C.F.R. § 7.4000 (2011).

[9] Sections 658.22 and 658.38, F.S.

[10] The OCC, *Who Regulates My Bank?*, *available at* Who Regulates My Bank? (helpwithmybank.gov) (last visited Jan. 24, 2024).

[11] Section 655.045(1), F.S.

When a state-chartered financial institution also has a federal regulator, the OFR may accept an examination performed by the federal regulator[12] or the regulators may conduct a joint examination.[13]

Laws Relating to Directors and Executive Officers

Once a financial institution obtains a charter, one of the regulator's primary tasks is to ensure solvency, which is achieved by conducting financial exams of its licensed entities. Financial institutions also need approval from their regulator to make changes in their upper management, merge with another company, pay dividends to shareholders, engage in material transactions with subsidiaries and affiliates, or make significant changes to their business operations.[14]

Qualifications

Section 658.33, F.S., provides that the board of directors of a bank or trust company must consist of at least five directors. Each director must be elected, except in cases when a director is appointed to fill a vacancy.[15] Elections are held at the annual meeting of stockholders or at a special meeting.[16]

A majority of the directors must be United States citizens during their whole term of service, and a majority of the directors must have resided in Florida for at least 1 year preceding their election and must remain residents during their time in office.[17] Within 30 days following the annual meeting or any other meeting at which directors or officers are elected, the bank or trust company must submit to the office the names and residence addresses of those persons on a form adopted by the commission and provided by the office.[18]

Each director, upon assuming office, must acknowledge that he or she is familiar with his or her responsibilities as a director and that he or she will diligently and honestly administer the affairs of the bank or trust company and will not knowingly violate, or willfully permit to be violated, any of the provisions of the financial institutions codes or pertinent rules of the commission.[19]

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[12] The FDIC may conduct examinations or take authorized investigatory steps to determine compliance with applicable law and regulations. 12 U.S.C. § 1820.

[13] Section 655.045(1)(a), F.S.

[14] For a detailed discussion of the regulatory framework, see, Congressional Research Service, *Who Regulates Whom? An Overview of the U.S. Financial Regulatory Framework*, March 10, 2020, *available at* https://crsreports.congress.gov/product/pdf/R/R44918/7 (last visited Jan. 24, 2024). *See also* ss. 655.0385, 655.0386, 655.03855, and 655.412, F.S.

[15] Section 658.33(1), F.S.

[16] *Id.* However, if authorized by the articles of incorporation, a majority of the full board of directors may, at any time during the year following the annual meeting of shareholders, increase the number of directors of the bank or trust company by not more than two and appoint persons to fill the resulting vacancies.

[17] Section 658.33(2), F.S. In the case of a bank or trust company with total assets of less than $150 million, at least one, and in the case of a bank or trust company with total assets of $150 million or more, two of the directors who are not also officers of the bank or trust company must have had at least 1 year of direct experience as an executive officer, regulator, or director of a financial institution within the last 5 years.

[18] Section 658.33(3), F.S.

[19] Section 658.33(4), F.S. The signed copy of such oath must be filed with the office within 30 days after election.

The president, chief executive officer, or any other person, regardless of title, who has equivalent rank or leads the overall operations of the bank or trust company must have had at least 1 year of direct experience as an executive officer, director, or regulator of a financial institution within the last 5 years.[20]

Disapproval of Directors and Executive Officers

Federal law

An insurance depository institution[21] or a depository institution holding company[22] must notify the appropriate Federal banking agency[23] of the proposed addition of any individual to the board of directors or the employment of any individual as a senior executive officer of such institution or holding company at least 30 days (or such other time as prescribed by the Federal banking agency) before such addition if:[24]

- The entity is noncompliant with minimum capital requirements or is otherwise in a troubled condition;[25] or
- The agency determines, within its specified authority, that prior notice is appropriate.

The appropriate Federal banking agency must issue a notice of disapproval if the competence, experience, character, or integrity of an individual indicates that it would not be in the best interests of the depositors of the depository institution or the public to permit the individual to be a director or be employed as a senior executive officer of the institution.[26] If the appropriate Federal banking agency issues a notice of disapproval before the end of a specified notice period, the entity may not add the individual to the board of directors.[27]

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[20] *See* s. 658.33(5), F.S. This requirement may be waived by the OFR after considering the overall experience and expertise of the proposed officer and the condition of the bank or trust company as reflected in the most recent regulatory examination report and other available data.

[21] "Insured depository institution" is defined as any bank or savings association the deposits of which are insured by the FDIC pursuant to ch. 16. 12 U.S.C. § 1831(c)(2). Under Florida law, a state bank must obtain and thereafter maintain insurance of its deposits by the FDIC. *See* s. 658.38, F.S.

[22] "Depository institution holding company" is defined as a bank holding company or a savings and loan holding company. 12 U.S.C. § 1831(w). "Bank holding company" means any company which has control over any bank or over any company that is or becomes a bank holding company by virtue of ch. 17. 12 U.S.C. § 1841. "Savings and loan holding company" is defined as any company that directly or indirectly controls a savings association or that controls any other company that is a savings and loan holding company except as specified in 12 U.S.C. § 1467a(a)(1)(D)(ii). 12 U.S.C. § 1467a(a)(1)(D)(i).

[23] "Appropriate Federal banking agency" is defined as: (1) the Office of the Comptroller of the Currency in the case of: (A) any national banking association; (B) any Federal branch or agency of a foreign bank; and (C) any Federal savings association; (2) the Federal Deposit Insurance Corporation, in the case of: (A) any State nonmember insured bank; (B) any foreign bank having an insured branch; and (C) any State savings association; (3) the Board of Governors of the Federal Reserve System, in the case of: (A) any State bank; (B) certain branch or agencies of a foreign bank; (C) any foreign bank which does not operate an insured branch; (D) any agency or commercial lending company other than a Federal agency; (E) supervisory or regulatory proceedings arising from the authority given to the Board of Governors under certain provisions; (F) any bank holding company and any non-depository subsidiaries of a bank holding company; and (G) any savings and loan holding company and any non-depository subsidiaries of a savings and loan holding company. 12 U.S.C. § 1813(q).

[24] 12 U.S.C. § 1831i(a).

[25] "Troubled condition" must be defined by each appropriate Federal banking agency. 12 U.S.C. § 1831i(f).

[26] 12 U.S.C. § 1831i(e).

[27] 12 U.S.C. § 1831i(b).

Florida law

Similar to Federal law, Florida law also authorizes the OFR to disapprove the proposed appointment of any individual to the board of directors or employment of an individual as an executive officer if the state financial institution meets specified criteria, including, but not limited to, when the institution is non-compliant with minimum capital requirements or is otherwise operating in an unsafe and unsound condition.[28]

Removal and Prohibition Orders of Directors

Federal law

Pursuant to 12 U.S.C. 1818(e), an appropriate Federal banking agency may serve upon a director (other than a bank holding company or savings and loan holding company)[29] a written notice of the agency's intention to remove such director from office or to prohibit any further participation in the conduct of the affairs of any insured depository institution if certain criteria are met.[30] Specifically, the appropriate Federal banking agency may take such action if it has determined that a director has:[31]

- Violated any law or regulation, any final cease-and-desist order, or certain conditions imposed in writing by, or any written agreement entered into with, certain Federal banking agencies;
- Engaged in any unsafe or unsound practice, or any act, omission, or practice which constitutions a breach of the director's fiduciary duty;
- By reason of the violation, practice, or breach:
    - Such insured depository institution or business institution has suffered or will probably suffer financial loss or other damage;
    - The interests of the insured depository institution's depositors have been or could be prejudiced; or
    - The director has received financial gain or other benefit by reason of such violation, practice, or breach; and
- Such violation, practice, or breach involves personal dishonesty by the director, or demonstrates willful or continuing disregard by the director for the safety or soundness of such insured depository institution or business.

[28] "Unsafe and unsound practice" is defined as: 1. any 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. Section 655.005(y), F.S.

[29] Federal law applies to "any institution-affiliated party" which is a broader category of persons than only directors and is defined as: (1) any director, officer, employee, or controlling stockholder (other than a bank holding company or savings and loan holding company) of, or agent for, an insured depository institution; (2) any other person who has filed or is required to file a change-in-control notice with the appropriate Federal banking agency under s. 1817(j) of this title; (3) any shareholder (other than a bank holding company or savings and loan holding company), consultant, joint venture partner, and any other person as determined by the appropriate Federal banking agency (by regulation or case-by-case) who participates in the conduct of the affairs of an insured depository institution; and (4) certain independent contractors. 12 U.S.C. § 1813(u).

[30] 12 U.S.C. § 1818(e). The appropriate Federal banking agency may also remove a director for specific violations of federal law, such as intentionally violating provisions relating to records and reports on mandatory instruments transactions. 12 U.S.C. § 1818(e)(2).

[31] 12 U.S.C. § 1818(e)(1).

The appropriate Federal banking agency may suspend the director from office or prohibit the director from further participation in the affairs of the depository institution if the agency finds that such action is necessary for the protection of the depository institution's depositors, and the director is served with written notice of the suspension order.[32]

Any director who is suspended from office or prohibited from participating in the affairs of the institution pursuant to this provision or pursuant to certain criminal offenses[33] may not, while such order is in effect, continue or commence to hold any office in, or participate in any manner in the conduct of the affairs of, any insured depository institution and other specified entities.[34] A specified federal agency may consent to limit or cease enforcement of any order against a director.[35]

Pursuant to these provisions, the FDIC pursued enforcement actions against directors of First NBC Bank which was a bank in New Orleans that failed in April 2017.[36] In April 2023, the FDIC issued orders of prohibition from further participation in specified activities, including serving or acting as a director unless or until the order is modified, terminated, suspended, or set aside by the FDIC and specified agencies.[37]

Florida law

Similar to Federal laws, Section 655.037, F.S., authorizes the OFR to issue and serve a complaint to remove a director[38] of a financial institution if the OFR has reason to believe that such party is engaging or has engaged in any specified conduct, including, but not limited to, an unsafe or unsound practice,[39] a prohibited act or practice, or a willful violation of any law relating to financial institutions.[40] The complaint must contain a statement of facts and notice of opportunity to be heard.[41] The OFR may enter an order removing the director or restricting or prohibiting

[32] 12 U.S.C. § 1818(e)(3)(A).
[33] 12 U.S.C. § 1818(g).
[34] 12 U.S.C. § 1818(e)(7)(A).
[35] 12 U.S.C. § 1818(e)(7)(B).
[36] RegReport, *Directors from Failed NOLA Bank Prohibited from Further Service or Fined – or Both*, May 26, 2023, *available at* Directors from failed NOLA bank prohibited from further service or fined – or both – Regulatory Report (regreport.info) (last visited Jan. 24, 2024).
[37] The FDIC, *ED&O Search Form*, *available at* FDIC: Enforcement Decisions and Orders - Search Form (last visited Jan. 24, 2024).
[38] Florida law applies to any "financial institution-affiliated party" which is a broader category of persons than only directors and is defined as: 1. a director, officer, employee, or controlling stockholder, other than a financial institution holding company, of, or agent for, a financial institution, subsidiary, or service corporation; 2. Any other person who has filed or is required to file a change-of-control notice with the appropriate state or federal regulatory agency; 3. A stockholder, other than a financial institution holding company, a joint venture partner, or any other person as determined by the office who participates in the affairs of a financial institution, subsidiary, or service corporation; or 4. certain independent contractors. *See* s. 655.005(j), F.S.
[39] "Unsafe or unsound practice" is defined as: 1. any 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. *See* s. 655.005(y), F.S.
[40] Section 655.037(1), F.S.
[41] Section 655.037(2), F.S. The OFR's jurisdiction and authority to issue any notice and proceed with a complaint is not affected by resignation, termination of employment or participation, or separation from a state financial institution by the

participation by the director in the affairs of that particular state financial institution, or any other state financial institution, subsidiary, or service if: (a) the director does not request a hearing within the prescribed time, or (b) a hearing is held and the OFR makes findings that:[42]

- Any of the charges in the complaint are true;
- One of the following is met:
  - The state financial institution has suffered or will likely suffer loss or other damage;
  - The interests of the depositors, members, or shareholders could be seriously prejudiced; or
  - The director has received financial gain by reason of such violation, practice, or breach; and
- Such violation, practice, or breach of fiduciary duty is one involving personal dishonesty by the director, or a continued disregard for the safety or soundness of the state financial institution.[43]

Under Florida law, any director removed from office pursuant to s. 655.037, F.S., is not eligible for reelection to such position or to any official position in any financial institution in Florida except with the written consent of the OFR.[44]

III. Effect of Proposed Changes:

The bill creates s. 655.038, F.S., to prohibit any person who served as an executive officer or director of a financial institution within the 5 year period before the date such financial institution became insolvent, from serving as an executive officer or director of any state financial institution for 5 years after the date of such insolvency. This prohibition only applies to any insolvency that occurs on or after the effective date of the bill.

The bill provides that any person who is disqualified under the aforementioned prohibition, is also prohibited from having direct or indirect control over the selection or appointment of an executive officer or director to any state financial institution through contact, trust, or by operation of law during such disqualification period. However, the prohibitions in the bill do not apply when an executive officer or director demonstrates to the OFR, and the OFR determines, that the actions or omissions of such executive officer or director were not a contributing cause to the insolvency.

The bill directs the Division of Law Revision to replace the phrase “the effective date of this act” wherever it occurs in the bill with the date this bill becomes a law.

The bill takes effect upon becoming a law.

director if such notice is served before the end of the 6-year period beginning on the date such person ceases to be such a director with respect to the state financial institution. *See* s. 655.037(8), F.S.

[42] *See* s. 655.037, F.S.

[43] *See* s. 655.037(3), F.S.

[44] Section 655.037(7), F.S.

IV. Constitutional Issues:

A. Municipality/County Mandates Restrictions:

None.

B. Public Records/Open Meetings Issues:

None.

C. Trust Funds Restrictions:

None.

D. State Tax or Fee Increases:

None.

E. Other Constitutional Issues:

None Identified.

V. Fiscal Impact Statement:

A. Tax/Fee Issues:

None.

B. Private Sector Impact:

Financial institutions and their customers may benefit from not having executive officers or directors that held the same position in a financial institution doing business in Florida that went insolvent within the previous 5 years.

A financial institution may incur replacement costs to the extent that any current executive officers or directors are disqualified under the provisions of the bill. Executive officers and directors who, but for the provisions of CS/SB 542, would serve as an executive officer or director of a financial institution may lose compensation.

C. Government Sector Impact:

None.

VI. Technical Deficiencies:

None.

VII. Related Issues:

None.

VIII. Statutes Affected:

This bill creates section 655.038 of the Florida Statutes.

IX. Additional Information:

A. Committee Substitute – Statement of Substantial Changes:

(Summarizing differences between the Committee Substitute and the prior version of the bill.)

CS by Commerce and Tourism on January 23, 2024

The committee substitute creates s. 655.038, F.S., to prohibit any person who served as an executive officer or director of a financial institution within the 5 year period before the date such financial institution became insolvent, from serving as an executive officer or director of any state financial institution for 5 years after the date of such insolvency. This prohibition only applies to any insolvency that occurs on or after the effective date of the bill. Additionally, any person who is disqualified under the aforementioned prohibition, is also prohibited from having direct or indirect control over the selection or appointment of an executive officer or director to any state financial institution through contact, trust, or by operation of law during such disqualification period. However, the prohibitions in the bill do not apply when an executive officer or director demonstrates to the Office of Financial Regulation (OFR), and the OFR determines, that the actions or omissions of such executive officer or director were not a contributing cause to the insolvency. The bill will take effect upon becoming a law.

B. Amendments:

None.