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 Appropriations

BILL:	CS/CS/SB 1012
INTRODUCER:	Appropriations Committee; Banking and Insurance Committee; and Senator Richter
SUBJECT:	Financial Institutions
DATE:	April 24, 2014 REVISED:

	ANALYST	STAFF DIRECTOR	REFERENCE	ACTION
1.	Johnson	Knudson	BI	**Fav/CS**
2.	Clodfelter/Davis	Sadberry	ACJ	**Favorable**
3.	Johnson/Clodfelter/ Davis	Kynoch	AP	**Fav/CS**

Please see Section IX. for Additional Information:

COMMITTEE SUBSTITUTE - Substantial Changes

I. Summary:

CS/CS/SB 1012 amends provisions of the Financial Institutions Codes (codes). The Office of Financial Regulation (OFR) regulates state-chartered banks, trust companies, credit unions, and other financial institutions pursuant to the codes. The OFR ensures that Florida-chartered financial institutions comply with state and federal requirements for safety and soundness. This bill provides the following changes to the codes:

- Updates provisions of the Florida Control of Money Laundering in Financial Institutions Act to codify the requirements of the Federal USA PATRIOT Act and the Office of Foreign Asset Control.
- Clarifies permissible activities for out of state trust companies and business trusts.
- Expands the scope of persons subject to prohibited acts and practices to include affiliates and related interests.
- Authorizes the OFR to issue immediate cease and desist orders for persons using misleading banking-related names to perpetrate fraud on Florida consumers.
- Expands competitive equality for Florida-chartered financial institutions by clarifying that the par value requirement only applies to the settlement of checks between financial institutions, and provides that such institutions may charge fees to cash checks.
- Expands competitive equality to Florida-chartered credit unions by authorizing employee benefit plans and specified types of insurance coverage that is consistent with regulations governing federal credit unions.

- Provides a general rule of preemption to the state for financial or lending activities, and requires financial institutions to report any administrative or civil proceedings or civil investigations initiated by a county or municipality to the OFR;
- Provides that a financial institution is not civilly liable for the actions or operations of a borrower solely by virtue of extending a loan or a line of credit to such borrower; and,
- The bill repeals the $2,000 annual assessment imposed on each international representative office, international administrative office and international trust company.

The OFR indicates that it expects the provisions of the bill to have a negligible fiscal impact. The Office of the State Courts Administrator expects the bill to result in an increase in workload for the court system, but is unable to estimate the extent or cost of the increase.

II. Present Situation:

The "dual banking system" refers to the parallel state and federal banking systems that co-exist in the United States. The federal system is based on a federal bank charter, powers defined under federal law, the National Bank Act,[1] operation under federal regulations, and oversight by the primary federal regulator, the Office of the Comptroller of the Currency (OCC) within the U.S. Department of the Treasury. The state system is characterized by state chartering, bank powers established under state law, and operation under state standards, including oversight by state supervisors. The primary federal regulator for state banks that are members of the Federal Reserve is the Federal Reserve. The primary federal regulator for non-members is the Federal Deposit Insurance Corporation.

National banks are subject to state laws concerning their daily course of business, such as their acquisition and transfer of property, their right to collect their debts and their liability to be sued for debts, contracts, usury, and trust powers.[2] However, while states are generally free to legislate on matters not controlled by federal regulation, the application of state laws to national banks is subject to the preemption doctrine. By operation of the Supremacy Clause of the United States Constitution, federal regulation of a particular subject preempts state regulation related to the same subject. For instance, the United States Supreme Court held that a federal statute granting small town banks the authority to sell insurance preempted a Florida statute that prohibited such sales.[3] The federal Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010 codified the test for "conflict preemption" articulated in the Barnett Bank decision. The conflict preemption test asks whether the state law prevents or significantly interferes with the exercise of a national bank's powers.

Federal Oversight

The Federal Deposit Insurance Corporation (FDIC) insures deposits in banks and thrift institutions for at least $250,000 and identifies, monitors, and addresses risks to deposit

[1] The National Bank Act of 1964 (12 U.S.C. s. 24) gives enumerated powers and "all such incidental powers as shall be necessary to carry on the business of banking" to nationally chartered banks. To prevent inconsistent or intrusive state regulation from impairing the national system, Congress provided "No national bank shall be subject to any visitorial powers except as authorized by Federal law." Id. at s. 484(a).
[2] *National Bank* v. *Commonwealth*, 76 U.S. 353 (1869).
[3] *Barnett Bank of Marion County, N.A. v. Nelson, Florida Insurance Commissioner, et. al.,* 517 U.S. 25 (1999).

insurance funds. The FDIC Rules and Regulations require an annual, comprehensive on-site examination of every insured state nonmember bank at least once during each 12-month period, with exceptions.

Anti-Money Laundering and Terrorist Financing Provisions

The Financial Crimes Enforcement Network (FinCEN) within the U.S. Department of the Treasury is charged with safeguarding the U.S. financial system from the abuses of money laundering, terrorist financing, and other financial crimes. It exercises regulatory functions primarily under the Currency and Financial Transactions Reporting Act of 1970, as amended by Title III of the USA PATRIOT Act of 2001[4] and other legislation, which is known as the "Bank Secrecy Act" (BSA). The Secretary of the Treasury has delegated to the Director of FinCEN the authority to implement, administer, and enforce compliance with the BSA and associated regulations. These regulations include requiring banks and other financial institutions to take a number of precautions against financial crime, including the establishment of anti-money laundering (AML) programs, maintaining certain records, and the filing of reports.

The Office of Foreign Assets Control (OFAC) within the U.S. Department of the Treasury administers and enforces economic and trade sanctions programs primarily against countries and groups of individuals, such as terrorists and narcotics traffickers. Prohibited transactions can include trade or financial transactions and other dealings in which U.S. persons may not engage unless authorized by the OFAC or expressly exempted by statute.[5]

State Oversight

The Office of Financial Regulation (OFR) ensures Florida-chartered financial institutions comply with state and federal requirements for safety and soundness. The codes define the term, "financial institution," to include banks, trust business, credit unions, international banks, savings banks and other entities.[6]

Enforcement Authority

Section 655.041, F.S., allows the OFR to initiate administrative proceedings to impose a fine against persons that have violated the financial institutions codes, a cease and desist order of the OFR, or any written agreement with the OFR. Section 655.041, F.S., provides that a person must receive written notice of a violation and be offered a reasonable period to cure the violation before the accrual of any fines or the initiation of any administrative proceedings to impose a fine.

Lending Limits and Related Interests

According to the OCC regulations for national banks, lending limits ensure the safety and soundness of national banks by preventing excessive loans to one person or to related persons that are financially dependent. These limits promote diversification of loans and help ensure

[4] The official title of the USA PATRIOT Act is "Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism (USA PATRIOT) Act of 2001." Pub. Law No. 107-56, H.R. 3162, 107th Cong. (October 26, 2001).
[5] See http://www.treasury.gov/resource-center/faqs/Sanctions/Pages/answer.aspx#1 (last visited February 26, 2014).
[6] Section 655.005, F.S.

equitable access to banking services.[7] The lending limits apply to all loans and extensions of credit made by national banks and their domestic operating subsidiaries. If the state lending limits are lower than those provided by Regulation O for state banks that are members of the Federal Reserve System, Regulation O provides that the state lending limits control.

Florida-chartered banks are also subject to lending limits. Generally, a bank may extend unsecured credit to any person up to 15 percent of its capital accounts, and up to 25 percent of its capital accounts for secured credit. For the latter, the codes specify that the 25 percent limitation must include the borrower's "related interests."[8] If the bank's total extension of credit to any person (including his or her related interests) exceeds 15 percent of the bank's capital accounts, a majority of the bank's board of directors must approve the loan in advance. A bank is prohibited from extending credit of more than $25,000 to any of its executive officers and directors (and their related interests) unless the majority of the board of directors have approved the loan in advance.

Currently, s. 655.005(1)(t), F.S., defines "related interest" as:

> [W]ith respect to any person, the person's spouse, partner, sibling, parent, child, or other individual residing in the same household as the person. With respect to any person, the term means a company, partnership, corporation, or other business organization controlled by the person. A person has control if the person:
> - Owns, controls, or has the power to vote 25 percent or more of any class of voting securities of the organization;
> - Controls in any manner the election of a majority of the directors of the organization; or
> - Has the power to exercise a controlling influence over the management or policies of the organization.

The 2011 Legislature amended the definition of "related interest."[9] Prior to 2011, the term, "related interest," was defined within the context of credit unions' loan powers and lending limits for state banks, and was limited to only any partnership, corporation, or other business organization controlled by a person. Because of the 2011 legislation, "related interest" was moved to s. 655.005(1)(t), F.S., as a general definition and was amended to include specified family and household members of a person. The purpose of this change was to stop circumvention of lending limits by executives and stockholders, who used relatives to obtain loans and other financial benefits.

Regulation O contains a similar prohibition for loans to executive officers, directors, and principal shareholders of state and national banks that are members of the Federal Reserve System.[10] Regulation O provides that a principal shareholder is a person with 10 percent or more of a bank's voting securities, and accounts for shares owned by that person's "immediate

[7] 12 C.F.R. 32.1(b).
[8] Section 658.48(1)(a), F.S.
[9] Ch. 2011-194, Laws of Fla.
[10] 12 C.F.R. s. 215.

family." However, Regulation O only considers an individual's spouse, minor children, and the individual's children residing in the same household, while the Florida provision also includes partners, siblings, parents, or other individuals residing in the same household.

Settlement of Checks and Par Value

Section 655.85, F.S., requires banks to settle checks "at par," or at face value. This means that if a person presented a check made out to her or him for $500 to any bank in Florida, the bank is required to provide $500 in funds. In the past several years, this provision has generated significant litigation in both state and federal courts by consumers who were charged fees to have checks cashed at banks at which they were not account holders. These cases generally involved federal preemption and applicability of the fee limitations to bank-to-bank transactions or to the cashing of personal checks.

Vida Baptista ("Baptista"), sought to cash a check at a Florida branch of JPMorgan Chase, a national bank. While a Chase account holder wrote the check, Baptista was not a Chase account holder, and was charged a $6 fee by Chase to cash the check immediately. Baptista brought a class action lawsuit against Chase in federal court, asserting the fee violated s. 655.85, F.S. The federal court held that s. 655.85, F.S., applied to fees on personal checks presented by the payee in person. However, in applying the Barnett Bank/Dodd-Frank preemption test described above, the federal district and appellate courts ruled in favor of Chase, finding that s. 655.85, F.S., was preempted by the National Bank Act, which allows banks to exercise a range of incidental powers necessary to carry on the business of banking.[11]

Baptista also brought a separate class action lawsuit against PNC Bank, a North Carolina state-chartered bank, in a Florida state court, based on grounds similar to those raised in her lawsuit against Chase. Baptista did not hold an account at PNC Bank and was charged a $5 check-cashing fee to cash a check at a Florida branch. The Fifth District Court of Appeal found that a statute was not preempted. The court held that a North Carolina state-chartered bank was not permitted to charge check-cashing fees under the statute. Finding that the statute was not ambiguous, the Fifth DCA found that the statute did not apply only to bank-to-bank transactions.[12] In an earlier decision, the Fifth DCA had ruled in favor of Bank of America (a national bank) by holding that s. 655.85, F.S., was preempted by federal law.[13]

On January 2, 2013, a federal district court in Florida ruled in favor of Regions Bank (an Alabama state-chartered bank) in a class action lawsuit similar to both Baptista cases.[14] Following the 11th Circuit Court of Appeal's decision in *Baptista v. JPMorgan Chase Bank*, the federal district court found that s. 655.85, F.S., was preempted, and thus inapplicable to both national banks and out-of-state state-chartered banks. However, the federal court did not address the issue of whether the statute applied only to bank-to-bank transactions or to the cashing of personal checks. These decisions do not affect the statute's prohibition on Florida-chartered

[11] *Vida Baptista v. JPMorgan Chase Bank*, 640 F.3d 1194 (11th Cir. C.A. 2011). The U.S. Supreme Court denied Baptista's petition for certiorari review of the federal appellate decision. *Baptista v. JPMorgan Chase Bank, N.A.*, 132 S.Ct. 253 (2011).
[12] *Vida Baptista v. PNC, N.A.*, 91 So.3d 230 (Fla. 5th DCA 2012) (per curiam), *cert. denied*, 133 S.Ct. 895 (2013).
[13] *Britt v. Bank of America, N.A.*, 52 So.3d 809 (Fla. 5th DCA 2011).
[14] *Pereira v. Regions Bank*, 2013 WL 265314 (M.D.Fla. 2013).

banks to charge check-cashing fees, because banks must follow the laws and regulations of their chartering authority.

Competitive Equality

States have enacted competitive equality or parity statutes to address the competitive advantages granted to national banks through their "incidental banking powers" under the federal National Bank Act. In Florida, if a state law places a Florida institution at a competitive disadvantage with a national institution, the OFR may grant a Florida institution the authority to make any loan or investment or exercise any power that it could make or exercise if it was a federally chartered financial institution, and provide entitlement to the same privileges and protections granted to a federally chartered or regulated institution.[15] In addition, the office or commission must consider the importance of maintaining a competitive dual system of financial institutions, and whether issuing such an order or rule is in the public interest.[16]

Local Government Powers and Legislative Preemption

The Florida Constitution grants counties or municipalities broad home rule authority. Specifically, non-charter county governments may exercise those powers of self-government that are authorized by federal or special law. Those counties operating under a county charter have all powers of self-government not inconsistent with general law.[17] Section 125.01, F.S., enumerates the powers and duties of all county governments, which may be exercised to the extent not inconsistent with general or special law. Section 166.021, F.S., provides that municipalities have those governmental, corporate, and proprietary powers that enable them to conduct municipal government, perform municipal functions and render municipal services, and may exercise any power for municipal purposes, except when expressly prohibited by law.

Under its broad home rule powers, a municipality or a charter county may legislate concurrently with the Legislature on any subject that has not been expressly preempted to the state. A county or municipality may not forbid what the legislature has expressly licensed, authorized or required, nor may it authorize what the legislature has expressly forbidden.[18]

In 2002, the Florida Legislature enacted the Florida Fair Lending Act (part IV, ch. 494, F.S.) to impose similar or more stringent restrictions on high-cost home loans than those found in the federal Home Ownership and Equity Protection Act (HOEPA) at the time of enactment. The Florida Fair Lending Act is administratively enforced by the OFR. In addition, several states and cities had enacted laws restricting or prohibiting the use of certain credit provisions commonly associated with predatory lending. Lenders have expressed concerns with compliance with a multitude of varying state and local requirements across different jurisdictions, and have argued for a national standard such as HOEPA. In response to these concerns, s. 494.00797, F.S., was enacted prohibiting counties and municipalities from enacting and enforcing local laws regulating financial or lending activities upon certain persons or entities, subject to the regulatory

[15] *See* Section 655.061, F.S.
[16] The OFR's orders of general application are publicly available on its agency website. https://real.flofr.com/ConsumerServices/SearchLegalDocuments/LDSearch.aspx (last accessed February 28, 2014).
[17] *See* Section 125.81(1), F.S.
[18] *City of Hollywood v. Mulligan*, 934 So.2d 1238 (Fla. 2006).

jurisdiction of the OFR, enumerated federal banking regulators, or authorized by Congress to engage in secondary market mortgage transactions.

Lender Liability and Third-party Litigation against Financial Institutions

Lender liability law generally requires lenders to treat their borrowers fairly, and subjects lending institutions to civil liability for losses and injuries sustained because of the lender's actions. In addition, the express terms of contracts governed by the Uniform Commercial Code are subject to the obligation of good faith.[19] In some cases, courts may infer a fiduciary relationship between the lender and the borrower if the facts indicate a relationship of trust.[20] Lenders can be subject to a number of legal claims by borrowers, most commonly under contract and tort theories of breach of contract, bad faith, fraud or misrepresentation, negligence, and tortious interference. Other lender liability claims may include labor violations, environmental violations, wrongful foreclosures, or a variety of civil remedies under federal regulatory statutes such as the Truth in Lending Act.

However, case law provides that lenders are generally not legally responsible for the operations and actions of its borrowers that cause harm to third parties.[21] Some exceptions include a joint venture between the borrower and lender or where a lender actively controls the borrower's business (especially as to the election of directors and the influence of day-to-day business affairs and decisions).[22]

In a number of recent medical negligence lawsuits filed against nursing homes in Florida courts, the plaintiffs have named large financial institutions as co-defendants, or have sought to collect a final money judgment against these banks when the plaintiffs were unable to collect from the nursing homes. The plaintiffs alleged that the lenders "colluded to pull money out of nursing home operations."[23] These lenders generally provided commercial loans to the nursing homes to finance a variety of operations, such as facility acquisitions. Plaintiffs have variously alleged in the different cases that the lender was related to the nursing home as a private equity investor, controlling owner, or through involvement with the nursing facilities through the financial institution's clinical performance division.[24] In two cases resulting in multi-million dollar jury verdicts on behalf of the estates of nursing home patients, the bank asserted that it did not have control over patient care and should not be held liable for the medical negligence claim.[25]

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[19] Section 671.203, F.S.
[20] *Barnett Bank v. Hooper*, 498 So.2d 923 (Fla. 1986).
[21] *Armetta v. Clevetrust Realty Inv.*, 359 So.2d 540, 543 (Fla. 4th DCA 1978) ("A lender owes no duty to others to supervise the construction and development of projects which it has financed."); *Napolitano v. Sec. First Fed. S&L Assoc.*, 533 So.2d 948 (Fla. 5th DCA 1988) ("Florida law is clear that a lender owes no duty to others to supervise construction which it has financed.").
[22] *Citibank, N.A. v Data Lease Fin. Corp.*, 828 F.2d 686 (11th Cir. 1987), cert. denied, 484. U.S. 1062 (1988).
[23] Stephen Nohlgren, "Tampa law firm wins another big verdict in nursing home lawsuit without a defense," *Tampa Bay Times* (February 8, 2012), at http://www.tampabay.com/news/courts/civil/tampa-law-firm-wins-another-big-verdict-in-nursing-home-lawsuit-without-a/1214647 (last accessed April 1, 2014).
[24] Nursing home litigation documents on file with the Banking and Insurance Committee staff.
[25] Stephen Nohlgren, "Who should pay the $200 million for nursing home death? It's complicated," *Tampa Bay Times* (February 4, 2012), at http://www.tampabay.com/news/courts/civil/who-should-pay-the-200-million-for-nursing-home-death-its-complicated/1214062 (last accessed April 1, 2014).

III. Effect of Proposed Changes:

Settlement of Checks and Par Value (Sections 12 and 13)

The bill provides that financial institutions must settle checks between institutions at par. The bill clarifies that banks are not prohibited from charging fees to cash checks presented by payees in person, thereby providing consistency with the federal decisions discussed in the Present Situation above. The bill provides a statement of legislative intent indicating that the changes clarify the relevant portions of the codes relating to the fees imposed by financial institutions.

Enforcement Authority

Related Interests (Section 1)

The bill amends the definition of "related interest" under s. 655.005, F.S. The bill removes a person's partner, sibling, or other individual residing in the same household as the person from the definition. The revised definition provides that the term "related interest" applies to an individual, company, partnership, corporation, or other business organization that engages in a common business enterprise with that person.

State Preemption and the Regulation of Financial Institutions (Sections 2 and 16)

This bill creates s. 655.017, F.S., which prohibits counties and municipalities from enacting and enforcing ordinances, resolutions or rules regulating financial or lending activities of persons who are subject to the jurisdiction of the OFR pursuant to the codes; persons who are subject to the jurisdiction of any one of specified federal agencies that regulate financial and lending activities; persons who originate, purchase, sell, assign, secure, or service property interests or obligations created by financial transactions or loans made by such persons; entities chartered by the U.S. Congress to engage in secondary market mortgage transactions; or persons acting on behalf of the Florida Housing Finance Corporation.

Subsection (1) is substantially similar to s. 414.0797, F.S. The bill excludes the Office of Thrift Supervision (formerly the primary federal regulator for savings banks and savings and loan association) as a federal banking regulator, since it was merged into other federal banking agencies in July 2011, by operation of the Dodd-Frank Act. The bill also includes the Board of Governors of the Federal Reserve System as a federal banking regulator.

Subsection (2) provides that counties and municipalities are not prevented from engaging in civil investigations or initiating civil or administrative proceedings to enforce any non-preempted state or local laws, rules, and ordinances. However, the bill provides that the OFR has sole and exclusive jurisdiction to initiate appropriate proceedings, if the OFR determines a local investigation or proceeding is based on a local law that is preempted, or "directly and specifically regulates the manner, content, or terms and conditions of any financial transaction or account related thereto, as may be authorized for financial institutions to engage in, or prevents, significantly interferes with, or alters the exercise of powers granted to a financial institution under the financial institutions codes or by any applicable federal law or regulation." This

preemption standard is similar to the Barnett Bank federal standard, as codified in the Dodd-Frank Act, for preempting state consumer financial laws.[26]

Additionally, subsection (3) provides that new s. 655.017, F.S., does not limit or restrict the powers of the Department of Legal Affairs or law enforcement agencies in Florida to commence criminal proceedings or of the Department of Legal Affairs to bring a civil action. This preserves the police powers of these entities and reinforces the fact that the OFR does not have jurisdiction over criminal proceedings.

The bill also amends s. 655.948, F.S., the notice of significant events statute, to require financial institutions to notify the OFR within 30 days of any civil investigation or any civil or administrative proceeding initiated by counties or municipalities against the financial institution or its subsidiary or service corporation. The bill provides a safe harbor for reporting entities that make a good faith effort to fulfill this disclosure requirement.

Prohibited Acts (Section 3)

The bill amends s. 655.0322, F.S., to expand the scope of prohibited acts and practices to include affiliates and related interests. The codes define "affiliate" as "a holding company of a financial institution established pursuant to state or federal law, a subsidiary or service corporation of such holding company, or a subsidiary or a service corporation of a financial institution."[27]

Administrative Authority and Fines (Section 7)

The bill amends s. 655.041, F.S., to revise the OFR's authority by providing that a violation of any rules adopted under the codes is also grounds for the OFR to impose administrative fines. The bill provides that a violation of any OFR order is a basis for administrative fines. Under current law, the OFR may initiate a proceeding if a person has violated the codes, a cease and desist order, or a written agreement with the OFR. The bill expands the scope of the section to apply to affiliates and persons regulated by the OFR pursuant to s. 655.0391, F.S. The bill provides that if there is a violation of an OFR order or written agreement, fines begin accruing immediately upon the service of a complaint. Such fines will continue until the violation is corrected.

Injunctions (Section 4)

The bill provides that a violation of a "formal enforcement action" would allow the circuit court to have jurisdiction to hear the complaint. The bill defines a "formal enforcement action." The bill provides that the circuit court has jurisdiction to issue an injunction in order to protect the interests of the depositors, members, creditors, or stockholders or the public's interest in the safety and soundness of the financial institution system. Currently, the codes authorize the OFR to pursue injunctive relief in circuit court whenever a "threatened and impending" violation of the codes "will cause substantial injury to a state financial institution or its depositors, members, creditors, or stockholders."

[26] 12 U.S.C. § 25b(b); Barnett Bank, 517 U.S. 25.

[27] Violation of subsection (2), (3), or (4) is a third degree felony, punishable by imprisonment for a term of up to five years and a fine of up to $5,000. Violation of subsection (4) or (5) is a second degree felony, punishable by imprisonment for a term of up to 15 years and a fine of up to $10,000.

Approval of Directors and Executive Officers (Sections 6 and 19)

The bill creates a new subsection in s. 655.0385, F.S., to prohibit a director or executive officer of a state financial institution or affiliate from concurrently serving as a director or officer in a nonaffiliated financial institution or affiliate in the same geographical area or the same major business market area, unless this prohibition is waived by the OFR. The OFR may waive this prohibition if the person can demonstrate that the proposed concurrent service does not present a conflict of interest and neither institution is disadvantaged in the common market area. The bill amends s. 657.028, F.S., to provide that an individual may not serve as a director, officer, or committee member of a credit union if he or she had defaulted on a debt or obligation to a financial institution that resulted in a material loss to the financial institution and allows for exceptions with the prior approval of the OFR. The same criteria already applies to individuals serving at other financial institutions.

Unauthorized Banking (Section 15)

The bill amends s. 655.922, F.S., to expand the list of terms, names, words, symbols, etc., which are limited for use by a financial institution authorized to do business in Florida. The bill prohibits a financial institution, affiliate, subsidiary, or service corporation from conducting business in Florida using a name, trademark, Internet address or logo that may mislead consumers or cause confusion as to the identification of the proper legal business or the nature of the institution's business. The bill enhances the OFR's enforcement authority by authorizing the OFR to seek a circuit court order for the annulment or dissolution of a corporation found violating any provision of this section, and to issue and serve an emergency cease and desist order. The bill provides that the OFR is not required to determine the consequences that a violation of this section may cause. Currently, the codes prohibit any person, other than an authorized state or federal financial institution, from engaging in the business of soliciting or receiving funds for deposit, issuing certificates of deposit, or paying checks. A violation of this provision is a third-degree felony.

Examinations, Records, and Reports

Examinations (Sections 8, 9, and 26)

The bill amends s. 655.045, F.S., to clarify that the OFR is required to conduct an examination of each state financial institution at least once every 18 months. Beginning July 1, 2014, the bill provides that during each 36-month period, the OFR is required to conduct an examination of each state financial institution in a manner that allows the preparation of a complete examination report not subject to the right of a federal or other non-Florida entity to limit access to the information. Under current law, the OFR may accept an examination made by an appropriate federal regulatory agency or may conduct a joint or concurrent examination with the federal agency.

The bill amends s. 655.057, F.S., to provide that any information provided to the OFR by any person pursuant to an investigation or other supervisory activity of the OFR is not considered a waiver of any privilege or other legal proceeding in which the office is not a party. It also clarifies who has the right to copy membership and shareholder records.

Trade Secrets (Section 10)

Currently, the codes do not provide a public records exemption for trade secret documents held by the OFR. Senate Bill 1278, if enacted, creates a public records exemption for certain examination documents containing proprietary business information that is a trade secret. The bill creates s. 655.0591, F.S., to specify requirements for submission of a document or other information to the OFR in order for a person to claim that the information is a trade secret. The failure to file a notice of trade secret with the OFR constitutes a waiver of any claim by such person that the information is a trade secret. The requirements include labeling each page or portion as a trade secret and separating the trade secret documents from the non-trade secret material. The bill requires the submitting party to include an affidavit certifying certain information as to the trade secret status of the documents. If the OFR receives a public records request for information that is marked and certified as confidential, the OFR must immediately notify the person that certified the information as a trade secret. The bill requires the OFR to inform such person that, in order to avoid disclosure of the trade secret; the person must file an action in circuit court within 30 days seeking declaratory judgment that the document contains trade secrets and an order barring disclosure. The owner of the information is required to provide written notice to the OFR that the action was filed and the OFR may not release the documents pending the outcome of legal action. The failure to file an action within 30 days constitutes a waiver of any claim of confidentiality. The bill allows the OFR to disclose a trade secret to an employee or officer of another governmental agency whose use of the trade secret is within the scope of their employment.

Florida Control of Money Laundering and Terrorist Financing (Sections 5, 11, 22, 23, 25, 28, 30, 31, 33, and 34)

The bill updates current recordkeeping and reporting provisions to conform to the USA PATRIOT Act and the Office of Foreign Asset Control (OFAC) requirements. The bill amends s. 655.50, F.S., to require each financial institution to designate and retain a BSA/AML compliance officer and provides that the board of directors is responsible for establishing the institution's BSA/AML and OFAC policies and compliance. The bill also amends s. 655.50, F.S., to define the term "suspicious activity," and requires a financial institution to maintain specified records and report financial transactions that the institution reasonably believes is suspicious activity. It also provides that a suspicious activity report is entitled to the same confidentiality provided under 31 C.F.R. s. 1020.320.

Out of State Trust, Business Trust, and Trust Business (Sections 14 and 21)

The bill amends s. 655.921, F.S., to provide that the codes do not prohibit a financial institution or business trust which has its principal place of business outside of Florida from filing suit in Florida to collect any debt or foreclose on any security interest in collateral securing a debt. The intent of this language is to clarify permissible activities for out-of-state trust companies and business trusts. It also provides that an out-of-state business trust which own pools of mortgages and is pursuing foreclosure actions is not considered to be engaging in trust business in Florida.

The bill revises the definition of "trust business" in s. 658.12, F.S., to include a business that receives compensation that is not deemed de minimis by the OFR. The OFR indicates that it routinely receives inquiries on behalf of individuals engaging in estate planning activities that

involves the use of trusts, which provide for the appointment of trustees that are not family members and are not otherwise subject to a structure of regulatory oversight. These trusts often provide for de minimis compensation and expense reimbursement. Further, the individuals are not engaging in business as professional fiduciaries.

Liability of Financial Institutions (Section 17).

The bill creates a new section in the codes, s. 655.955, F.S., to provide that a financial institution is not civilly liable to a third party for the actions or operations of a borrower, solely by virtue of extending a loan or a line of credit to such borrower.

The bill provides this limited immunity to "financial institutions," which the codes define as a state or federal savings or thrift association, bank, savings bank, trust company, international bank agency, international banking corporation, international branch, international representative office, international administrative office, international trust company representative office, credit union, or an agreement corporation or Edge Act corporation organized pursuant to the Federal Reserve Act.

To the extent third-party litigation is pending against financial institutions in this state at the time of the bill's effective date, legislation is presumed only to operate prospectively, especially when retroactive application would impair existing rights.[28]

Credit Unions and Competitive Equality (Sections 18 and 20)

The bill revises the application process and approval criteria for new branch applications and relocations by state-chartered credit unions and codifies a 2008 Order of General Application (OGA) issued by the OFR which allows a state credit union to maintain branches without requiring prior OFR examination and approval if certain conditions are met. Currently, s. 657.008, F.S., allows Florida credit unions to establish or relocate branch offices only if the credit union is operating in a safe and sound manner, its board has determined that such branches are reasonably necessary to furnish service to its members, and the credit union has provided 30 days' prior written notification to the OFR. Thus, Florida credit unions that do not meet this criterion cannot establish or relocate branch offices, even if the establishment or relocation of a branch would be in the best interests of the credit union and its members. This has placed Florida credit unions at a competitive disadvantage with their federally chartered counterparts, who are permitted under the Federal Credit Union Act and the National Credit Union Administration's (NCUA) regulations to establish or relocate branches if its directors determine that such action would be in the best interest of the federal credit union's members.

The bill amends s. 657.041, F.S., to authorize state credit unions to establish employee, officer, and director benefit plans, insurance, and investments consistent with NCUA rules for federal credit unions. This would codify the 2011 OGA currently in place to address competitive equality issues regarding a state credit union's ability to offer products that are permissible for a federal credit union.

[28] Art. I, Sec. 10 ("No . . . Law impairing the obligation of contracts shall be passed"). *See also State Farm Mut. Auto. Ins. Co. v. Laforet*, 658 So.2d 55 (Fla. 1995); *Alamo Rent-A-Car, Inc. v. Mancusi*, 632 So.2d 1352 (Fla. 1994).

Loans of $50,000 or Less (Sections 24, 25, 29, and 32)

Current law caps the interest rate on loans of $50,000 or less which are issued by state-chartered banks at 18 percent per year. The law allows two additional charges with exceptions. National banks are not subject to such lending restrictions, which raises a competitive equality issue for Florida-chartered banks. The bill repeals section 658.49, F.S., and makes technical and conforming changes.

Annual Assessments for International Offices (Section 27)

The bill repeals the $2,000 annual assessment that is imposed on each international representative office, international administrative office, and international trust company office by s. 663.12, F.S.

Effective Date (Section 35)

The bill takes effect July 1, 2014.

IV. Constitutional Issues:

A. Municipality/County Mandates Restrictions:

None.

B. Public Records/Open Meetings Issues:

None.

C. Trust Funds Restrictions:

None.

V. Fiscal Impact Statement:

A. Tax/Fee Issues:

CS/CS/SB 1012 repeals the $2,000 annual assessment imposed on each international representative office, international administrative office and international trust company.

B. Private Sector Impact:

The bill codifies current federal credit union regulations relating to branches, and employee benefit plans, which would place state credit unions at parity with federal credit unions.

The bill clarifies that institutions may charge customers a fee to cash checks. This will provide consistency with the federal laws permitting national banks and out-of-state

state-chartered banks operating in Florida to charge check-cashing fees, and will place Florida-chartered banks at parity with national and other state-chartered banks.

C. Government Sector Impact:

According to the OFR, the fiscal impact of repealing the $2,000 annual assessment fee for each international representative office, international administrative office or international trust company office is $18,000 on annual basis. The OFR considers this fiscal impact to be negligible.

The Office of the State Courts Administrator indicates that it expects some increase in workload as a result of the expanded authority to issue injunctions, new provisions regarding public records and trade secrets, and new authorization for the OFR and out-of-state financial institutions and business trust to engage in litigation. However, the extent and cost of the increase in workload cannot be determined.

VI. Technical Deficiencies:

None.

VII. Related Issues:

None.

VIII. Statutes Affected:

This bill substantially amends the following sections of the Florida Statutes: 655.005, 655.0322, 655.034, 655.037, 655.0385, 655.041, 655.045, 655.057, 655.50, 655.85, 655.921, 655.922, 655.948, 657.008, 657.028, 657.041, 658.12, 658.21, 658.235, 663.02, 663.09, 663.12, 663.306, 665.013, 665.033, 665.034, 667.003, 667.006, and 667.008.

This bill creates sections 655.17, 655.0591, and 655.955 of the Florida Statutes.

This bill repeals section 658.49 of the Florida Statutes.

The bill creates an undesignated section of Florida law.

IX. Additional Information:

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

CS/CS by Appropriations on April 22, 2014:
The committee substitute:

- Provides that a financial institution is not civilly liable to a third party for the actions or operations of a borrower solely by virtue of extending a loan or a line of credit of such borrower.

- Creates s. 655.017, F.S., which preempts to the state regulation of financial or lending activities which is substantially similar to s. 494.00797, F.S., and which also:
  - Preserves the ability of counties and municipalities to conduct civil investigations or initiate administrative civil proceedings to determine compliance or to enforce other laws, regulations, or ordinances that are not preempted,
  - Provides that the Office of Financial Regulation (OFR) has the sole and exclusive jurisdiction to initiate appropriate proceedings, if the OFR determines that a local investigation or proceeding is either based on a preempted local law or prevents, significantly interferes with, or alters the exercise of a financial institution's powers that have been granted under the Financial Institutions Codes or by applicable federal law or regulation, and
  - Preserves the ability of the Attorney General's office to initiate civil or criminal proceedings, as well as the ability of law enforcement agencies of the state to initiate criminal proceedings.
- Requires all financial institutions to notify the OFR within 30 days of any civil investigation or any civil or administrative proceeding initiated by counties or municipalities, and provides a safe harbor for financial institutions which make a good faith effort to fulfill this disclosure requirement.

CS by Banking and Insurance on March 5, 2014:
CS/SB 1012 provides technical, clarifying changes.

B. Amendments:

None.

This Senate Bill Analysis does not reflect the intent or official position of the bill's introducer or the Florida Senate.