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 Banking and Insurance

BILL: SB 1012

INTRODUCER: Senator Richter

SUBJECT: Financial Institutions

DATE: February 28, 2014 REVISED:

	ANALYST	STAFF DIRECTOR	REFERENCE	ACTION
1.	Johnson	Knudson	BI	**Pre-meeting**
2.			ACJ	
3.			AP	

I. Summary:

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.

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 U.S. Supremacy Clause of the U.S. 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 the 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 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

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[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).

[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).

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 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 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 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. Banks are 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.

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[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.
[7] 12 C.F.R. 32.1(b).
[8] Section 658.48(1)(a), F.S.

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 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,

[9] Ch. 2011-194, Laws of Fla.
[10] 12 C.F.R. s. 215.

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 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 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 they could make or exercise if they were a federally chartered financial institution, and provides the entitled 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]

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[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).
[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).

III. Effect of Proposed Changes:

Settlement of Checks and Par Value (Sections 11 and 12)

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.

***Prohibited Acts (Section 2)*—**The bill expands 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."

***Administrative Authority and Fines (Section 6)*—**The bill revises 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 3)*—**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."

***Approval of Directors and Executive Officers (Sections 5 and 16)*—**The bill prohibits 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 provides 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 OFR. The same criteria already applies to individuals serving at other financial institutions.

Unauthorized Banking (Section 14)—The bill expands the list of terms, names, words, symbols, etc., that 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 7, 8, and 23)—The bill clarifies that the OFR is required to conduct an examination of each state financial institution at least once every 18 months. Effective July 1, 2014, the OFR is required to conduct a joint or concurrent examination at least once every 36 months. 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 also provides 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. The bill removes the requirement that that credit unions and mutual associations must keep records of their members at their principal office for transacting business. The bill clarifies who has the right to copy membership and shareholder records.

Trade Secrets (Section 9)—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 specifies 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 4, 10, 19, 20, 22, 25, 27, 28, 30, and 31)

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 requires 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 defines 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. The bill 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 13 and 18)

The bill provides that the codes do not prohibit a financial institution or business trust that 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. The bill provides that an out-of-state business trust that own pools of mortgages and is pursuing foreclosure actions is not considered engaging in trust business in Florida.

The bill revises the definition of "trust business" 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.

Credit Unions and Competitive Equality (Sections 15 and 17)

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 is 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 authorizes state credit unions to establish employee, officer, and director benefit plans, insurance, and investments consistent with NCUA rules for federal credit unions, which would codify the 2011 OGA currently in place to address competitive equality issue regarding state credit union's ability to offer products that are permissible for a federal credit union.

Loans of $50,000 or Less (Sections 21, 22, 26, and 29)

Current law caps the interest rate on such loans 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 24)

The bill repeals the $2,000 annual assessment imposed on each international representative office, international administrative office, and international trust company office.

Effective Date (Section 32)

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:

The bill 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.

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, 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 section 655.091 of the Florida Statutes.

This bill repeals section 658.49 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.