

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 Rules

BILL: SB 1620

INTRODUCER: Senator Powell

SUBJECT: Deceptive and Unfair Trade Practices

DATE: April 11, 2017

REVISED: _____

| ANALYST | STAFF DIRECTOR | REFERENCE | ACTION |
|------------|----------------|-----------|--------------------|
| 1. Matiyow | Knudson | BI | Favorable |
| 2. Harmsen | McKay | CM | Favorable |
| 3. Matiyow | Phelps | RC | Pre-meeting |

I. Summary:

SB 1620 exempts credit unions licensed under ch. 657, F.S., from the Florida Deceptive and Unfair Trade Practices Act. Other entities currently exempt from the act include Florida-licensed banks and savings and loans associations.

II. Present Situation:

Florida Deceptive and Unfair Trade Practices Act (FDUTPA)

History and Purpose of FDUTPA

The Florida Deceptive and Unfair Trade Practices Act (FDUTPA) is a consumer and business protection measure that prohibits unfair methods of competition, unconscionable acts or practices, and unfair or deceptive acts or practices in trade or commerce.¹ The FDUTPA is based on federal law.² The state attorney or the Department of Legal Affairs may bring actions when it is in the public interest on behalf of consumers or governmental entities.³ The Office of the State Attorney may enforce violations of the FDUTPA if the violations take place in its jurisdiction. The Department of Legal Affairs has enforcement authority if the violation is multi-jurisdictional, the state attorney defers in writing, or the state attorney fails to act within 90 days after a written complaint is filed.⁴ Consumers may also file suit through private actions.⁵

¹ Chapter 73-124, L.O.F., and s. 501.202, F.S.

² D. Matthew Allen, et. al., *The Federal Character of Florida's Deceptive and Unfair Trade Practices Act*, 65 U. Miami L. Rev. 1083, Summer 2011.

³ Section 501.207, F.S. David J. Federbush, *FDUTPA for Civil Antitrust: Additional Conduct, Party, and Geographic Coverage; State Actions for Consumer Restitution*, 76 FLA. B.J. 52, December 2002, available at http://www.floridabar.org/divcom/jn/jnjournal01.nsf/c0d731e03de9828d852574580042ae7a/99aa165b7d8ac8a485256c8300791ec1!OpenDocument&Highlight=0,business,Division* (last visited on February 13, 2017).

⁴ Section 501.203(2), F.S.

⁵ Section 501.211, F.S.

Remedies under the FDUTPA

The Department of Legal Affairs and the State Attorney, as enforcing authorities, may seek the following remedies:

- Declaratory judgments;
- Injunctive relief;
- Actual damages on behalf of consumers and businesses;
- Cease and desist orders;
- Civil penalties of up to \$10,000 per willful violation; and
- Civil penalties of up to \$15,000 per willful violation where certain aggravating factors are found.⁶

Remedies for private parties are limited to:

- A declaratory judgment and an injunction where a person is aggrieved by a FDUTPA violation; and
- Actual damages, attorney fees and court costs, where a person has suffered a loss due to a FDUTPA violation.⁷

Exemptions under the FDUTPA

FDUTPA exempts certain entities from its governance, including:⁸

- Any person or activity regulated under laws administered by the Office of Insurance Regulation of the Financial Services Commission (OIR);
- Banks and savings and loan associations regulated by the Office of Financial Regulation of the Financial Services Commission (OFR);
- Banks or savings and loan associations regulated by federal agencies; or
- Any person or activity regulated under the laws administered by the former Department of Insurance, which are now administered by the Department of Financial Services (DFS).

Although FDUTPA exempts the above entities that would otherwise be regulated, it does not currently exempt credit unions.

Federal Unfair and Deceptive Trade Practices Laws

The Federal Trade Commission's (FTC's) unfair and deceptive trade practices regulations prohibit unfair or deceptive acts or practices in or affecting commerce.⁹ However, like FDUTPA, the FTC's regulations exempt banks, savings and loan institutions, or federally-chartered credit unions.¹⁰

⁶ Sections 501.207(1), 501.208, and 501.2075, F.S. Civil Penalties are deposited into general revenue. Enforcing authorities may also request attorney fees and costs of investigation or litigation. *See also*, s. 501.2105, F.S.

⁷ Sections 501.211(1)-(2), and 501.2105 F.S.

⁸ Section 501.212(4), F.S.

⁹ 15 U.S.C. s. 45(a)(1).

¹⁰ 15 U.S.C. s. 45(a)(2).

The Dodd-Frank Act extends the prohibition of unfair, deceptive, or abusive acts (UDAAPs) to banks, credit unions, and other financial institutions.¹¹ The Consumer Financial Protection Bureau (CFPB) is the regulatory agency under the Dodd-Frank Act.¹² The CFPB has identified the following practices as probable UDAAPs:¹³

- Collection or assessment of a debt or any additional fee, interest, or charge in connection with a debt, which is not expressly authorized by the underlying loan;
- The taking of property without a legal right to do so;
- Causing a consumer's debt to be revealed to his or her employer or co-workers, without the consumer's consent to do so;
- Misrepresentation of a communication as from a government source or attorney; and
- Making false threats of lawsuits, arrest, or prosecution for non-payment of a debt.

Regulation of Credit Unions

Credit unions are financial institutions organized to encourage thrift among, and create sources of credit for, their members.¹⁴ Under the dual banking system in the United States, credit unions may be chartered under either state or federal law:

- The Florida Credit Union Act (act) governs the formation and duties of state-chartered credit unions, but ch. 655, F.S., provides guidance regarding the credit union's operations.¹⁵ State-chartered credit unions are regulated by the Florida OFR and the National Credit Union Association (NCUA), an independent federal agency.
- Federally-chartered credit unions are chartered under the Federal Credit Union Act of 1934¹⁶ and are regulated only by the NCUA.

In addition to its oversight of both state- and federally-chartered credit unions, the NCUA also operates and manages the National Credit Union Share Insurance Fund (NCUSIF), which insures share (deposit) accounts for members of all federally-chartered credit unions and most state-chartered credit unions.¹⁷ All state-chartered credit unions that operate in Florida must carry NCUSIF insurance.¹⁸ The standard maximum share insurance coverage amount for a credit union is \$250,000.¹⁹

Like banks, both state- and federally-chartered credit unions are subject to a number of regulations that provide some protections that overlap with FDUTPA, including the following:

¹¹ See 12 U.S.C. ss. 5481, 5531, and 5536(a); *see also* Consumer Financial Protection Bureau, *Compliance Bulletin and Policy Guidance 2016-02, Service Providers*, (Oct. 19, 2016), available at http://files.consumerfinance.gov/f/documents/102016_cfpb_OfficialGuidanceServiceProviderBulletin.pdf (last visited Mar. 30, 2017).

¹² 12 U.S.C. s. 5481(2).

¹³ *See supra* note 11.

¹⁴ *See, e.g.*, 12 U.S.C. s. 1752, and s. 657.003, F.S.

¹⁵ Ch. 80-258, Laws of Fla.; codified at ch. 657, F.S.

¹⁶ Public Law 73-467, codified as 12 U.S.C. s. 1751 *et seq.*

¹⁷ Federally-chartered credit unions must be insured through NCUSIF, and state-chartered credit unions may be insured through NCUSIF, though some state-chartered credit unions may be insured by private insurance or guaranty corporations. *See* NCUA, *Your Insured Funds*, available at <https://www.ncua.gov/Legal/GuidesEtc/GuidesManuals/NCUAYourInsuredFunds.pdf> (last visited Mar. 29, 2017).

¹⁸ Sections 657.005(7), 657.008(5)(a)2., and 657.033(9), F.S.

¹⁹ *See supra* note 12.

- Truth in Savings Act (TISA)²⁰ – TISA enables credit union members to make informed decisions about accounts at credit unions by requiring credit unions to disclose information such as fees, dividend rates, and annual percentage yield regarding its accounts.²¹ TISA also prohibits credit unions from advertising in a misleading or inaccurate manner.²²
- Accuracy of advertising requirement – Credit unions insured through NCUSIF “may [not] use any advertising, or make any representation which is inaccurate or deceptive... [or] misrepresents its services, contracts, or financial condition.”²³
- Equal Credit Opportunity (ECOA)²⁴ and Fair Housing (FHA)²⁵ Acts – The ECOA prohibits discrimination in any aspect of a credit transaction on the basis of race, color, religion, national origin, sex, marital status, age, the fact that an applicant’s income derives from any public assistance program, or the fact that the applicant has in good faith exercised any right under the Consumer Credit Protection Act. The FHA works in conjunction with the ECOA to prohibit discrimination by anyone who is in the business of providing loans for housing.²⁶
- Fair Credit Reporting Act (FCRA)²⁷ – The FCRA defines the responsibilities and liabilities of those who provide information to, and access data from, a consumer reporting agency (CRA).²⁸ The FCRA promotes accuracy, fairness, and privacy of information held by CRA’s by:
 - Regulating the consumer reporting industry;
 - Placing disclosure obligations on users of consumer reports;
 - Ensuring fair, timely, and accurate reporting of credit information;
 - Restricting the use of reports on consumers; and
 - Requiring the deletion of obsolete information, in certain situations.²⁹
- Truth in Lending Act (TILA)³⁰ – TILA requires clear and conspicuous disclosures relating to the terms and costs of various forms of consumer credit.³¹
- Real Estate Settlement Procedures Act (RESPA)³² – RESPA requires timely disclosures regarding the nature and costs of the real estate settlement process. For example, a lender must provide an applicant with a good faith estimate no more than 3 business days after a lender receives an application.³³
- Privacy of consumer financial information under the Gramm-Leach-Bliley Act (GLBA)³⁴ – The GLBA generally prohibits a financial institution from disclosing a consumer’s nonpublic personal information to nonaffiliated third parties, unless the institution satisfies notice and

²⁰ 12 CFR Part 707.

²¹ 12 CFR s. 707.1(b); 12 CFR ss. 707.4-.6.

²² 12 CFR s. 707.8(a)(1).

²³ 12 CFR s. 740.2.

²⁴ 12 CFR Part 1002.

²⁵ 42 U.S.C. s. 3601 *et seq.*

²⁶ NCUA, *Consumer Compliance Manual: Fair Housing Act*, available at <https://www.ncua.gov/regulation-supervision/Pages/manuals-guides/consumer-compliance.aspx> (last visited Mar. 29, 2017).

²⁷ 15 U.S.C. s. 1681 *et seq.*

²⁸ NCUA, *Consumer Compliance Manual: Fair Credit Reporting Act*, available at <https://www.ncua.gov/regulation-supervision/Pages/manuals-guides/consumer-compliance.aspx> (last visited Mar. 29, 2017).

²⁹ *Id.*

³⁰ 12 CFR Part 1026.

³¹ *Id.* at ss. 1026.1(b) and 1026.5(a).

³² 12 CFR Part 1024.

³³ *Id.* at s. 1024.7 and Appendix C.

³⁴ 15 U.S.C. s. 6801 *et seq.*

opt-out requirements, and the consumer has not elected to opt-out of the disclosure.³⁵ Under the GLBA, an institution must also give customers notice of its privacy policies and practices. Rules and regulations have been issued to implement provisions of the GLBA.³⁶

- CFPB’s prohibition on unfair, deceptive, or abusive practices (UDAAPs)³⁷ – The CFPB regulates the offering and provision of consumer financial products or services,³⁸ and that enforces many of the above-mentioned regulations. The CFPB prohibits banks, financial institutions, and state- and federally-chartered credit unions from committing or engaging in UDAAPs in connection with any transaction with a consumer.^{39, 40}
- Federal Trade Commission’s (FTC’s) prohibition on unfair or deceptive acts or practices.⁴¹ State-chartered credit unions are not expressly exempt from the FTC’s authority to prosecute unfair or deceptive acts. However, as noted above, the CFPB has broad authority to enforce a prohibition on unfair, deceptive, or abusive acts or practices in relation to both state- and federally-chartered credit unions.

III. Effect of Proposed Changes:

Section 1 amends s. 501.212, F.S., to exempt credit unions regulated by the OFR under ch. 657, F.S., and credit unions regulated by federal agencies, from the FDUTPA. Current law exempts banks and savings and loan associations regulated by the OFR or federal agencies from the FDUTPA.

Section 2 provides an effective date of July 1, 2017.

IV. Constitutional Issues:

A. Municipality/County Mandates Restrictions:

None.

B. Public Records/Open Meetings Issues:

None.

C. Trust Funds Restrictions:

None.

³⁵ *Id.*

³⁶ 12 CFR s. 716.1 and Part 1016.

³⁷ 12 U.S.C. s. 5536(a)(1).

³⁸ 12 U.S.C. ss. 5481(14) and 5491(a).

³⁹ 12 U.S.C. s. 5531(a). *See also* s. 5536(a)(1) (prohibiting “any covered person or service provider – (A) to offer or provide to a consumer any financial product or service not in conformity with Federal consumer financial law, or otherwise commit any act or omission in violation of a Federal consumer financial law; or (B) to engage in any unfair, deceptive, or abusive act or practice”).

⁴⁰ 12 U.S.C. ss. 5481(5), (6), and (15).

⁴¹ 15 U.S.C. s. 45(a).

V. Fiscal Impact Statement:**A. Tax/Fee Issues:**

None.

B. Private Sector Impact:

Credit Unions regulated under Florida law will no longer be subject to litigation costs related to claims under the FDUTPA.

C. Government Sector Impact:

The Department of Legal Affairs may see reduced litigation under FDUTPA relating to credit unions.

VI. Technical Deficiencies:

None.

VII. Related Issues:

None.

VIII. Statutes Affected:

This bill substantially amends section 501.212 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.