

# SENATE STAFF ANALYSIS AND ECONOMIC IMPACT STATEMENT

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

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Prepared By: Commerce Committee

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BILL: CS/SB 252

INTRODUCER: Commerce Committee and Senator Aronberg

SUBJECT: Uniform Commercial Code

DATE: February 5, 2007

REVISED: \_\_\_\_\_

	ANALYST	STAFF DIRECTOR	REFERENCE	ACTION
1.	Gordon	Cooper	CM	Fav/CS
2.	_____	_____	JU	_____
3.	_____	_____	TA	_____
4.	_____	_____	_____	_____
5.	_____	_____	_____	_____
6.	_____	_____	_____	_____

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## I. Summary:

This Committee Substitute (CS) amends Article 1 of the Uniform Commercial Code (UCC or code), which is codified in chs. 670-680, F.S. The CS reflects revisions made to the UCC by the National Conference of Commissioners on Uniform State Laws (NCCUSL) in 2001.

This CS amends the following sections of the Florida Statutes: 559.9232, 563.022, 668.50, 670.106, 670.204, 671.101, 671.102, 671.106, 671.107, 671.201, 671.202, 671.203, 671.204, 671.205, 671.208, 675.102, 679.525, 680.518, 680.519, 680.527, 680.528, and 713.901.

This CS creates s. 671.209, 671.21, 671.211, 671.212, and 671.213, Florida Statutes.

This CS repeals s. 15.091 and s. 671.206, Florida Statutes.

## II. Present Situation:

### *Uniform Commercial Code*

The Uniform Commercial Code (UCC or code) is a uniform act created to harmonize the law governing commercial transactions and other financial areas. It has been adopted in every state except one, Louisiana, which has partially adopted it.<sup>1</sup> The code provides default language where contracts are silent. The UCC consists of 9 articles dealing with the following subjects in consecutively numbered articles:

- Article 1: General provisions (definitions and rules for interpretation)
- Article 2: Sales of Goods

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<sup>1</sup> Duke University, UCC Research Guide, <http://www.law.duke.edu/lib/researchguides/pdf/ucc.pdf>, 29 January 2007.

- 2A: Leases of Goods
- Article 3: Negotiable Instruments
- Article 4: Bank Deposits and Collections
  - 4A: Funds transfers
- Article 5: Letters of Credit
- Article 6: Bulk Transfers (repealed)
- Article 7: Bills of Lading, warehouse receipts and other documents of title
- Article 8: Investment securities
- Article 9: Secured Transactions (liens and security interests in personal property)<sup>2</sup>

In 2001, the National Conference of Commissioners on Uniform State Laws (NCCUSL) finalized the Revision of Uniform Commercial Code Article 1, which governs the general provisions of the UCC.

The NCCUSL summarized its revisions to the UCC in the following manner:

As other parts of the UCC have been revised and amended to accommodate changing business practices and development in the law, these modifications need to be reflected in an updated Article 1. Thus, Article 1 contains many changes of a technical, non-substantive nature, such as reordering and renumbering sections, and adding gender neutral terminology. In addition, over the years it has been in place, certain provisions of Article 1 have been identified as confusing or imprecise. Several changes reflect an effort to add greater clarity in light of this experience. Finally, developments in the law have led to the conclusion that certain changes of a substantive nature needed to be made.<sup>3</sup>

### ***UCC Filing Fees***

Section 15.091, F.S., contains a fee schedule for filing of financing statements or other documents required by ch. 679, F.S., of the UCC. However, ch. 2001-198, L.O.F., incorporated NCCUSL's revisions to Article 9 of the UCC and codified a new fee schedule for UCC filings in s. 679.525, F.S.<sup>4</sup>

Part IV of ch. 713, F.S., is the Florida Uniform Federal Lien Registration Act. Section 713.901(6), F.S., specifies that the fees for filings required under this act are "the same as those prescribed in s. 15.091."

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<sup>2</sup> Ibid.

<sup>3</sup> NCCUSL, *Revised Article 1 of the Uniform Commercial Code*, [http://www.nccusl.org/Update/uniformact\\_summaries/uniformacts-s-ucc1.asp](http://www.nccusl.org/Update/uniformact_summaries/uniformacts-s-ucc1.asp), 31 March 2006.

<sup>4</sup> Staff Analysis for HB 579 (2001), pages 2-3. Article 9 governs "secured transactions" or transaction in which a creditor retains an interest in the subject matter of the transaction. This interest is secured by an agreement between the creditor and debtor. Black's Law Dictionary, 6<sup>th</sup> Ed. 942 (1991).

### *Florida Secured Transaction Registry*

Chapter 2001-200, L.O.F., established the Florida Secured Transaction Registry to serve as a central database for filing all documents related to secured transactions. This law also required the Department of State (the Department) to contract with a private vendor to conduct the administrative and operational aspects of this registry, which included collecting filing fees.

### **III. Effect of Proposed Changes:**

**Section 1** repeals s. 15.091, F.S., relating to filing fees for financing statement and other written documents under the Uniform Commercial Code. This provision is made obsolete by s. 6, ch. 2001-198, L.O.F., which created another fee schedule for UCC filing fees, and section 29 of this bill.

**Section 2** amends s. 671.101, F.S., to define the scope of Florida's UCC.

Currently s. 671.101, F.S., only provides that chs. 670-680, F.S., may be cited as the "Uniform Commercial Code." Article 1 of the UCC contains few substantive rules, but those rules underpin the code. In order to resolve any confusion regarding whether certain transactions are governed by these rules, this section is amended to clarify that ch. 671, F.S., applies to transactions to the extent that they are governed by one of the code's provisions.

**Section 3** amends s. 671.102, F.S., which governs the purposes, rules of construction, and variations from the UCC that are made by contracts. The CS makes editorial changes to the language of this section.

In addition, the CS provides that where the code requires action to be taken in a reasonable time, a time that is not "manifestly unreasonable" may be fixed by agreement. This provision is added to paragraph (2)(b), which relates to obligations of good faith, diligence, reasonableness, and care. That paragraph provides that these aspects of transactions may not be disclaimed by agreement, but that parties may generally determine standards for performance of those obligations, as long as they are not manifestly unreasonable.

**Section 4** amends s. 671.106, F.S., to make minor technical changes, such as adding a comma and changing "shall" to "must."

**Section 5** amends s. 671.107, F.S., related to a waiver or renunciation of claim or right after a breach of contract occurs.

Currently, under this statute, a claim or right that arises out of an alleged breach of contract can be discharged, in whole or in part, without consideration by a written waiver or renunciation signed and delivered by the aggrieved party. The CS deletes the required written waiver or renunciation signed and delivered by the aggrieved party and, instead, requires agreement of the aggrieved party in an authenticated record. This change requires that the aggrieved party *agree* to discharge any claims or rights arising from the breach. This change also requires that the agreement take the form of an "authenticated record" (one that can be verified).

**Section 6** amends s. 671.201, F.S., which provides general definitions for terms used in the code. This CS adds several new definitions and revises existing ones. The new terms include:

- **Consumer** refers to an individual who enters into a transaction primarily for personal, family, or household purposes.
- **Present value** is the amount as of a date certain, of one or more sums payable in the future, discounted to the date certain by use of either (1) an interest rate specified by the parties, if that rate is not manifestly unreasonable at the time the transaction is entered into; or (2) if an interest rate is not so specified, a commercially reasonable rate that takes into account the facts and circumstances at the time the transaction is entered into. The current statute defines this term in s. 671.201(37), F.S., which defines security interests.
- **Record** is a term describing information that is inscribed on a tangible medium, that is stored in an electronic or other medium or is retrievable in perceivable form
- **State** describes a state of the United States, the District of Columbia, Puerto Rico, the United States Virgin Islands, or any territory or insular possession subject to the jurisdiction of the United States.

Several terms are revised in the following manner:

- **Aggrieved party**: This term is currently defined as a party entitled to resort to a remedy. The revised definition replaces the phrase “resort to” with “pursue.”
- **Agreement**: This term is defined as a bargain between parties in fact as demonstrated by their language or implied from other circumstances. The revised definition distinguishes this term from a contract by specifying that legal consequences flow from a contract while an agreement is a bargain between parties. The meaning of an agreement can be determined from the language of the parties or inferred from other circumstances.
- **Bank**: This term is revised to include a savings bank, a savings and loan association, credit union, and a trust company.
- **Bearer**: The revised definition inserts the word “negotiable,” before instrument and makes a minor grammatical change.
- **Bill of lading**: This definition deletes the reference to airbills.
- **Buyer in ordinary course of business**: The revised definition makes minor grammatical changes to the definition.
- **Conspicuous**: The current definition of conspicuous refers to a term or clause that is written in such a way that a reasonable person to whom it refers would notice it. The revised definition removes the term “clause” and adds that conspicuous terms may also be displayed or presented, in addition to being written. The revision further provides that whether a term is conspicuous is a decision for a court.

The current definition also includes subparagraphs (a) and (b) which outline the type of language that comprises conspicuous terms (e.g., printed headings, etc.). The revised definition makes minor grammatical changes to (a), which currently discusses headings in capitals with large font. The revised definition deletes the reference to telegrams in (b) and replaces it with a description of language in text that is larger than surrounding text or set off with symbols or other marks to call attention to the language.

- **Contract:** The revision distinguishes this term from an agreement and defines it as the legal obligation that stems from an agreement created under the code and supplemented by other laws.
- **Defendant:** The revised definition clarifies that this term also refers to a person who must defend against a cross-claim or third-party claim.
- **Delivery:** This term is currently defined as the voluntary transfer of possession of certain instruments, documents of title or chattel paper, or certificated securities. The revision deletes the reference to certificated securities.
- **Fault:** This term is currently defined as a wrongful act, omission, or breach. The revision adds the term “default” to the definition.
- **Fungible goods:** This definition is reorganized and references to securities are deleted to reflect that other portions of the UCC no longer use the term “fungible” to describe securities.
- **Good faith:** Currently, this term is defined as honesty in fact in the conduct or transaction concerned. The term is revised to reflect the broader standard of good faith in Article 2 of the UCC. That new standard includes “honesty in fact *and the observance of reasonable commercial standards of fair dealing in the trade.*” (Emphasis added). This broader definition reflects the standard already applicable throughout the code.
- **Holder:** This definition is reorganized for clarity.
- **Insolvent:** The revised definition makes minor grammatical changes.
- **Money:** This definition is slightly revised to indicate that the medium of exchange authorized or adopted by a domestic or foreign government must be current.
- **Organization:** This term currently includes a corporation, government or governmental subdivision or agency, business trust, estate, trust, partnership or association, two or more persons having a joint or common interest, or any other legal or commercial entity. The revised definition deletes these terms and redefines organization as “a person other than an individual.” This is the standard definition of “organization” that is used in acts prepared by the NCCUSL.
- **Party:** The revised definition makes minor grammatical definitions.
- **Person:** Currently, “person” is defined as an individual or an organization. The new definition tracks the standard definition used by the National Conference of Commissioners on Uniform State Laws. That definition includes a corporation, business trust, estate, trust, partnership, limited liability company, association, joint venture, government, governmental subdivision, agency, or instrumentality, public corporation, or any other legal or commercial entity as a person.
- **Purchase:** This definition is revised to include a lease transaction along with such activities as taking by sale, negotiation, or any other voluntary transaction creating an interest in property.
- **Representative:** This definition retains the same language, but is reorganized for clarity.
- **Right:** The revised definition makes a minor grammatical change.
- **Security Interest:** The revised definition makes technical changes to the current statute including deleting the definition of “present value.”
- **Send:** This definition makes minor technical changes to the current statute.
- **Signed:** This definition recognizes the growth of electronic commerce and revises the current definition to include bearing a symbol that indicates a person’s present intention to adopt or accept a writing.

- **Surety:** This term is currently defined as a guarantor. The definition is expanded to include “other secondary obligor.”
- **Term:** The revised definition makes minor grammatical changes.
- **Unauthorized signature:** The revised definition contains minor technical changes.
- **Warehouse receipt:** The revised definition deletes the requirement that a receipt be in writing. This change recognizes the increase in electronic commerce.
- **Writing:** The revised definition makes minor technical changes to provide that the term “written” has a meaning that corresponds to the current definition of “writing,” which includes printing, typewriting, or any other intentional reduction to tangible form.

The definitions of the following terms are deleted from s. 671.201, F.S.: “honor,” “notice,” “airbill,” “notifies or gives notice,” “presumption or presumed,” “telegram,” and “value.” A new statutory provision, s. 67.209, F.S., is created to define the terms “notice” and “knowledge.” In addition, new provisions are created to define “presumptions,” s. 671.210, F.S., and “value,” s. 671.211, F.S.

**Section 7** amends s. 671.202, F.S., related to prima facie evidence of authenticity and “genuineness” created by third party documents. The revision makes one change—replacing the phrase “shall be” with the word “is.”

**Section 8** amends s. 671.203, F.S., regarding the obligation of good faith. Currently the definition states: “Every contract or duty within this code imposes an obligation of good faith in its performance or enforcement.” The revised definition changes the “or” after “performance” to “and.” This change ensures that the good faith standard will influence all aspects of contract creation, performance and enforcement to preserve the integrity of commercial transactions.

**Section 9** amends s. 671.204, F.S., regarding when actions taken related to contracts occur within a reasonable timeframe. The CS revises this section to emphasize that reasonableness depends on the nature, purpose and circumstances of the action. This change ensures that the particular context of the transaction controls reasonableness.

**Section 10** amends s. 671.205, F.S., related to course of dealing and usage of trade.

The CS adds course of performance to the heading of this statutory section and provides a definition. According to this new definition, a “course of performance” refers to a sequence of conduct between parties as it relates to a particular transaction. It exists if the agreement of the parties involves repeated occasions for performance by a party and the other party, with knowledge of the nature of performance and having an opportunity to object to it, accepts the performance or acquiesces in it without objection.

The CS also provides that “course of performance” prevails over “course of dealing” and “usage of trade.” However, express terms prevail over all three. Moreover, the CS provides that “course of performance” is relevant to show a waiver or modification of any term inconsistent with the “course of performance.”

Currently, “course of dealing,” refers to a sequence of previous conduct between parties regarding a particular transaction. The CS revises the description to include a sequence of conduct concerning previous transactions, rather than previous conduct.

The CS also provides that the “course of performance” or “course of dealing” may be considered in determining the particular meaning of specific terms of an agreement, and may supplement or qualify as a term of an agreement.

Currently, “usage of trade” refers to any practice or method of dealing having such regularity in a place, vocation, or trade as to justify an expectation that it will be observed with respect to a particular transaction. The CS slightly revises this provision to provide that if such usage is embodied in a written trade code, the interpretation of the record is a question of law.

**Section 11** repeals s. 671.206, F.S., relating to the Statute of Frauds<sup>5</sup> for certain types of personal property not otherwise covered under the code. Drafters of this CS indicate that other articles of the UCC delineate requirements for writings necessary to comply with those articles. This section of law imposed a writing requirement on sales transactions not governed by the UCC, and is, therefore, unnecessary.

**Section 12** revises s. 671.208, F.S., related to the option to accelerate, at will, either payment or performance under a contract. The CS makes minor grammatical changes to replace “shall” with “must,” and “shall have” with “has.”

**Section 13** creates s. 671.209, F.S., to define “notice” and “knowledge.” Subsection (1) provides that a person has notice of a fact if the person:

- Has actual knowledge of it;
- Has received a notice or notification of that fact; or
- From all the facts and circumstances known to the person at the time in question, has reason to know that the fact exists.

Subsection (2) provides that knowledge means actual knowledge. This subsection also states that “knows” has a corresponding meaning to “knowledge.” Subsection (3) provides that the words “discover” and “learn” refer to the more general concept of knowledge rather than using reason to arrive at knowledge of a particular fact. Subsection (4) provides that a person notifies or gives notice or notification to another by taking steps that are reasonable to inform the other person that s/he has come to know of a particular fact.

Subsection (5) states that a person receives notice when:

- (a) it comes to that person’s attention; or
- (b) it is delivered in a form reasonable under the circumstances at the place of business through which a contract is made.

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<sup>5</sup> The Statute of Frauds is a common law statute, codified at UCC Art. 2-201, which requires that certain contracts be in writing in order to be enforceable.

Subsection (6) provides that “notice, knowledge or a notice or notification received by an organization is effective for a particular transaction from the time it is brought to the attention of the person conducting [the] transaction and, . . ., from the time it would have been brought to that person’s attention” had the organization exercised due diligence. The definition describes due diligence as maintaining reasonable routines for communicating significant information to the person conducting the transaction when there is reasonable compliance with those routines. Due diligence does not require an individual acting for the organization to communicate information unless it is part of the individual’s regular duties, or the individual knows of the transaction and the transaction would be materially affected by the information.

**Section 14** creates s. 671.21, F.S., to address presumptions. This term is currently defined in s. 671.201(31), F.S. This new section requires that whenever the code creates a presumption of a fact or states that a fact is presumed, the trier of fact must find the existence of the fact presumed unless, and until, evidence is introduced that supports a finding of its nonexistence.

**Section 15** creates s. 671.211, F.S., to describe the circumstances under which a person gives value for rights. This term is currently defined in s. 671.201(44), F.S. The new description retains much of the language in the current provision and adds that a person gives value for rights if the person acquires them:

- As a security for, or in total or partial satisfaction of, a preexisting claim;
- By accepting delivery under a preexisting contract for purchase; or
- In return for any consideration sufficient to support a simple contract.

However, the revised definition adds that a person gives value for rights if she or he acquires them in return for a binding commitment to extend credit or for the extension of immediately available credit.

**Section 16** creates s. 671.212, F.S., regarding electronic signatures. As a result of the enactment of the Electronic Signatures in Global National Commerce Act (E-sign)<sup>6</sup> at the federal level, it is now possible to have sales contracts, mortgage instruments, and promissory notes memorialized in electronic form with the electronic signatures of the parties involved in the transaction.

This CS is designed to avoid preemption of state law by the federal legislation. This section of the CS modifies, limits, and supersedes E-sign, but does not modify, limit, or supersede s. 7001(c)<sup>7</sup> of the act. That section of the act provides that

information required by law to be in writing can be made available electronically to a consumer *only if* he or she affirmatively consents to receive the information

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<sup>6</sup> 15 USC ss. 7001, et. seq. Congress enacted this law on June 30, 2000, “to facilitate the use of electronic records and signature in interstate and foreign commerce by ensuring the validity and legal effect of contracts entered into electronically.” Electronic Signatures in Global National Commerce Act, *The Consumer Consent Provision in Section 101(c)(1)(C)(iii)*, *Executive Summary*, <http://www.ftc.gov/os/2001/06/esign7.htm>. 3 April 2006.

<sup>7</sup> 15 USC s. 7001(c) states that a consumer’s consent to receive electronic records is valid only if the consumer has affirmatively consented and, prior to the consent, he or she was provided a clear and conspicuous statement outlining the consumer’s rights.



electronically and the business clearly *and* conspicuously discloses specified information to the consumer before obtaining his or her consent.<sup>8</sup>

(Emphasis added). The CS also does not authorize electronic delivery of any of the notices described in s. 7003(b) of E-sign.<sup>9</sup>

**Section 17** creates s. 671.213, F.S., to address subordinated obligations, or debts that are ranked below other debts as they relate to one's obligations to creditors. Subordinated debt is usually subordinated at the time of issue or acquisition and is evidenced by an investment security or negotiable or non-negotiable note. Debt may also be subordinated after it arises by agreement between the creditor and debtor, by agreement between two creditors of the same debtor, or by agreement of all three parties. The subordinated creditor may be a stockholder or other "insider" interested in the common debtor. The subordinated debt may consist of accounts or other rights to payment not evidenced by any instrument.

Subordination agreements are enforceable between parties to a contract; and in bankruptcy of the common debtor, dividends otherwise payable to the subordinated creditor are turned over to the superior creditor.

The CS provides that an obligation may be subordinated on issue and that a creditor may subordinate its right to performance by agreement. The CS further provides that subordination does not create a security interest against either the common debtor or a subordinated creditor.

**Section 18** amends s. 559.9232, F.S., related to rental purchase agreements, to conform cross-references and make minor grammatical changes.

**Section 19** amends s. 563.022, F.S., related to beer distributors and manufacturers, to conform cross-references.

**Section 20** amends s. 668.50, F.S., related to the Uniform Electronic Transaction Act, to conform cross-references.

**Section 21** amends s. 670.106, F.S., related to the receipt of payment orders, to conform cross-references.

**Section 22** amends s. 670.204, F.S., related to refunds of payments and unauthorized payment orders to conform cross-references.

**Section 23** amends s. 675.102, F.S., related to the scope of Article 5 (Letter of Credit), to conform cross-references.

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<sup>8</sup> *Executive Summary*, note 4, *supra*.

<sup>9</sup> 15 USC s. 7003(b) excludes from E-sign "court orders or notices, or official court documents (including briefs, pleadings, and other writings) required to be executed in connection with court proceedings" and notices of: cancellation of utility services; defaults or foreclosures or other such proceedings on a primary residence; cancellation or termination of health or life insurance; or recall of a product because of health or safety issues, or documents required to transport toxic or dangerous materials.

**Section 24** amends s. 679.525, F.S., related to processing fees for filing financing statement and other written documents under the Uniform Commercial Code.

The current version of s. 679.525, F.S., lists fees for the electronic filing of financing statements and amendments to those statements. Currently, the private vendor that accepts the UCC filings under contract with the Department, does not have the capacity to accept electronic filings, and, consequently, does not charge these fees. If the vendor moves to electronic filing in the future, this revision would require that filing fees be the same for paper or electronic filing.

**Section 25** amends s. 680.518, F.S., related to substituting goods, to conform cross-references.

**Section 26** amends s. 680.519, F.S., related to lessee damages for non-delivery, repudiation, default or breach of warranty, to conform cross-references.

**Section 27** amends s. 680.527, F.S., related to lessors' rights to dispose of goods, to conform cross references.

**Section 28** amends s. 680.528, F.S., related to lessors' damages for non-acceptance or repudiation, to conform cross references.

**Section 29** amends s. 713.901, F.S., related to the Florida Uniform Federal Lien Registration Act<sup>10</sup> to specify the fees charged by the Department which were previously indicated solely by a cross-reference to s. 15.091, F.S. Section 15.091, F.S., is repealed in section 1 of this bill.

**Section 30** provides an effective date of January 1, 2008.

#### **IV. Constitutional Issues:**

A. Municipality/County Mandates Restrictions:

None.

B. Public Records/Open Meetings Issues:

None.

C. Trust Funds Restrictions:

None.

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<sup>10</sup> The purpose of this act is to provide uniformity among the states with respect to the filing of federal liens. See In Re Carrens, 198 B.R. 999, 1003 (Bkrtcy, M.D. Fla. 1996).

**V. Economic Impact and Fiscal Note:****A. Tax/Fee Issues:**

The CS retains the same fees specified in s. 15.091, F.S., which is cited as a cross-reference in the current version of s. 713.091, F.S. However, the bill deletes the fee authority for electronic filing of UCC-related documents under s. 679.525, F.S.

**B. Private Sector Impact:**

None.

**C. Government Sector Impact:**

None.

**VI. Technical Deficiencies:**

None.

**VII. Related Issues:**

None.

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

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## **VIII. Summary of Amendments:**

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

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