

# 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: Transportation and Economic Development Appropriations Committee

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BILL: CS/CS/SB 252

INTRODUCER: Judiciary Committee, Commerce Committee, and Senators Aronberg and Lynn

SUBJECT: Uniform Commercial Code

DATE: April 11, 2007

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

	ANALYST	STAFF DIRECTOR	REFERENCE	ACTION
1.	Gordon	Cooper	CM	<b>Fav/CS</b>
2.	Cibula	Maclure	JU	<b>Fav/CS</b>
3.	Weaver	Noble	TA	<b>Favorable</b>
4.				
5.				
6.				

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## I. Summary:

This bill amends Article 1 of the Uniform Commercial Code (UCC or code), which is codified mainly in ch. 671, F.S. The changes made to ch. 671, F.S., are largely technical, stylistic, and non-substantive in nature. The changes are based on revisions made in 2001 to Article 1 of the UCC model code by the National Conference of Commissioners on Uniform State Laws and the American Law Institute. The bill also makes other technical changes.

This bill 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 bill creates the following sections of the Florida Statutes: 671.209, 671.21, 671.211, 671.212, and 671.213.

This bill repeals section 15.091 and section 671.206, Florida Statutes.

## II. Present Situation:

### Uniform Commercial Code

The Uniform Commercial Code (UCC or code) is a uniform code created to harmonize the law governing commercial transactions and other financial areas. Article 1 of the UCC provides “definitions and general provisions which, in the absence of conflicting provisions, apply as default rules covering transactions and matters otherwise covered under a different article of the

UCC.”<sup>1</sup> The UCC consists of 9 articles dealing with the following subjects in consecutively numbered articles:

- Article 1: General Provisions (ch. 671, F.S.)
- Article 2: Sales of Goods (ch. 672, F.S.)
- Article 2A: Leases (ch. 680, F.S.)
- Article 3: Negotiable Instruments (ch. 673, F.S.)
- Article 4: Bank Deposit (ch. 674, F.S.)
- Article 4A: Funds Transfers (ch. 670, F.S.)
- Article 5: Letters of Credit (ch. 675, F.S.)
- Article 6: Bulk Transfers and Bulk Sales (not codified in the Florida Statutes)
- Article 7: Warehouse Receipts, Bills of Lading and Other Documents of Title (ch. 677, F.S.)
- Article 8: Investment Securities (ch. 678, F.S.)
- Article 9: Secured Transactions (ch. 679, F.S.)

In 2001, the National Conference of Commissioners on Uniform State Laws (NCCUSL) and the American Law Institute finalized the Revision of Uniform Commercial Code Article 1. 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>2</sup>

At least 22 states and the U.S. Virgin Islands have adopted the 2001 revision of UCC Article 1.<sup>3</sup>

### **UCC Filing Fees**

Section 15.091, F.S., contains a fee schedule for filing financing statements or other documents required or permitted by ch. 679, F.S., of the UCC. That fee schedule was effectively incorporated into ch. 679, F.S., in 2001. Section 713.901, F.S., which pertains to the Florida Uniform Federal Lien Registration Act, also imposes the filing fees under s. 15.091, F.S.

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<sup>1</sup> THE NATIONAL CONFERENCE OF COMMISSIONERS ON UNIFORM STATE LAWS, UNIFORM LAW COMMISSIONERS, SUMMARY: 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) (last visited Mar. 2, 2007).

<sup>2</sup> *Id.*

<sup>3</sup> THE NATIONAL CONFERENCE OF COMMISSIONERS ON UNIFORM STATE LAWS, A FEW FACTS ABOUT THE...REVISED UNIFORM COMMERCIAL CODE ARTICLE 1, GENERAL PROVISIONS (2001), [http://www.nccusl.org/Update/uniformact\\_factsheets/uniformacts-fs-ucc1.asp](http://www.nccusl.org/Update/uniformact_factsheets/uniformacts-fs-ucc1.asp) (last visited Mar. 5, 2007).

However, s. 15.091, F.S., uses terminology based on the UCC, rather than the Uniform Federal Lien Registration Act.

### **Florida Secured Transaction Registry**

Section 679.527, F.S., establishes the Florida Secured Transaction Registry to serve as a central database for filing all documents related to secured transactions. This law also requires the Department of State (the Department) to contract with a private vendor to conduct the administrative and operational aspects of this registry, which includes collecting filing fees. Although reduced filing fees apply to electronic filings, the vendor does not have the capacity to accept them.<sup>4</sup>

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

This bill amends Article 1 of the Uniform Commercial Code (UCC or code), which is codified mainly in ch. 671, F.S. The changes made to ch. 671, F.S., are largely technical, stylistic, and non-substantive in nature. The changes are based on revisions made in 2001 to Article 1 of the UCC model code by the National Conference of Commissioners on Uniform State Laws and the American Law Institute. The bill also makes other technical changes. The specific changes to the existing law are detailed below.<sup>5</sup>

**Section 1** repeals s. 15.091, F.S., relating to filing fees for financing statements and other written documents under the Uniform Commercial Code. This provision was made obsolete by s. 6, ch. 2001-198, L.O.F., which created another fee schedule for UCC filing fees. Section 29 of this bill effectively duplicates the fee schedule in s. 15.091, F.S., the Florida Uniform Federal Lien Registration Act.

**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." The new language clarifies that ch. 671, F.S., applies to transactions governed by other chapters of the UCC.

**Section 3** amends s. 671.102, F.S., which governs the purposes, rules of construction, and variations from the UCC that are made by agreements. The changes to s. 671.102, F.S., are minor stylistic changes. However, the new language in s. 671.102(2)(b), F.S., was transferred from s. 671.204(1), F.S.

**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 a claim or right after a breach of agreement occurs.

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<sup>4</sup> Conversation with Anthony DiMarco, a representative of the Florida Bankers Association (March 2007).

<sup>5</sup> Much of the "Effect of Proposed Changes" section of this staff analysis is based on the Official Comments to the Uniform Commercial Code.

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 bill deletes the required written waiver or renunciation signed and delivered by the aggrieved party and, instead, permits agreement of the aggrieved party in an authenticated record. Thus, the changes permit the waiver to be in writing or electronic form.

**Section 6** amends s. 671.201, F.S., which provides general definitions for terms used in the code. The bill adds several new definitions and revises existing ones. The new terms and definitions are as follows.

- **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 or that is stored in an electronic or other medium and 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.
- **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.

- **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, 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 other portions of the UCC that 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.”<sup>6</sup> This broader definition reflects the standard already applicable throughout the code.
- **Holder:** This definition is reorganized for clarity.
- **Insolvent:** The revised definition clarifies that three different tests exist to determine insolvency.
- **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 NCCUSL. 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.
- **Purchase:** This definition is revised to include a lease.
- **Representative:** The definition of representative 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.” The definition also clarifies the existing distinction between a lease that creates a security interest and a lease that does not.

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<sup>6</sup> NATIONAL CONFERENCE OF COMMISSIONERS ON UNIFORM STATE LAWS AND THE AMERICAN LAW INSTITUTE, REVISION OF UNIFORM COMMERCIAL CODE ARTICLE-1 GENERAL PROVISIONS 20 (Mar. 8, 2006).

- **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. 671.209, F.S., is created to define the terms "notice" and "knowledge." In addition, new provisions are created to define "presumptions," s. 671.21, 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 a technical change by 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 section states: "[e]very contract or duty within this code imposes an obligation of good faith in its performance or enforcement." The revised sentence changes the "or" after "performance" to "and."

**Section 9** amends s. 671.204, F.S., regarding when actions taken related to contracts occur within a reasonable timeframe. The bill revises this section to clarify that reasonableness depends on the transactional context of the particular action.

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

The bill defines "course of performance" as 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 bill also provides that "course of performance" prevails over "course of dealing" and "usage of trade." However, express terms may prevail over all three. Moreover, the bill 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 bill revises the description to include a sequence of conduct concerning previous transactions, rather than previous conduct.

**Section 11** repeals s. 671.206, F.S., relating to the Statute of Frauds for certain types of personal property not otherwise covered under the code. According to the Business Law Section of The Florida Bar, this section is not necessary.

**Section 12** revises s. 671.208, F.S., related to the option to accelerate, at will, either payment or performance under a contract. The bill 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.

The section also defines the terms “knowledge,” “knows,” “discover,” “learn,” “notifies,” “gives notification to,” and “receives.” The concepts in this section were transferred from s. 671.201, F.S.

**Section 14** creates s. 671.21, F.S., to address presumptions. This section was transferred from s. 671.201(31), F.S., with only stylistic changes.

**Section 15** creates s. 671.211, F.S., to describe the circumstances under which a person gives value for rights. This provision was transferred from s. 671.201(44), F.S.

**Section 16** creates s. 671.212, F.S., regarding electronic signatures. In 2000, Congress enacted the Electronic Signatures in Global and National Commerce Act (ESIGN).<sup>7</sup> The purpose of ESIGN was to “facilitate the use of electronic records and signatures in interstate and foreign commerce by ensuring the validity and legal effect of contracts entered into electronically.”<sup>8</sup> A state, however, is permitted under s. 102 of ESIGN to specify alternative procedures for electronic signatures and records. In accordance with that authority, the bill relies on the UCC for alternative procedures. Additionally, the bill does not supersede s. 101 ESIGN, which requires consumers to consent prior to the use of electronic records.

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<sup>7</sup> FEDERAL TRADE COMMISSION, BUREAU OF CONSUMER PROTECTION AND DEPARTMENT OF COMMERCE, NATIONAL TELECOMMUNICATIONS AND INFORMATION ADMINISTRATION, ELECTRONIC SIGNATURES IN GLOBAL AND NATIONAL COMMERCE ACT, THE CONSUMER CONSENT PROVISION IN SECTION 101(C)(1)(C)(III), EXECUTIVE SUMMARY, 3, <http://www.ftc.gov/os/2001/06/esign7.htm> (last visited Mar. 2, 2007).

<sup>8</sup> *Id.*

**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 bill provides that an obligation may be subordinated on issue and that a creditor may subordinate its right to performance by agreement. The bill 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 a cross-reference and make minor grammatical changes.

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

**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 a conform cross-reference.

**Section 22** amends s. 670.204, F.S., related to refunds of payments and unauthorized payment orders, to delete a cross-reference that is no longer applicable due to changes to the referenced statute.

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

**Section 24** amends s. 679.525, F.S., related to processing fees for filing financing statements 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 State does not have the capacity to accept electronic filings. If the vendor is able to accept electronic filings in the future, the fees for electronic filings will be the same as the fees for hard copies.

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



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

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

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

**Section 29** amends s. 713.901, F.S., related to the Florida Uniform Federal Lien Registration Act.<sup>9</sup> This section effectively transfers the fee schedule deleted in section one of the bill to s. 713.901. However, the terminology is changed to reflect the terminology of the Florida Federal Lien Registration Act, rather than the UCC.<sup>10</sup>

**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.

#### **V. Economic Impact and Fiscal Note:**

A. Tax/Fee Issues:

The fee schedule in s. 15.091, F.S., is transferred to s. 713.901, F.S., the Florida Uniform Federal Lien Registration Act. However, the terminology of the fee schedule is changed to reflect the terminology of the Florida Federal Lien Registration Act.

B. Private Sector Impact:

None.

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<sup>9</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 (Bankr. M.D. Fla. 1996).

<sup>10</sup> Telephone interview with Jay Kassees, Department of State, in Tallahassee, Fla. (Mar. 8, 2007).

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:**

None.

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