

HOUSE OF REPRESENTATIVES STAFF ANALYSIS

BILL #: CS/CS/HB 897 Service of Process on Financial Institutions

SPONSOR(S): Regulatory Affairs Committee; Insurance & Banking Subcommittee; Stone and others

TIED BILLS: **IDEN./SIM. BILLS:** CS/CS/SB 1104

REFERENCE	ACTION	ANALYST	STAFF DIRECTOR or BUDGET/POLICY CHIEF
1) Insurance & Banking Subcommittee	10 Y, 0 N, As CS	Bauer	Luczynski
2) Regulatory Affairs Committee	14 Y, 0 N, As CS	Bauer	Hamon

SUMMARY ANALYSIS

The Office of Financial Regulation (OFR) is responsible for the regulation of financial institutions chartered and organized under Florida law and in accordance with the Florida Financial Institutions Codes (Codes) for safety and soundness. The OFR does not regulate financial institutions that are chartered under federal law or in other states, although these non-Florida financial institutions that transact business in Florida are still subject to certain state laws, including service of process laws.

Currently, s. 655.0201, F.S., governs the manner in which service of process, notice, or demand may be made on financial institutions that transact business in Florida, whether state or nationally chartered. It provides that process may be served in accordance with any of the following:

- *Chs. 48 and 49, F.S.* (relating to service of process and constructive service of process):
 - Provisions in ch. 48, F.S., designate the Secretary of State of Florida to serve as the agent for foreign business entities doing business in Florida and for domestic LLCs under certain circumstances. The Department of State (DOS)'s Division of Corporations currently maintains corporate registered agent information through its website, www.sunbiz.org.
- *Ch. 605, F.S. or Pt. I, Ch. 607, F.S.* (LLC and corporation law):

Because the Codes require Florida-chartered banks to be formed as a Florida corporation or as a LLC in certain circumstances, s. 655.0201(1), F.S., also allows service of process to be made on financial institutions pursuant to ch. 605, F.S. (Florida Revised Limited Liability Company Act), or part I of ch. 607, F.S. (Florida Business Corporation Act). Foreign corporations may generally be served process through its registered agent.
- However, if the financial institution does not have a registered agent, or the registered agent cannot be served with reasonable diligence, the statute authorizes service on any *executive officer* of the financial institution at its principal place of business in Florida.

The bill creates s. 48.092, F.S., to specify that service of process on a financial institution must be made in accordance with s. 655.0201, F.S., which the bill amends regarding how service of process may be made upon a financial institution, whether state- or nationally-chartered. The bill allows financial institutions to designate a registered agent or place with the DOS as the sole location or agent for service of process; if service cannot be made at such location or the financial institution does not have a registered agent, service may be made upon officers, directors, or business agents at specified locations. The bill allows the OFR to serve process on financial institutions through certified mail on specified persons and locations.

The bill has no impact on local governments and an indeterminate impact on state government, in that the DOS may experience an increase in registered agent filings as well as filing fees. The bill may have a positive impact on the private sector due to the clarified methods by which service of process may be made on financial institutions in this state.

The bill provides an effective date of January 1, 2017.

FULL ANALYSIS

I. SUBSTANTIVE ANALYSIS

A. EFFECT OF PROPOSED CHANGES:

Current Situation

The U.S. Dual Banking System

The U.S. dual banking system allows financial institutions to become chartered (organized) under either federal or state law.

- *National banks* are chartered under federal law, i.e., the National Bank Act,¹ and are supervised by the Office of the Comptroller of the Currency (OCC), which is housed with the U.S. Department of the Treasury.
- *State-chartered banks* are chartered under the laws of the state in which the bank is headquartered.
- *Credit unions* may also be either state or federally chartered.

In Florida, the Office of Financial Regulation (OFR), which is administratively housed within the Department of Financial Services (DFS), is responsible for the regulation of financial institutions chartered and organized under Florida law and in accordance with the Florida Financial Institutions Codes (Codes) and commission rules² for safety and soundness. The OFR does not regulate national banks and banks that are chartered and regulated in other states. In addition, the OFR does not regulate institutions that are chartered and regulated by foreign institutions, except to the extent those foreign institutions seek to engage in the business of banking or trust business in Florida.

While a financial institution may elect to be state-chartered, it is still subject to federal regulation. The U.S. dual banking system is premised on two related doctrines - the competitive equality doctrine and federal preemption. The competitive equality doctrine essentially states that national banks are subject to state laws with regards to 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.³ 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. Constitution's Supremacy Clause,⁴ federal regulation of a particular subject preempts state regulation related to the same subject.⁵

OCC regulations provide that a nationally chartered bank may exercise its deposit-taking and lending powers *without regard* to state law limitations on certain matters, such as checking accounts, disclosure requirements, and state licensing and registration requirements, meaning these state laws are preempted. However, the regulations specifically exclude state licensing or registration requirements "for purposes of service of process," meaning that state service of process laws may apply to national banks and are not preempted by federal law.⁶

¹ The National Bank Act of 1964 (12 U.S.C. § 24 Seventh) gives enumerated powers and "all such incidental powers as shall be necessary to carry on the business of banking" to nationally chartered banks.

² s. 20.121(3)(a)2. and (e), F.S. The Codes consist of ch. 655 (financial institutions generally); ch. 657 (credit unions); ch. 658 (banks and trust companies); ch. 660 (trust business); ch. 663 (international banking); ch. 665 (capital stock associations); and ch. 665 (savings associations).

³ *National Bank v. Commonwealth*, 9 Wall. 353, 362, 19 L.Ed. 701(1870).

⁴ U.S. Const., Art. VI, cl. 2.

⁵ In *Barnett Bank of Marion County, N.A. v. Nelson*, 517 U.S. 25 (1996), for instance, the U.S. Supreme Court held that a federal statute granting small town banks the authority to sell insurance, preempted a Florida statute which prohibited such sales. 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 by the national bank's powers. See 12 U.S.C. §25b(b)(1).

⁶ 12 C.F.R. §§7.4007(a)(6) and 7.4008(d)(1).

Service of Process on Financial Institutions in Florida Under the Codes

Currently, s. 655.0201, F.S., governs the manner in which service of process, notice, or demand may be made on financial institutions that transact business in Florida, whether state or nationally chartered. It provides that process may be served in accordance with any of the following:

1. *Chs. 48 and 49, F.S. (Process and Service of Process & Constructive Service of Process)*

- Ch. 48, F.S. (Process and Service of Process):
 - In particular, s. 48.081, F.S., sets forth the order of priority of persons within a private corporation, domestic or foreign, who may be properly served:⁷
 - President or vice president, or other head of the corporation,
 - Cashier, treasurer, secretary, or general manager,
 - Any director,
 - Any officer or business agent residing in the state.
 - Provisions in ch. 48, F.S. designate the Secretary of State of Florida to serve as the agent for foreign business entities doing business in Florida and for domestic LLCs under certain circumstances. The Department of State (DOS)'s Division of Corporations currently maintains corporate registered agent information through its website, www.sunbiz.org.
 - Every Florida corporation and every foreign corporation qualified to do business in this state must designate a registered agent and registered office (which must be kept open and available for receiving process during certain hours and days), in accordance with pt. 1, ch. 607, F.S.⁸

2. *Ch. 605, F.S., or Part I, Ch. 607, F.S. (LLC and corporation law)*

Secondly, because the Codes require Florida-chartered banks to be formed as a Florida corporation or as a limited liability company (LLC) in certain circumstances,⁹ s. 655.0201(1), F.S., also allows service of process to be made on financial institutions pursuant to ch. 605, F.S. (Florida Revised Limited Liability Company Act), or part I of ch. 607, F.S. (Florida Business Corporation Act).

- The LLC Act generally provides that process may be served on the entity's registered agent.¹⁰
- Process may generally be served on any corporation in accordance with ch. 48, F.S., or ch. 49, F.S., discussed above, while notice or demand may be made to the chair of the board of directors the president, any vice president, the secretary, the treasurer, the registered agent, or to the principal office of the corporation in Florida.¹¹
- Process on foreign corporations authorized to transact business in Florida may be made on its registered agent, or in certain circumstances, to the secretary of the corporation.¹²

3. *Registered Agent, Executive Officer, or Other Designated Persons*

Thirdly, the Codes also permit financial institutions to designate a *registered agent* for service of process. However, if the financial institution does not have a registered agent, or the registered agent cannot be served with reasonable diligence, the statute authorizes service on any *executive officer* of the financial institution at its principal place of business in Florida. The Codes broadly define "executive officer" as:

An individual, whether or not the individual has an official title or receives a salary or other compensation, who participates or has authority to participate, other than in the

⁷ "The object of s. 48.081, F.S., is to have service made upon someone who is held responsible by the corporation, "and it contemplates that service shall be made, whenever possible, upon the more responsible officers before resorting to service upon one of the inferior officers or agents of the corporation." *Imperial Towers, Inc. v. Dade Home Servs., Inc.*, 199 So.2d 518, 520-521 (Fla. 4th DCA 1967) (citing *Cherry Lake Farms v. Love*, 129 Fla. 469, 176 486 (1937)).

⁸ s. 48.091, F.S.

⁹ See s. 658.16, F.S., relating to creation of banking or trust corporations. Credit unions authorized to transact business pursuant to Florida law are required to have one principal place of business (as designated in its bylaws) where legal process may be served. See s. 657.00891, F.S.

¹⁰ ss. 605.0113 and 605.0117, F.S.

¹¹ s. 607.0504, F.S.

¹² s. 607.15101, F.S.

capacity of a director, in the major policymaking functions of a financial institution. The term does not include an individual who may have an official title and may exercise discretion in the performance of duties and functions, including discretion in the making of loans, but who does not participate in the determination of major policies of the financial institution and whose decisions are limited by policy standards established by other officers, whether or not the policy standards have been adopted by the board of directors.¹³

If neither of the previously described alternatives is viable, the default alternative is to serve any *officer, director, or business agent* of the financial institution at its principal place of business or at any other branch, office, or place of business in this state.

Finally, the statute provides that this section does not prescribe the only means of serving notice or demand on a financial institution.

A recent example of improper service of process on a financial institution in Florida is illustrated in the *Bank of America, N.A. v. Bornstein* decision from the Fourth District Court of Appeal. The plaintiff served a writ of garnishment on Bank of America (BOA) through a bank teller at a West Palm Beach branch office, without showing that service was first attempted on the statutorily prescribed superior classes of persons who could have been served. BOA moved to quash service under the service of process statutes in the Codes and under ch. 48, F.S., asserting that the bank teller was not authorized to accept service on behalf of the bank. The appellate court concurred with the bank, finding service was improper.¹⁴ In instances where a financial institution does not timely move to quash defective service, it could be held liable for the underlying action, such as in garnishment proceedings.¹⁵

Effect of the Bill

Section 1 of the bill creates s. 48.092, F.S., to state that service on a financial institution must be made in accordance with s. 655.0201, F.S.

Section 2 of the bill amends s. 655.0201, F.S., to revise the ways in which service of process may be made upon a financial institution, whether state- or nationally-chartered. The bill amends s. 655.0201, F.S., to allow a financial institution to designate a place or registered agent within this state as its sole location for service of process. The place or agent must be open or available to receive service on regular business days from at least 9 a.m. to 5 p.m. The revisions to s. 655.0201, F.S., eliminate the potential for serving a financial institution through constructive notice by publication.

If the financial institution has no registered agent, or service cannot be made at the designated location, service may be made to any officer, director, or business agent of the financial institution at its principal place of business or at any other branch, office, or place of business in this state.

The bill allows the OFR to serve process on a financial institution by serving any officer, director, or business agent at its principal place of business or any other branch, office, or place of business in Florida. OFR can continue to serve process on financial institutions via certified mail.

Section 3 provides for an effective date of January 1, 2017.

B. SECTION DIRECTORY:

Section 1. Creates s. 48.092, F.S., relating to service on financial institution.

¹³ s. 655.005(1)(g), F.S. The statute also lists presumptive examples of “executive officer,” such as the chair of the board of directors, the president, the chief executive officer, etc., unless excluded by board resolution or bylaws.

¹⁴ *Bank of America, N.A. v. Bornstein*, 39 So.3d 500 (4th DCA 2010).

¹⁵ Ch. 77, F.S., requires the garnishee-defendant to serve an answer on the plaintiff within 20 days after service of the writ of garnishment, or be subject to a default judgment.

Section 2. Amends s. 655.0201, F.S., relating to service of process, notice, or demand on financial institutions.

Section 3. Provides an effective date of July 1, 2016.

II. FISCAL ANALYSIS & ECONOMIC IMPACT STATEMENT

A. FISCAL IMPACT ON STATE GOVERNMENT:

1. Revenues:

See Fiscal Comments.

2. Expenditures:

See Fiscal Comments.

B. FISCAL IMPACT ON LOCAL GOVERNMENTS:

1. Revenues:

None.

2. Expenditures:

None.

C. DIRECT ECONOMIC IMPACT ON PRIVATE SECTOR:

The bill may have a positive impact on the private sector due to the clarified methods by which service of process may be made on financial institutions in this state.

D. FISCAL COMMENTS:

The bill has an indeterminate impact on state government, in that the DOS may experience an increase in registered agent filings as well as filing fees.¹⁶ Currently, the DOS fee for a for-profit corporation to designate a registered agent designation is \$35.00.¹⁷

III. COMMENTS

A. CONSTITUTIONAL ISSUES:

1. Applicability of Municipality/County Mandates Provision:

Not applicable. This bill does not appear to affect county or municipal governments.

2. Other:

None.

B. RULE-MAKING AUTHORITY:

None provided by the bill.

C. DRAFTING ISSUES OR OTHER COMMENTS:

None.

¹⁶ Email from Christie Fitz-Patrick, Legislative Director of Department of State, RE:HB 897 – Service of Process on Financial Institutions, regarding fiscal impact of committee substitute (Feb. 2, 2016).

¹⁷ FLORIDA DEPARTMENT OF STATE, DIVISION OF CORPORATIONS, *Instructions for Filing a Florida Profit Corporation Online or by Mail*, at https://efile.sunbiz.org/Profit_Filing_Help.html (last visited Feb. 2, 2016).

IV. AMENDMENTS/ COMMITTEE SUBSTITUTE CHANGES

On February 1, 2016, the Insurance & Banking Subcommittee considered and adopted a strike-all amendment and reported the bill favorably as a committee substitute. The amendment:

- Requires, instead of permits, a financial institution to designate a registered agent as its agent for service of process, notice, or demand;
- Deletes language allowing service of process to be made on any executive officer of the financial institution at its principal place of business in Florida, if the financial institution has no registered agent or its registered agent cannot be served with reasonable diligence;
- Removes business agents and the financial institution's other branches, offices, or places of business in Florida as authorized recipients and locations at which service of process may be made on a financial institution, if service cannot be made on the registered agent; and
- Provides that this statute provides the only means of serving notice or demand on a financial institution, subject to chapters 48, 49, 605, or part I of chapter 607, F.S.

On February 25, 2016, the Regulatory Affairs Committee adopted a strike-all amendment and reported the bill favorably as a committee substitute. The strike-all amendment conforms the bill to the Senate companion, CS/CS/SB 1104. The amendment:

- Clarifies that service on a financial institution must be made in accordance with s. 655.0201, F.S.;
- Allows financial institutions to designate with the Department of State a registered agent or a "place" as the sole location for service of process;
- Allows service of process to be alternatively made on any officer, director, or business agent of the financial institution at any other branch, office, or place of business in this state;
- Specifies how the Office of Financial Regulation may serve process on a financial institution; and
- Provides an effective date of January 1, 2017.

This analysis is drafted to the committee substitute as passed by the Regulatory Affairs Committee.