HOUSE OF REPRESENTATIVES STAFF ANALYSIS

BILL #: PCS for HB 1091 Banking
SPONSOR(S): Insurance & Banking Subcommittee
TIED BILLS: **IDEN./SIM. BILLS:** SB 1020

REFERENCE	ACTION	ANALYST	STAFF DIRECTOR or BUDGET/POLICY CHIEF
Orig. Comm.: Insurance & Banking Subcommittee		Bauer	Cooper

SUMMARY ANALYSIS

The Office of Financial Regulation (OFR) regulates and charters banks, trust companies, credit unions, and other financial institutions pursuant to the Financial Institutions Codes ("Codes"), chapters 655 to 667, Florida Statutes. The OFR ensures Florida-chartered financial institutions' compliance with state and federal requirements for safety and soundness.

This PCS amends the following provisions of the Codes:

- Creates a definition of "control of a company or bank."
- Amends the definition of "related interest" to remove the person's family and household members.
- Amends the par value statute to clarify that the par value requirement only applies to the settlement of checks between institutions, and provides that institutions may charge fees to cash checks.
- Provides a statement of legislative intent for amending the par value statute.
- Makes a technical change to the definition of "financial institution."

The PCS does not have a fiscal impact on state or local government. The PCS may have a positive fiscal impact on the private financial sector by allowing Florida-chartered banks to charge check-cashing fees to non-customers, but may result in more fees for consumers if they are not customers of these banks.

The PCS is effective July 1, 2013.

FULL ANALYSIS

I. SUBSTANTIVE ANALYSIS

A. EFFECT OF PROPOSED CHANGES:

Background

The U.S. Dual Banking System

The U.S. dual banking system allows commercial banks to become chartered and regulated under either federal or state law.

- *National banks* are chartered under federal law, i.e., the National Bank Act.[1] Their primary federal regulator is the Office of the Comptroller of the Currency (OCC), an independent agency within the U.S. Department of the Treasury.
- *State-chartered banks* are chartered under the laws of the headquarters' state.
    - 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.

The Florida Office of Financial Regulation (OFR) regulates entities that engage in financial institution business in Florida, in accordance with the Florida Financial Institutions Codes (Codes) and the Florida Financial Institutions Rules.[2] The specific chapters under the Codes are:

- Chapter 655, F.S. – Financial Institutions Generally
- Chapter 657, F.S. – Credit Unions
- Chapter 658, F.S. – Banks and Trust Companies
- Chapter 660, F.S. – Trust Business
- Chapter 663, F.S. – International Banking
- Chapter 665, F.S. – Associations
- Chapter 665, F.S. – Savings Banks

The OFR ensures Florida-chartered financial institutions' compliance with state and federal requirements 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.

Competitive Equality & Preemption

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. In *Barnett Bank of Marion County, N.A. v. Nelson*, 517 U.S. 25 (1996), for

[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. 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 § 484(a).

[2] Chapter 69U-100 through 69U-150, F.A.C.

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

[4] U.S. Const., Art. VI, cl. 2.

instance, the United States 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.[5]

It is noted that the Codes contain a unique provision that ensures competitive equality for *Florida-chartered* financial institutions. If a state law places a Florida financial institution at a competitive disadvantage with national banks, Section 655.061, F.S. authorizes the OFR to grant Florida banks the authority to make any loan or investment or exercise any power which they could make or exercise as if they were federally chartered financial banks, and provides the entitled to the same privileges and protections granted to federally chartered or regulated banks. In addition, this provision states:

> In issuing an order or rule under this section, the office or commission shall consider the importance of maintaining a competitive dual system of financial institutions and whether such an order or rule is in the public interest.[6]

Control

Current Situation

Currently, the Codes provide a presumption that a *business organization* has control over a bank or a business or over any business organization, if one of the following apply:

> (a) The business organization directly or indirectly or acting through one or more other persons owns, controls, or has power to vote 25 percent or more of any class of voting securities of the bank or other business organization;
> (b) The business organization controls in any manner the election of a majority of the directors, trustees, or other governing body of the bank or other business organization;
> (c) The business organization owns, controls, or has power to vote 10 percent or more of any class of voting securities of the bank or other business organization and exercises a controlling influence over the management or policies of the bank or other business organization; *or*
> (d) The office determines, after notice and opportunity for hearing, that the business organization directly or indirectly exercises a controlling influence over the management or policies of the bank or other business organization.[7]

A business organization is generally defined as "a corporation, association, partnership, or business trust and includes any similar organization," wherever created, but does not include any corporation with a majority of its shares owned by the United States or by the state of Florida.[8]

In addition, the Codes state that any "person or group of persons" that proposes to purchase or acquire a controlling interest in a state bank or state trust company are subject to the same standards, criteria, and exceptions for business organizations described above.[9] The Codes do not define person, but s. 1.01, F.S., provides that "[t]he word 'person' includes individuals, children, firms, associations, joint adventures, partnerships, estates, trusts, business trusts, syndicates, fiduciaries, corporations, and all other groups or combinations." Accordingly, the Codes' requirements for acquiring control apply to both natural persons and to business organizations. Pursuant to s. 658.28(2), the OFR is required to issue a certificate of authority after investigating and determining "that the proposed new owners of the interest are qualified by reputation, character, experience, and financial responsibility to control and operate the bank or trust company in a legal and proper manner and that the interests of the other stockholders, if any, the

[5] 12 U.S.C. §25b(b)(1).
[6] The OFR's orders of general application are publicly available on its agency website. https://real.flofr.com/ConsumerServices/SearchLegalDocuments/LDSearch.aspx (last accessed March 16, 2013).
[7] Section 658.27(2), F.S. The statute also provides exceptions to the presumption of ownership or control.
[8] Section 658.27(1)(b), F.S.
[9] Section 658.28(1), F.S.

depositors and creditors of the bank or trust company, and the public generally will not be jeopardized by the proposed change in ownership, controlling interest, or management."[10] Persons who have been convicted or have pled to specified criminal offenses, such as money laundering in financial institutions, may not receive a certificate of approval.[11]

If a proposed purchase or acquisition of 10% or more of any class of voting securities would give rise to the presumption that the purchaser would own, control, or have power to vote 10% of any class of the bank's securities *and* exercises a controlling influence[12] over the bank's management or policies, the purchaser must first provide written notice of the proposal to the OFR. The statute permits such person to present facts to the OFR, either in writing in or in an informal conference with the OFR, to rebut the presumption that the person exercises a controlling influence over the bank. If the person cannot rebut the presumption, that person must file an application for a certificate of approval with the OFR.[13]

It is noted that a federal regulation exists for state and national banks that are members of the Federal Reserve System. Regulation O (12 C.F.R. 215), regarding extensions of credit to insiders and transactions with affiliates, states that "control of a company or bank" is presumed to exist if a person:

1) Is an executive officer or director of the company or bank, and owns, controls, or has the power to vote more than 10% of the voting securities of the company or bank, ***or***
2) Owns, controls, or has the power to vote more than 10% of the voting securities of the company or bank, and no other person has a greater percentage of that class of voting securities.[14]

Reg O also provides that a person does not control merely because he or she is an officer or director of a bank.[15]

Accordingly, Florida-chartered banks who are members of the Federal Reserve System are subject to two differing definitions of "control."

Effect of the PCS on control

Section 1 of the PCS creates a general definition of "control of a bank or company" that is identical to the Regulation O's instances of presumed control. The PCS also slightly modifies the presumption of control and specifies that an individual is not considered to have control, solely by virtue of the individual's position as an officer or director of the company or bank.

However, the PCS does not address the existing language regarding control in s. 658.27(2), F.S. Accordingly, there may be ambiguity as to which provision would apply to Florida-chartered banks.

Lending limits and related interests

Current Situation

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

[10] Section 658.28(1)(b), F.S.
[11] Section 658.28(1)(c), F.S.
[12] The Codes do not define "controlling influence."
[13] Section 658.28, F.S.; Rule 69U-105.102(1)(l), F.A.C.; Form OFR-U-11, http://flofr.com/PDFs/OFR-U-11.pdf.
[14] 12 C.F.R. 215.2(c)(2).
[15]

dependent. These limits promote diversification of loans and help ensure equitable access to banking services.[16]

Florida-chartered banks are also subject to lending limits in the Codes:

- *General limitations*: a bank may extend unsecured credit to any person up to 15% of its capital accounts, and up to 25% of its capital accounts for secured credit. For the latter, the Codes specify that the 25% limitation must include the borrower's "related interests."[17]
    - If the bank's total extension of credit to any person (including his or her related interests) exceed 15% of the bank's capital accounts, a majority of the bank's board of directors must approve the loan in advance.
- *Loans to executive officers, directors, and related interests*: 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.

To the extent state lending limits are lower than those provided in Regulation O for state banks that are members of the Federal Reserve System, Reg O provides that the state lending limits control.[18]

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:
> 1. Owns, controls, or has the power to vote 25 percent or more of any class of voting securities of the organization;
> 2. Controls in any manner the election of a majority of the directors of the organization; or
> 3. Has the power to exercise a controlling influence over the management or policies of the organization (emphasis added).

In the 2011 Regular Session, the Legislature enacted CS/HB 1121, relating to financial institutions. The bill made numerous changes to the Banking Codes. Prior to 2011, this term was defined within the context of credit unions' loan powers[19] and lending limits for state banks,[20] and was limited to only any partnership, corporation, or other business organization controlled by a person. As a result 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.[21]

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. Regulation O does state that a principal shareholder is a person with 10% or more of a bank's voting securities, and accounts for shares owned by that person's "immediate family." However, Reg O only considers the person's spouse, minor children, and the person's children residing in the same household, while the Florida provision also includes partners, siblings, parents, or other individuals residing in the same household.

"Related interest" also appears in other provisions of the Codes:

- *Required notice for significant events*: The Codes require financial institutions to provide a written disclosure for certain significant events, including any credit extension to an institution's executive officer and his or her *related interests*, that when combined with all other extensions of credit to that officer, exceed 15% of the institution's capital accounts.[22]

[16] 12 C.F.R. 32.1(b)
[17] Section 658.48(1)(a), F.S.
[18] 12 C.F.R. 215.2(i), footnote 2.
[19] Section 657.038, F.S.
[20] Section 658.48, F.S.
[21] *See* Senate Banking & Insurance staff analysis of SB 1332, the Senate companion to CS/HB 1121 (General Session 2011).
[22] Section 658.945(2)(a)5., F.S.

- *Stock subscriptions*: Newly formed financial institutions must provide the OFR with a list of subscribers of the capital stock of a proposed bank or trust company, following the completion of a stock offering. The Codes require that the directors provide information to the OFR regarding persons subscribing to 10% or more of the voting stock or nonvoting convertible stock. This 10% threshold must include the person's *related interests*.[23]
- *Changes in capital*: The Codes require banks and trust companies to provide notice to the OFR upon specified changes in capital. In certain situations where capital accounts have been diminished below regulatory requirements and the bank or trust company cannot reasonably replenish its capital, the Codes permit special stock offering plans subject to OFR's approval. The Codes provide that the OFR shall disapprove a plan that provides unfair or disproportionate benefits to existing shareholders, directors, executive officers, or their *related interests*.[24]

Effect of the PCS on "related interest"

Section 1 of the PCS amends the definition of "related interest" by restoring it to pre-2011 language. By removing the person's spouse, partner, sibling, parent, child, or other individual residing in the same household as the person from the definition, the PCS defines "related interest" to include only *entities* controlled by the person.

The PCS may limit the OFR's ability to enforce lending limits against banks, particularly as the limits relate to executives and stockholders.

Check-cashing fees and "par value"

Current Situation

Since 1992, the Codes require banks to settle checks "at par," or at face value.[25] This means that if an individual presented a check made out to him for $300 to any bank in Florida, the bank is required to provide $300 in funds.

In the past several years, this provision has engendered 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 two main claims – 1) federal preemption and 2) whether the statute's limitations on fees apply to bank-to-bank transactions[26], 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 the check was written by a Chase account holder, Baptista was not a Chase account holder, and was accordingly 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, 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.[27]

  The OCC, empowered by the National Bank Act to adopt bank regulations, authorizes national banks to "charge its customers non-interest charges and fees."[28] The OCC has interpreted

[23] Section 658.235(2), F.S.
[24] Section 658.36(3)(c), F.S.
[25] Section 655.85, F.S. This provision was enacted in 1992. Section 52, ch. 92-303, L.O.F.
[26] The Federal Reserve System operates a nationwide check-clearing system to facilitate the collection and settlement of checks between paying and collecting banks.
[27] 12 U.S.C. § 24 (Seventh).
[28] 12 C.F.R. § 7.4002(a).

"customer" to include "any person who presents a check for payment."[29] In light of the OCC's interpretation, the federal court held that *national banks* are not bound by the Florida statute disallowing fees to cash checks in person.[30]

- 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 reached the opposite conclusion from the federal courts' decision in the *Baptista v. Chase* lawsuit, and found that a statute was not preempted. The court held that an out-of-state state-chartered bank was <u>not</u> permitted to charge check-cashing fees under the statute.[31] Finding that the statute was not ambiguous, the Fifth DCA found that the statute did not apply only to bank-to-bank transactions.

  Curiously, 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.[32] However, when presented with PNC Bank (North Carolina-chartered bank operating in Florida) in the *Baptista* case, the court did not discuss the applicability of the 1997 federal Riegle-Neal Amendments[33] to PNC Bank. This federal legislation gives out-of-state state-chartered banks that operate in multiple states to enjoy the same benefits of federal preemption as national banks.

- 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.[34] 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. The court declined to follow the Fifth DCA's opinion to the extent that the Fifth DCA held s. 655.85, F.S. was not preempted,[35] and applied the Riegle-Neal Amendments in favor of Regions Bank. 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.

<u>Effect of the PCS on the par value statute</u>

Section 3 of the PCS amends s. 655.86, F.S., to provide that financial institutions must settle checks at par, but overrides the Fifth DCA's decision in *Baptista* to provide that this requirement only applies to the settlement of checks between banks. The PCS provides that banks are not prohibited from charging fees to cash checks presented by payees in person, and thus provides consistency with the federal decisions discussed above. 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 also place Florida-chartered banks on equal footing with national and other state-chartered banks.

[29] Cited in *Wells Fargo Bank of Texas, NA v. James*, 321 F.3d 488 (5th Cir.C.A 2003) (holding that Texas par value statute was preempted by the National Bank Act).
[30] *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).
[31] *Vida Baptista v. PNC, N.A.*, 91 So.3d 230 (Fla. 5th DCA 2012) (per curiam), *cert. denied*, 133 S.Ct. 895 (2013).
[32] *Britt v. Bank of America, N.A.*, 52 So.3d 809 (Fla. 5th DCA 2011).
[33] 12 U.S.C. § 1831a(j)1.
[34] *Pereira v. Regions Bank*, 2013 WL 265314 (M.D.Fla. 2013).
[35] Id. at footnote 4. *See also Tafflin v. Levitt*, 493 U.S. 455, 465 (1990) (holding that federal courts are "not bound by state court interpretations" of federal law).

Section 4 of the PCS provides a statement of legislative intent for Section 3, indicating that the changes clarify the relevant portions of the Codes, relating to the fees imposed by financial institutions.

B. SECTION DIRECTORY:

Section 1. Amends s. 655.005, F.S. to add and revise definitions.

Section 2. Amends s. 655.85, F.S., to clarify that a financial institution may impose a fee for the settlement of a check under certain circumstances.

Section 3. Provides legislative intent for Section 3 of the PCS.

Section 4. Amends s. 655.968, F.S., to conform a cross-reference.

Section 5. Provides an effective date of July 1, 2013.

II. FISCAL ANALYSIS & ECONOMIC IMPACT STATEMENT

A. FISCAL IMPACT ON STATE GOVERNMENT:

1. Revenues:

   The PCS does not appear to have any impact on state revenues.

2. Expenditures:

   The PCS does not appear to have any impact on state expenditures.

B. FISCAL IMPACT ON LOCAL GOVERNMENTS:

1. Revenues:

   The PCS does not appear to have any impact on local government revenues.

2. Expenditures:

   The PCS does not appear to have any impact on local government expenditures.

C. DIRECT ECONOMIC IMPACT ON PRIVATE SECTOR:

The PCS's clarification that all banks may charge check-cashing fees may provide additional revenue for Florida-chartered banks. However, this may also result in more fees for consumers who are not customers of Florida-chartered banks.

D. FISCAL COMMENTS:

None.

III. COMMENTS

A. CONSTITUTIONAL ISSUES:

1. Applicability of Municipality/County Mandates Provision:

   Not applicable. This PCS does not appear to: require counties or municipalities to spend funds or take an action requiring the expenditure of funds; reduce the authority that counties or municipalities have to raise revenues in the aggregate; or reduce the percentage of a state tax shared with counties or municipalities.

2. Other:

None.

B. RULE-MAKING AUTHORITY:

None provided in the PCS.

C. DRAFTING ISSUES OR OTHER COMMENTS:

- Section 1 of the PCS creates a definition of “control of a company or bank,” but does not amend current language that already specifies when control may be presumed and how a person may rebut the presumption.

IV. AMENDMENTS/ COMMITTEE SUBSTITUTE CHANGES