

HOUSE OF REPRESENTATIVES STAFF ANALYSIS

BILL #: PCS for HB 1347 Application of the Florida Deceptive and Unfair Trade Practices Act to Credit Unions

SPONSOR(S): Insurance & Banking Subcommittee

TIED BILLS: **IDEN./SIM. BILLS:**

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

SUMMARY ANALYSIS

The Florida Deceptive and Unfair Trade Practices Act (FDUTPA) prohibits “[u]nfair methods of competition, unconscionable acts or practices, and unfair or deceptive acts or practices in the conduct of any trade or commerce.” FDUTPA does not apply to certain entities that are otherwise regulated, such as banks or savings and loan associations, but it does apply to credit unions.

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

- Truth in Savings Act,
- Accuracy of advertising requirement,
- Equal Credit Opportunity and Fair Housing Acts,
- Fair Credit Reporting Act,
- Truth in Lending Act,
- Real Estate Settlement Procedures Act,
- Gramm-Leach-Bliley Act’s requirements relating to the privacy of consumer financial information,
- Consumer Financial Protection Bureau’s prohibition on unfair, deceptive, or abusive acts or practices, and
- Federal Trade Commission’s prohibition on unfair or deceptive acts or practices.

Consistent with current exemptions for banks and savings and loan associations, the bill provides that FDUTPA does not apply to state-chartered and federally-charted credit unions.

The bill has an indeterminate fiscal impact on the state. The bill has no impact on local governments and an indeterminate impact on the private sector.

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

FULL ANALYSIS

I. SUBSTANTIVE ANALYSIS

A. EFFECT OF PROPOSED CHANGES:

Background

Florida Deceptive and Unfair Trade Practices Act

The Florida Deceptive and Unfair Trade Practices Act (FDUTPA) became law in 1973.¹ The purpose² of FDUTPA is to:

- 1) Simplify, clarify, and modernize the law governing consumer protection, unfair methods of competition, and unconscionable, deceptive, and unfair trade practices.
- 2) Protect the consuming public and legitimate business enterprises from those who engage in unfair methods of competition, or unconscionable, deceptive, or unfair acts or practices in the conduct of any trade or commerce.
- 3) Make state consumer protection and enforcement consistent with established policies of federal law relating to consumer protection.

FDUTPA prohibits “[u]nfair methods of competition, unconscionable acts or practices, and unfair or deceptive acts or practices in the conduct of any trade or commerce.”³ The term “trade or commerce” is defined as “advertising, soliciting, providing, offering, or distributing, whether by sale, rental, or otherwise, of any good or service, or any property, whether tangible or intangible, or any other article, commodity, or thing of value, wherever situated”, and the term includes “the conduct of any trade or commerce, however denominated, including any nonprofit or not-for-profit person or activity.”⁴

Investigative and enforcement authority under FDUTPA is given to a state attorney if a violation occurs in or affects the judicial circuit under the office’s jurisdiction, and to the Department of Legal Affairs (Department) if a violation occurs in or affects more than one judicial circuit or if the state attorney defers to the Department.⁵ These enforcing authorities may, within 4 years after the occurrence of a violation or within 2 years after the last payment in a transaction involved in a violation, bring an action to obtain a declaratory judgment that an act or practice violates FDUTPA; an action to enjoin any person who has violated, is violating, or is otherwise likely to violate FDUTPA; or an action on behalf of one or more consumers or governmental entities for the actual damages caused by an act or practice in violation of FDUTPA.⁶ Additionally, these enforcing authorities may collect a civil penalty of up to \$10,000 per violation plus reasonable attorney’s fees and costs for willful violations of FDUTPA and up to \$15,000 plus reasonable attorney’s fees and costs for willful violations of FDUTPA involving a senior citizen, a person who has a disability, a military servicemember, or the spouse or dependent child of a military servicemember.⁷ The Department also has authority to issue a cease and desist order if it would be in the interest of the public.⁸

If a state attorney or the Department receives a complaint regarding a person who is subject to other supervision in this state, such enforcing authority must inform the supervising agency.⁹

¹ Ch. 73-124, Laws of Fla.; codified at Part II of Ch. 501, F.S.

² s. 501.202, F.S.

³ s. 501.204(1), F.S.

⁴ s. 501.203(8), F.S.

⁵ ss. 501.203(2), 501.206, and 501.207, F.S.

⁶ s. 501.207(1) and (5), F.S.

⁷ ss. 501.2075, 501.2077, and 501.2105, F.S.

⁸ s. 501.208(1), F.S.

⁹ s. 501.209, F.S.

FDUTPA provides a private cause of action for anyone aggrieved by a violation of FDUTPA to obtain a declaratory judgment that an act or practice violates FDUTPA; to enjoin a person who has violated, is violating, or is otherwise likely to violate this part; and to recover actual damages plus reasonable attorney's fees and costs.¹⁰

FDUTPA contains a list of certain entities to which it is *inapplicable*, including:¹¹

- a) Any person or activity regulated under laws administered by the Office of Insurance Regulation of the Financial Services Commission;
- b) Banks and savings and loan associations regulated by the Office of Financial Regulation of the Financial Services Commission;
- c) Banks or savings and loan associations regulated by federal agencies; or
- d) Any person or activity regulated under the laws administered by the former Department of Insurance which are now administered by the Department of Financial Services.

Although FDUTPA contemplates the exemption of the above entities that are otherwise regulated, it does not currently exempt credit unions.

Regulation of Credit Unions

Under the dual banking system in the United States, credit unions may be chartered under either state or federal law:

- *State-chartered credit unions* may be formed under the Florida Credit Union Act (act), which became law in 1980.¹² The act provides that “[a] credit union is a cooperative, nonprofit association, organized . . . for the purposes of encouraging thrift among its members, creating sources of credit at fair and reasonable rates of interest, and providing an opportunity for its members to use and control their resources on a democratic basis in order to improve their economic and social condition.”¹³ State-chartered credit unions have both a state regulator, the Office of Financial Regulation, and a federal regulator, the National Credit Union Association (NCUA).
- *Federally-chartered credit unions* are chartered under the Federal Credit Union Act of 1934¹⁴ and are regulated by the NCUA.

In addition to regulating both state-chartered and federally-chartered credit unions, the NCUA also operates and manages the National Credit Union Share Insurance Fund (NCUSIF), which insures share (deposit) accounts for members of all federally-chartered credit unions and most state-chartered credit unions.¹⁵ All state-chartered credit unions operating in Florida must carry NCUSIF insurance.¹⁶ The standard maximum share insurance amount is \$250,000.¹⁷

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

- *Truth in Savings Act (TISA)*¹⁸ - The purpose of TISA is “to enable credit union members and potential members to make informed decisions about accounts at credit unions.”¹⁹ TISA

¹⁰ ss. 501.2105 and 501.211, F.S.

¹¹ s. 501.212, F.S.

¹² Ch. 80-258, Laws of Fla.; codified at ch. 657, F.S.

¹³ s. 657.003, F.S.

¹⁴ Public Law 73-467, codified at 12 U.S.C. § 1751 *et seq.*

¹⁵ Federally-chartered credit unions must be insured through NCUSIF, and state-chartered credit unions may be insured through NCUSIF, though some state-chartered credit unions may be insured by private insurance or guaranty corporations. See NCUA, *Your Insured Funds*, available at

<https://www.ncua.gov/Legal/GuidesEtc/GuidesManuals/NCUAYourInsuredFunds.pdf> (last visited Mar. 17, 2017).

¹⁶ ss. 657.005(7), 657.008(5)(a)2., and 657.033(9), F.S.

¹⁷ *Id.*

¹⁸ 12 CFR Part 707.

“requires credit unions to provide disclosures so that members and potential members can make meaningful comparisons among credit unions and depository institutions.”²⁰ TISA also prohibits an advertising that is misleading or inaccurate or that misrepresents a credit union’s account agreement.²¹

- *Accuracy of advertising requirement* – Credit unions insured through NCUSIF “may [not] use any advertising (which includes print, electronic, or broadcast media, displays and signs, stationery, and other promotional material) or make any representation which is inaccurate or deceptive in any particular, or which in any way misrepresents its services, contracts, or financial condition.”²²
- *Equal Credit Opportunity (ECOA)*²³ and *Fair Housing (FHA)*²⁴ Acts – ECOA prohibits discrimination in any aspect of a credit transaction against persons on the basis of race, color, religion, national origin, sex, marital status, age (provided the applicant has the capacity to contract), the fact that an applicant’s income derives from any public assistance program, or the fact that the applicant has in good faith exercised any right under the Consumer Credit Protection Act. The FHA works in conjunction with the ECOA to prohibit discrimination by anyone who is in the business of providing loans for housing.²⁵
- *Fair Credit Reporting Act (FCRA)*²⁶ – The FCRA defines the responsibilities and liabilities of those who provide information to and access data from a consumer reporting agency (CRA).²⁷ The FCRA was designed to promote accuracy, fairness, and privacy of information in the files of every CRA by:
 - Regulating the consumer reporting industry;
 - Placing disclosure obligations on users of consumer reports;
 - Ensuring fair, timely, and accurate reporting of credit information;
 - Restricting the use of reports on consumers; and
 - In certain situations, requiring the deletion of obsolete information.²⁸
- *Truth in Lending Act (TILA)*²⁹ – TILA requires certain disclosures relating to the terms and cost of various forms of consumer credit, and such disclosures must be made “clearly and conspicuously.”³⁰
- *Real Estate Settlement Procedures Act (RESPA)*³¹ – RESPA requires certain timely disclosures regarding the nature and costs of the real estate settlement process. For example, a lender must provide an applicant with a good faith estimate no later than three business days after a lender receives an application.³²
- *Privacy of consumer financial information under the Gramm-Leach-Bliley Act (GLBA)*³³ – The GLBA governs a financial institution’s treatment of nonpublic personal information about consumers.³⁴ Subject to only certain exceptions, the GLBA prohibits a financial institution from

¹⁹ 12 CFR § 707.1(b).

²⁰ *Id.*

²¹ 12 CFR § 707.8(a)(1).

²² 12 CFR § 740.2.

²³ 12 CFR Part 1002.

²⁴ 42 U.S.C. § 3601 *et seq.*

²⁵ NCUA, *Consumer Compliance Manual: Fair Housing Act*, available at <https://www.ncua.gov/regulation-supervision/Pages/manuals-guides/consumer-compliance.aspx> (last visited Mar. 18, 2017).

²⁶ 15 U.S.C. § 1681 *et seq.*

²⁷ NCUA, *Consumer Compliance Manual: Fair Credit Reporting Act*, available at <https://www.ncua.gov/regulation-supervision/Pages/manuals-guides/consumer-compliance.aspx> (last visited Mar. 18, 2017).

²⁸ *Id.*

²⁹ 12 CFR Part 1026.

³⁰ *Id.* at §§ 1026.1(b) and 1026.5(a).

³¹ 12 CFR Part 1024.

³² *Id.* at § 1024.7 and Appendix C.

³³ 15 U.S.C. § 6801 *et seq.*

³⁴ NCUA, *Consumer Compliance Manual: Privacy of Consumer Financial Information*, available at <https://www.ncua.gov/regulation-supervision/Pages/manuals-guides/consumer-compliance.aspx> (last visited Mar. 18, 2017).

disclosing nonpublic personal information about a consumer to nonaffiliated third parties, unless the institution satisfies various notice and opt-out requirements, and provided that the consumer has not elected to opt out of the disclosure.³⁵ The GLBA also requires the institution to provide notice of its privacy policies and practices to its customers. Various rules and regulations have been issued to implement provisions of the GLBA.³⁶

- *Consumer Financial Protection Bureau's (CFPB's) prohibition on unfair, deceptive, or abusive acts or practices*³⁷ – The CFPB is a federal agency that regulates the offering and provision of consumer financial products or services under the federal consumer financial laws for which the CFPB has been given authority to enforce.³⁸ The CFPB is the enforcement authority for many of the above-mentioned regulations. The CFPB has broad prohibitions on covered persons or service providers “from committing or engaging in an unfair, deceptive, or abusive act or practice under Federal law in connection with any transaction with a consumer for a consumer financial product or service, or the offering of a consumer financial product or service.”³⁹ State-chartered and federally-chartered credit unions would be considered covered persons for purposes of the CFPB’s prohibition on unfair, deceptive, or abusive acts or practices.⁴⁰
- *Federal Trade Commission's (FTC's) prohibition on unfair or deceptive acts or practices*⁴¹ - The FTC is a federal agency whose mission is “[t]o prevent business practices that are anticompetitive or deceptive or unfair to consumers; to enhance informed consumer choice and public understanding of the competitive process; and to accomplish this without unduly burdening legitimate business activity.”⁴² The FTC is empowered to prevent persons and entities “from using unfair methods of competition in or affecting commerce and unfair or deceptive acts or practices in or affecting commerce.”⁴³ The FTC’s authority in this area does not extend to banks, savings and loan institutions, or federally-chartered credit unions.⁴⁴ Because state-chartered credit unions are not expressly exempted from the FTC’s authority to enforce this prohibition on unfair or deceptive acts or practices, such credit unions would be covered by the FTC’s authority. However, as noted above, the CFPB has broad authority to enforce a prohibition on unfair, deceptive, or abusive acts or practices in relation to both state-chartered and federally-chartered credit unions.

Effect of Proposed Changes

Consistent with current exemptions for banks and savings and loan associations, the bill provides that FDUTPA does not apply to state-chartered and federally-chartered credit unions.

B. SECTION DIRECTORY:

Section 1. Amends section 501.212, F.S., relating to application of the Florida Deceptive and Unfair Trade Practices Act.

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

³⁵ *Id.*

³⁶ 12 CFR § 716.1 and Part 1016.

³⁷ 12 U.S.C. § 5536(a)(1).

³⁸ 12 U.S.C. §§ 5481(14) and 5491(a).

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

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

⁴¹ 15 U.S.C. § 45(a).

⁴² Federal Trade Commission, *About the FTC*, <https://www.ftc.gov/about-ftc> (last visited Mar. 18, 2017).

⁴³ 15 U.S.C. § 45(a).

⁴⁴ *Id.* at 45(a)(2).

II. FISCAL ANALYSIS & ECONOMIC IMPACT STATEMENT

A. FISCAL IMPACT ON STATE GOVERNMENT:

1. Revenues:

If a state attorney or the Department collects money under FDUTPA for civil penalties, attorney's fees, or costs, FDUTPA instructs the state attorney or Department to deposit such money in the General Revenue Fund, Legal Affairs Revolving Trust Fund of the Department, or Consumer Frauds Trust Fund of the Justice Administrative Commission, depending on the nature of the action.⁴⁵ The bill would prevent these enforcing authorities from collecting civil penalties, attorney's fees, and costs against a credit union for FDUTPA violations. However, the fiscal impact of the bill is indeterminate, as the potential for future actions under FDUTPA is unknown.

2. Expenditures:

The primary enforcing authorities of FDUTPA are state attorneys and the Department. The exemption of an entity under FDUTPA relieves these enforcing authorities from expenditures involved in enforcing FDUTPA against an exempt entity. However, in the case of an entity that is subject to supervision by another agency, such as a state-chartered credit union regulated by the OFR, FDUTPA would still require that the enforcing authorities forward a complaint to the OFR, which may result in expenditures on the part of the OFR. However, the fiscal impact of the bill is indeterminate, as the potential for future actions and complaints under FDUTPA is unknown.

B. FISCAL IMPACT ON LOCAL GOVERNMENTS:

1. Revenues:

None.

2. Expenditures:

None.

C. DIRECT ECONOMIC IMPACT ON PRIVATE SECTOR:

The bill relieves credit unions of the potential for investigation and enforcement by authorities over and above the regulatory authorities to which they are otherwise subject. The bill precludes a private citizen from suing a credit union to recover the cost of actual damages, plus attorney's fees and court costs, for violations of FDUTPA. However, the fiscal impact of the bill is indeterminate, as the potential for future actions under FDUTPA is unknown.

D. FISCAL COMMENTS:

None.

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.

⁴⁵ ss. 501.2075, 501.2077, and 501.2101, F.S.
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2. Other:

None.

B. RULE-MAKING AUTHORITY:

The bill does not appear to create a need for rulemaking or rulemaking authority.

C. DRAFTING ISSUES OR OTHER COMMENTS:

None.

IV. AMENDMENTS/ COMMITTEE SUBSTITUTE CHANGES