

HOUSE OF REPRESENTATIVES STAFF ANALYSIS

BILL #: CS/HB 623 Money Services Businesses
SPONSOR(S): Insurance & Banking Subcommittee; Roberson
TIED BILLS: **IDEN./SIM. BILLS:** CS/CS/SB 590

REFERENCE	ACTION	ANALYST	STAFF DIRECTOR or BUDGET/POLICY CHIEF
1) Insurance & Banking Subcommittee	12 Y, 0 N, As CS	Bauer	Cooper
2) Criminal Justice Subcommittee	12 Y, 0 N	Jones	Cunningham
3) Government Operations Appropriations Subcommittee	13 Y, 0 N	Keith	Topp
4) Regulatory Affairs Committee			

SUMMARY ANALYSIS

Money services businesses (“MSBs”) offer a variety of non-depository financial services involving the receipt and transmission of currency, monetary value, or payment instruments through a variety of means, including wire, electronic transfer, or through third-party payment systems. MSBs that are located in Florida or do business in this state must comply with the federal Bank Secrecy Act and implementing regulations, as well as the Florida Money Services Businesses Act (ch. 560, F.S., “the Act”), which is administered and enforced by the Florida Office of Financial Regulation (“OFR”).

The bill:

- Makes violations under s. 560.310(2)(d), F.S., relating to electronic log and database reporting requirements applicable to licensed check cashers that cash checks exceeding \$1,000, a third-degree felony;
- Allows the OFR to summarily suspend the license of a MSB pursuant to s. 120.60(6), F.S., if the OFR finds the licensee poses an immediate, serious danger to the public health, safety, and welfare, and if a natural person listed on the application is criminally charged or arrested for specified crimes;
- Provides that a deferred presentment transaction is void if the person conducting the transaction is not authorized under the Act, and such person has no right to collect funds relating to such transaction; and
- Updates outdated cross-references to federal MSB regulations.

The bill has an insignificant, yet indeterminate fiscal impact on state government expenditures due to the creation of a new third degree felony offense for persons who knowingly and willfully violate information reporting requirements of check cashing transactions. The bill has not been heard by the Criminal Justice Impact Conference to determine an impact on state prison beds. However, a preliminary estimate by the Office of Economic and Demographic Research determined that this bill will have an insignificant impact on state prison beds. The bill’s provision regarding unauthorized deferred presentment transactions may have a positive impact on the private sector.

The bill provides an effective date of July 1, 2014.

FULL ANALYSIS

I. SUBSTANTIVE ANALYSIS

A. EFFECT OF PROPOSED CHANGES:

Background

Money services businesses (MSBs) offer a variety of non-depository financial services involving the receipt and transmission of currency, monetary value, or payment instruments through a variety of means, including wire, electronic transfer, or through third-party payment systems. MSBs that are located in, or do business in this state (whether within Florida or into Florida from locations outside Florida or country)¹, must comply with the following federal and state laws and regulations.

Federal Regulation of MSBs – Bank Secrecy Act

The Financial Crimes Enforcement Network (FinCEN) is a bureau within the U.S. Department of the Treasury, and its mission is to “safeguard the financial system from illicit use and combat money laundering and promote national security through the collection, analysis, and dissemination of financial intelligence and strategic use of financial authorities.”²

FinCEN enforces the Currency and Foreign Transactions Reporting Act of 1970 (commonly referred to as the “Bank Secrecy Act” or “BSA”), which requires U.S. financial institutions to assist U.S. government agencies to detect and prevent money laundering. The BSA is sometimes referred to as an “anti-money laundering” law (“AML”) or jointly as “BSA/AML.”³ The BSA was amended by Title III of the USA PATRIOT Act of 2001 to include additional measures to prevent, detect, and prosecute terrorist-related activities and international money laundering. The BSA requires financial institutions to keep records of cash purchases of negotiable instruments, file reports of cash transactions exceeding \$10,000 (daily aggregate amount), and to report suspicious activity that might signify money laundering, tax evasion, or other criminal activities. In addition, MSBs conducting more than \$1,000 in business with one person in one or more transactions are required to register with FinCEN or be subject to civil money penalties and criminal prosecution.⁴

The Secretary of the Treasury has delegated to the Director of FinCEN the authority to implement, administer, and enforce compliance with the BSA and associated regulations under 31 C.F.R. Part 103.⁵ On March 1, 2011, FinCEN transferred its regulations from 31 CFR Part 103 to 31 CFR Chapter X as part of an ongoing effort to increase the efficiency and effectiveness of its regulatory oversight. There have been no substantive changes made to the underlying regulation as a result of this transfer and reorganization.⁶

State Regulation of MSBs - Money Services Businesses Act

In 1994, the Florida Legislature enacted the Money Transmitters’ Code (renamed the Money Services Business Act, ch. 560, F.S., “the Act”). The Act consists of four parts: (I) general provisions, (II) payment instruments and funds transmission; (III) check cashing and foreign currency exchange; and (IV) deferred presentment. The Act does not apply to state and federally chartered banks, credit unions, trust companies, and other financial depository institutions, nor does it apply to the sovereign.⁷ Part I of the Act gives supervisory, licensing, and enforcement authority to the Florida Office of Financial Regulation (“OFR”), and authorizes the OFR’s rulemaking body, the Financial Services Commission (Commission), to adopt rules to implement the Act’s requirements regarding books and records, examinations, forms, and fees.

¹ See s. 560.103(22), F.S. (definition of “money services business”).

² FinCEN, “What We Do,” at http://www.fincen.gov/about_fincen/wwd/ (last accessed March 5, 2014).

³ FinCEN, “FinCEN’s Mandate from Congress / Bank Secrecy Act,” at http://www.fincen.gov/statutes_regs/bsa/ (last accessed March 5, 2014).

⁴ 31 C.F.R. § 1022.380.

⁵ U.S. Department of the Treasury, Treasury Order 180-01, at <http://www.treasury.gov/about/role-of-treasury/orders-directives/Pages/to180-01.aspx> (last accessed March 5, 2014).

⁶ FinCEN, Chapter X, at http://www.fincen.gov/statutes_regs/ChapterX/ (last accessed March 5, 2014).

⁷ Section 560.104, F.S.

According to the Act, MSBs are persons who act as one or more of the following:

- Part II:
 - *Payment instrument seller*: a qualified entity that sells instruments like checks, money orders, and travelers checks. Payment instruments do not include gift cards, credit card vouchers, and letters of credit.
 - *Money transmitter*: a qualified entity that receives currency, monetary value, or payment instruments for the purpose of transmitting the same by any means to, within, or from the U.S.

- Part III:
 - *Foreign currency exchanger*: a person who exchanges currency of one country to that of another for compensation.
 - *Check casher*: a person who sells currency in exchange for payment instruments received, excluding travelers checks.
 - Licensed check cashers are required to comply with federal requirements, if applicable, and state requirements, such as maintaining specified records and reporting information to the OFR. Section 560.310, F.S., requires licensed check cashers to maintain copies of cashed checks, and for checks exceeding \$1,000, the licensed check casher must submit specified transactional data to an electronic log or check-cashing database.
 - In 2013, the Florida Legislature enacted CS/CS/HB 217,⁸ which authorized the OFR to issue a competitive solicitation for a statewide, real-time online check cashing database. The database will hold the same transactional information required from licensed check cashers for checks exceeding \$1,000 that is currently required in an electronic log format. The implementation of check cashing database will also be used by the Department of Financial Services' Division of Workers Compensation and Division of Insurance Fraud and various law enforcement agencies in efforts to combat workers' compensation insurance fraud.

- Part IV:
 - *Deferred presentment provider ("DPP", commonly known as payday lenders)*: DPPs are a MSB designation, not a separate license. DPPs are persons licensed under part II or part III of the Act, and have filed a declaration of intent with the OFR to engage in *deferred presentment transactions*, which means providing currency or a payment instrument in exchange for a customer's check and agreeing to hold the check for a deferment period.
 - Part IV of ch. 560, F.S., regulates DPPs and deferred presentment transactions. A deferred presentment transaction means providing currency or a payment instrument in exchange for a person's check and agreeing to hold the person's check for a period prior to presentment, deposit, or redemption.⁹ The face amount of a check taken for a deferred presentment may not exceed \$500.¹⁰ A DPP may charge a maximum fee of 10 percent of the currency or payment instrument provided (exclusive of the verification fee). Section 560.404(19), F.S., prohibits a DPP from entering into a deferred presentment agreement with a customer if the customer has an outstanding deferred presentment agreement with any DPP, or terminated an agreement within the previous 24 hours.

The current licensee statistics from the OFR¹¹ are:

- Part II: 163 licensees
- Part III: 1,133 licensees
- Part IV: 162 declarations of intent
 - 21 DPPs are licensed under Part II

⁸ CS/CS/HB 217 was approved by the Governor on June 7, 2013 (ch. 2013-139, Laws of Florida).

⁹ See s. 560.402(3), F.S.

¹⁰ Section 560.404, F.S.

¹¹ E-mail from the OFR (received January 21, 2014), on file with the Insurance & Banking Subcommittee staff.

- 141 DPPs are licensed under Part III

To qualify for licensure as a MSB under the Act, an applicant must meet the following requirements:

- Demonstrate to the OFR the character and general fitness necessary to command the confidence of the public and warrant the belief that the money services business or deferred presentment provider will operate lawfully;
- Be legally authorized to do business in Florida;
- Be registered as a MSB with the FinCEN as required by 31 C.F.R. s. 103.41, if applicable;
- Have an anti-money laundering program in place that meets the requirements of 31 C.F.R. s. 103.125;¹² and
- Provide the OFR with information required under the Act and related rules.¹³

Prohibited Acts

The Act prohibits MSBs, authorized vendors, and affiliated parties from engaging in specified acts in s. 560.111, F.S., such as embezzlement and making false entries in books and documents with the intent to deceive or defraud. A person who violates any of these acts commits a third-degree felony.¹⁴ In addition, the Act prohibits a willful violation of certain DPP requirements (i.e., willfully failing to file a declaration of intent, willfully failing to comply with the requirements for deferred presentment transactions, or willfully failing to comply with deposit and redemption requirements¹⁵), which is also a third-degree felony.

Emergency Suspension Authority

Currently, the Act authorizes the OFR to immediately suspend the license of a MSB that fails to provide the office specified records or fails to maintain a federally insured depository account, and such failure constitutes immediate and serious danger to the public health, safety, and welfare, for purposes of s. 120.60(6), F.S.¹⁶

The OFR has an emergency suspension and restriction authority pursuant to s. 120.60(6), F.S., which provides that:

- (6) If the agency *finds that* immediate serious danger to the public health, safety, or welfare requires emergency suspension, restriction, or limitation of a license, the agency may take such action by any procedure that is fair under the circumstances if:
 - (a) The procedure provides at least the same procedural protection as is given by other statutes, the State Constitution, or the United States Constitution;
 - (b) The agency takes only that action necessary to protect the public interest under the emergency procedure; and
 - (c) The agency states in writing at the time of, or prior to, its action the *specific facts and reasons for finding an immediate danger to the public health, safety, or welfare and its reasons for concluding that the procedure used is fair under the circumstances*. The agency's findings of immediate danger, necessity, and procedural fairness are judicially reviewable. Summary suspension, restriction, or limitation may be ordered, but a suspension or revocation proceeding pursuant to ss. 120.569 and 120.57, F.S., shall also be promptly instituted and acted upon (emphasis added).

A licensee who is the subject of an emergency order may request an expedited administrative hearing with the Division of Administrative Hearings to challenge the factual basis of an emergency suspension order (ESO), or may seek to enjoin the ESO and immediately appeal to a district court of appeal to determine the

¹² In 2008, the Florida Legislature adopted a number of BSA/AML regulations in the Act and provided that it was a violation of state law, subject to administrative sanctions by the OFR, to fail to comply with federal BSA/AML regulations. Ch. 2008-177, Laws of Florida.

¹³ Section 560.1401, F.S.

¹⁴ A third degree felony is punishable by up to five years imprisonment and a \$5,000 fine. Sections 775.082 and 775.083, F.S.

¹⁵ These DPP requirements are found at ss. 560.403, 560.404, and 560.405, F.S.

¹⁶ Section 560.114(2), F.S.

limited issue of whether the ESO complies with the statutory and due process requirements of the Administrative Procedures Act.¹⁷

The case law surrounding ESOs has repeatedly held that general conclusory predictions of harm are not sufficient to support the issuance of an emergency suspension order; rather, the agency's stated reasons "must be factually explicit and persuasive concerning the existence of a genuine emergency."¹⁸ The courts have found to sustain an ESO, it must: "contain *factual allegations* which demonstrate that (i) the complained of conduct was likely to continue; (ii) the order was necessary to stop the emergency; and (iii) the order was sufficiently narrowly tailored to be fair."¹⁹

The *Bio-Med* court further held that although proof of a specific statutory violation (such as being criminally charged with a felony) may satisfy an agency's burden in an ordinary non-emergency administrative proceeding, "an allegation of such a violation does not, by itself, satisfy the requirements of s. 120.60(6)" and the specific regulatory statute authorizing emergency action.²⁰

Effect of the Bill

Prohibited Acts – s. 560.111, F.S.

The bill provides that any licensed check casher who knowingly and willfully violates the check casher electronic log and database reporting requirements of s. 560.310(2)(d), F.S., commits a felony of the third degree. As noted above, the electronic log and database reporting requirements of s. 560.310(2)(d), F.S., apply to checks exceeding \$1,000 that are cashed by licensees.

BSA/Chapter X citation updates

Sections 2, 3, 5, 6, and 7 of the bill conforms the Act's cross-references to federal BSA/AML regulations which were moved and renumbered by FinCEN on March 1, 2011.

Summary suspension powers – s. 560.114(2), F.S.

The bill gives the OFR an additional ground to summarily suspend a MSB's license pursuant to s. 120.60(6), F.S., if the OFR "finds that licensee poses an immediate, serious danger to the public health, safety, and welfare." Specifically, the bill allows the OFR to summarily suspend a MSB's license when a natural person who is required to be listed on the license application is criminally charged, or arrested for one of the crimes listed in:

- s. 560.114(1)(o), F.S. – A felony or equivalent which involves fraud, moral turpitude, or dishonest dealing;
- s. 560.114(1)(p), F.S. – A crime under 18 U.S.C. 1956 [laundering of monetary instruments] or 31 U.S.C. s. 5324 [structuring transactions to evade reporting requirement]; or
- s. 560.114(1)(q), F.S. – Misappropriation, conversion, or unlawful withholding of moneys belonging to others.

The bill requires the OFR to seek the issuance of a final order for the summary suspension of the licensee at a proceeding conducted by the commissioner of the OFR, or his or her designee, who shall issue the final order. Currently, s. 20.121(3)(c), F.S., designates the director (commissioner) as the agency head for purposes of final agency action under ch. 120, F.S.

Unauthorized deferred presentment – s. 560.125, F.S.

Current Situation

¹⁷ *Robin Hood Group, Inc. v. Fla. Office of Ins. Regulation*, 885, So.2d 393, 396 (Fla. 4th DCA 2004) and *Bertany Ass'n for Travel and Leisure, Inc. v. Fla. Dep't of Fin. Servs.*, 877 So.2d 854, 855 (Fla. 1st DCA 2004).

¹⁸ *Fla. Home Builders v. Div. of Labor*, 355 So.2d 1245, 1246 (Fla. 1st DCA 1978).

¹⁹ *Bio-Med Plus, Inc., v. Fla. Dep't of Health*, 915 So.2d 669 at 672 (Fla. 1st DCA 2005).

²⁰ *Id.* at 673.

Often, out-of-state payday lenders evade applicable rate caps and state licensing requirements by operating through the Internet, which present challenges for regulatory detection and enforcement. Persons who provide deferred presentment transactions in Florida without the appropriate Part II or Part III license and declaration of intent, as required by the Act, typically operate through the Internet and thus evade other regulatory requirements that were intended to provide consumer protections (such as the Act's prohibitions on DPP rollovers, excessive fees, and extensions of multiple, simultaneous loans, or interest rate in excess of the caps set forth in the Florida Consumer Finance Act, ch. 516, F.S.²¹). In addition, unlicensed internet payday lenders may also seek subterfuge by operating offshore, affiliating with Native American tribes in order to claim tribal immunity, or incorporating in states with no usury caps with the belief that only the home state law applies despite reaching other states' residents through the Internet.

A number of states have recently increased enforcement efforts and/or legislative measures towards payday lending abuses, such as enacting rate caps, reaching affiliates (banks and debt collectors) who participate in the making or servicing of unauthorized loans,²² and exercising state jurisdiction to out-of-state lenders who make usurious loans.²³ In addition, state and federal courts have ruled in favor of state jurisdiction over online payday lenders.²⁴

Section 560.125(1), F.S., provides that a person may not engage in the business of a money services business or deferred presentment provider in this state unless the person is licensed or exempted from the licensure under ch. 560, F.S.

Effect of the Bill

The bill amends s. 560.125(1), F.S., to add that a deferred presentment transaction conducted by a person who is not authorized by the OFR under the Act as a DPP is void, and that the unauthorized person has no right to collect, receive, or retain any principal, interest, or charges relating to such transactions. This would mean that the unauthorized lender does not have the legal authority to collect on the loan via garnishment, court action, or otherwise.

B. SECTION DIRECTORY:

Section 1: Amends s. 560.111, F.S., relating to definitions.

Section 2: Amends s. 560.114, F.S., relating to disciplinary actions; penalties.

Section 3: Amends s. 560.1235, F.S., relating to anti-money laundering requirements.

Section 4: Amends s. 560.125, F.S., relating to unlicensed activity; penalties.

Section 5: Amends s. 560.1401, F.S., relating to licensing standards.

Section 6: Amends s. 560.141, F.S., relating to license application.

Section 7: Amends s. 560.309, F.S., relating to conduct of business.

Section 8: Provides an effective date of July 1, 2014.

II. FISCAL ANALYSIS & ECONOMIC IMPACT STATEMENT

²¹ The Florida Consumer Finance Act (ch. 516, F.S.), is also administered by the OFR and sets forth allowable interest rates for small unsecured loans. That act also provides a similar provision in that “[a] loan for which a greater rate of interest or charge than is allowed by this chapter has been contracted for or received, wherever made, is not enforceable in this state.” (s. 516.02(2)(c), F.S.).

²² New York Department of Financial Services press release on payday loan investigation (August 6, 2013), at <http://www.dfs.ny.gov/about/press2013/pr1308061.htm> (last accessed March 5, 2014).

²³ See Center for Responsible Lending, *Issue Brief: Effective State and Federal Payday Lending Enforcement: Paving the Way for Broader, Stronger Protections* (October 4, 2013), on file with the Insurance & Banking Subcommittee staff.

²⁴ Consumer Federation of America, *States Have Jurisdiction over Online Payday Lenders* (May 2010), on file with the Insurance & Banking Subcommittee staff.

A. FISCAL IMPACT ON STATE GOVERNMENT:

1. Revenues:

None.

2. Expenditures:

The bill has an insignificant, yet indeterminate fiscal impact on state government expenditures due to the creation of a new third degree felony offense for persons who knowingly and willfully violate information reporting requirements of check cashing transactions. The bill has not been heard by the Criminal Justice Impact Conference to determine an impact on state prison beds. However, a preliminary estimate by the Office of Economic and Demographic Research determined that this bill will have an insignificant impact on state prison beds²⁵.

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 bill's prohibition on unlicensed deferred presentment transactions. This could be beneficial to consumers and may provide competitive equality for licensed MSBs who comply with the Part IV/DPP requirements of the Act.

D. FISCAL COMMENTS:

None.

III. COMMENTS

A. CONSTITUTIONAL ISSUES:

1. Applicability of Municipality/County Mandates Provision:

Not applicable. This bill 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.

²⁵ Email correspondence with the Office of Economic and Demographic Research (March 6, 2014) on file with the Government Operations Appropriations Subcommittee.

B. RULE-MAKING AUTHORITY:

None provided in the bill. However, the bill's updating of the federal regulations cited in the Act will also require updating of the same citations currently in Chapter 69V-560, Fla. Admin. Code.

C. DRAFTING ISSUES OR OTHER COMMENTS:

None.

IV. AMENDMENTS/ COMMITTEE SUBSTITUTE CHANGES

On February 11, 2014, the Insurance & Banking Subcommittee considered and adopted a strike-all amendment and reported the bill favorably as a committee substitute. The strike-all amendment retained the provisions of the bill and made the following changes:

- Provided a title change to the bill;
- Clarified that failure to provide certain information relating to a check cashing transaction is a felony;
- Clarified the OFR's emergency suspension powers;
- Corrected several cross-references to federal Bank Secrecy Act regulations in the Act; and
- Clarified the regulatory approval required of deferred presentment providers.

This analysis is drafted to the committee substitute as passed by the Insurance & Banking Subcommittee.