

HOUSE OF REPRESENTATIVES STAFF ANALYSIS

BILL #: CS/HB 1425 Consumer Finance Loans
SPONSOR(S): Insurance & Banking Subcommittee; Fant and others
TIED BILLS: **IDEN./SIM. BILLS:** SB 1696

REFERENCE	ACTION	ANALYST	STAFF DIRECTOR or BUDGET/POLICY CHIEF
1) Insurance & Banking Subcommittee	11 Y, 1 N, As CS	Bauer	Luczynski
2) Government Operations Appropriations Subcommittee			
3) Regulatory Affairs Committee			

SUMMARY ANALYSIS

The Florida Office of Financial Regulation (OFR)'s Division of Consumer Finance is responsible for the licensing and regulation of non-depository financial service entities and individuals, and conducts examinations and compliance investigations for licensed entities to determine compliance with Florida law. One of the regulatory programs administered by OFR is the Florida Consumer Finance Act (ch. 516, F.S., "the Act"), which sets forth licensing requirements for consumer finance lenders and the terms and conditions under which a consumer finance loan is permitted in Florida. The Act sets forth maximum interest rates for *consumer finance loans*, which are "loan[s] of money, credit, goods, or a provision of a line of credit, in an amount or to a value of \$25,000 or less at an interest rate greater than 18 percent per annum. The allowable interest rates on consumer finance loans are tiered and limited based on the principal amount that falls within each tier of the loan. As the principal amount increases, the allowable interest rate decreases. Pursuant to federal law, the annual percentage rate (APR) for each consumer finance loan must be computed and disclosed to the borrower.

The bill creates a small dollar pilot program in the Act from January 1, 2017 to January 1, 2022, which would permit licensed small lenders to make loans, between \$300 and \$3,000, at a maximum interest rate of 36 percent per annum. The loans must be unsecured and for a minimum term of 120 days. The bill:

- Requires program licensees to be licensed with the OFR in order to impose any charges or fees or use a referral partner;
- Permits origination fees, delinquency charges, bad check (NSF) charges of specified amounts, but prohibits certain waivers of borrower rights;
- Sets forth requirements for credit reporting, underwriting, certain disclosures, receipts, rescission rights, and optional credit counseling;
- Allows program licensees to contract with *referral partners*, who provide marketing, servicing, and other ancillary services for the licensees, so long as they do not counsel or advise borrowers or negotiate loan terms;
- Provides that licensees are responsible for violations committed by referral partners;
- Sets forth recordkeeping requirements for licensees, and provides the OFR with examination and enforcement authority;
- Requires licensees to file with the OFR, by every March 15, a report regarding program loans;
- Requires the OFR to publish its program report online by January 1, 2018, and annually thereafter. The report may not identify data by any specific licensee, but must include specified aggregate data points.

The bill has no impact on local governments, an indeterminate impact on state revenues, and a significant negative impact on state expenditures, and an indeterminate impact on the private sector. The number of lenders, referral partners, and borrowers who will participate in the pilot program is unknown.

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

FULL ANALYSIS

I. SUBSTANTIVE ANALYSIS

A. EFFECT OF PROPOSED CHANGES:

State Regulation of Consumer Loans

The Florida Office of Financial Regulation (OFR)'s Division of Consumer Finance is responsible for the licensing and regulation of non-depository financial service entities and individuals, and conducts examinations and compliance investigations for licensed entities to determine compliance with Florida law. One of the regulatory programs administered by OFR is the Florida Consumer Finance Act (ch. 516, F.S., "the Act"), which sets forth licensing requirements for consumer finance lenders and the terms and conditions under which a consumer finance loan is permitted in Florida. The Act sets forth maximum interest rates for *consumer finance loans*, which are "loan[s] of money, credit, goods, or a provision of a line of credit, in an amount or to a value of \$25,000 or less at an interest rate greater than 18 percent per annum."¹

Consumer finance loans may be secured or unsecured. The allowable interest rates on consumer finance loans are tiered and limited based on the principal amount that falls within each tier of the loan. As the principal amount increases, the allowable interest rate decreases. In 2013, the Legislature increased the principal amounts that would be subject to the maximum amount of interest within each tier, so that consumer finance lenders licensed with the OFR may charge a maximum interest rate of:

- 30 percent a year, computed on the first \$3,000 of the principal amount,
- 24 percent a year on that part of principal between \$3,001 to \$4,000, and
- 18 percent per year on that part of principal between \$4,001 to \$25,000.²

These principal amounts are the same as the financed amounts determined by the Federal Truth-in-Lending Act (TILA), and Regulation Z (Reg Z) of the Board of Governors of the Federal Reserve System.³ The maximum interest rates and finance charges under the Act are computed on a simple-interest basis, and not a compounding or other basis. The APR for all loans under the Act may equal, but cannot exceed, the APR for the loan as required to be computed and disclosed by TILA and Reg Z.⁴

Other than the applicable interest rates described above, the Act allows consumer finance lenders to charge borrowers the following charges and fees⁵:

- Up to \$25 for investigating the credit and character of the borrower,
- A \$25 annual fee on the anniversary date of each line-of-credit account,
- Brokerage fees for certain loans and appraisals of real property offered as security,
- Intangible personal property tax, if secured by a loan note on real property,
- Documentary excise tax and lawful fees,
- Insurance premiums,
- Actual and reasonable attorney fees and court costs,
- Actual and commercially reasonable expenses for recovering the collateral property,
- Delinquency charges of up to \$15 for each payment in default for at least 10 days, if agreed upon in writing before the charge is imposed,
- A bad check charge of up to \$20.

Add-on credit insurance products for consumer finance loans must be optional (and not made a condition of the loan), and must comply with the applicable Insurance Code provisions.⁶ In particular, credit insurance insures the debtor for loss of life, involuntary unemployment, illness, or damage or loss

¹ s. 516.01(2), F.S.

² Ch. 2013-124, Laws of Fla. TILA is codified at 15 U.S.C. §1601 et seq.; Reg Z is at 12 C.F.R. pt. 226.

³ s. 516.031(1), F.S.

⁴ s. 516.031(2), F.S.

⁵ s. 516.031(3), F.S.

⁶ s. 516.35, F.S.; see also pt. IX, ch. 627, F.S. (Credit Life and Disability Insurances).

to any collateral property. Credit insurance forms and rates must be approved by the Office and Insurance Regulation (OIR).⁷ As described below, TILA and Reg Z does not include credit insurance premiums in the finance charge.

The Act provides the grounds for denial of a license or other disciplinary action by the OFR. In particular, s. 516.07(1)(k), F.S., provides that it is grounds for administrative action, for any person to pay money or anything else of value, either directly or indirectly, to any person as compensation, inducement, or reward for referring a loan applicant to a licensed consumer finance lender.

The Act does not apply to persons doing business under state or federal laws governing banks, savings banks, trust companies, building and loan associations, credit unions, or industrial loan and investment companies.⁸ As of December 2014, there are 142 licensed consumer finance loan companies operating in 349 locations in Florida.⁹

The OFR also has regulatory authority over other small consumer loans authorized under ch. 520 (retail installment sellers), ch. 537 (title loans), and part IV of ch. 560 (deferred presentment or payday loans), F.S.:

- *Title lenders* provide loans secured through transfer of a motor vehicle certificate of title, with the loan amount dependent on the vehicle's value. Title lenders charge tiered interest rates according to principal amount, similar to the Act. The maturity date of a title loan is 30 days after the agreement date, but the loan can be extended for one or more 30-day periods by mutual consent of the lender and the borrower.¹⁰ One major difference between consumer finance loans and title loans is that title lenders are prohibited from selling or charging for any type of insurance in connection with a title loan.¹¹
- *Retail installment lenders* under ch. 520, F.S., authorizes retail installment businesses, motor vehicle sellers, and home improvement businesses to finance personal, family, or household goods or services sold by an installment contract or a revolving charge account to a retail buyer.¹² Finance charges under ch. 520, F.S., are expressed in dollar amounts (e.g., \$12 per \$100 per year for retail installment contracts).¹³
- *Deferred presentment or payday lenders* under part IV of ch. 560, F.S., offer currency or a payment instrument (e.g., electronic funds transfer, check, or money order) in exchange for a person's paycheck up to \$500 and agree to hold it for a specified period. Repayment terms range from 7 to 31 days, and the maximum allowable fee is 10% of the currency or payment instrument provided, as well as a verification fee of up to \$5.00 per transaction. Borrowers may have only one active payday loan at a time, but are permitted to secure a new loan 24 hours after paying off the original loan.¹⁴

Current law does not require any underwriting or determination of the borrower's ability to repay for any of these loans. Additionally, retail installment loans and consumer finance loans are excluded from the 18 percent per year simple interest cap set forth in the usury statute.¹⁵ There is no minimum or maximum loan term. However, every loan made pursuant to ch. 516, F.S., except for lines of credit, is to be repaid in monthly installment as nearly equal as mathematically practicable. Each location of a consumer finance company is required to hold a consumer finance license. Current law does not require reports to be issued by the OFR regarding consumer finance loans.

Federal Regulation of Consumer Lending

⁷ ss. 627.682 and 627.6785, F.S. Credit insurers must meet specified loss ratios for credit life and credit disability insurance. Rules 69O-163.009 - 69O-163.011, Fla. Admin. Code.

⁸ s. 516.02(4), F.S.

⁹ Office of Financial Regulation, *Fast Facts* (2nd edition, Dec. 2014), <http://lofr.com/StaticPages/documents/FastFacts2015.pdf>.

¹⁰ s. 537.011(3), F.S.

¹¹ s. 537.013(1)(h), F.S.

¹² Pts. I, II, and IV, ch. 520, F.S.

¹³ s. 520.34(6)(a), F.S.

¹⁴ s. 560.404(6) and (8), F.S.; Rule 69V-560.801, F.A.C.

¹⁵ s. 687.02, F.S.

Truth in Lending Act and Regulation Z

The purpose of TILA and Reg Z is to promote the informed use of credit through “a meaningful disclosure of credit terms so that the consumer will be able to compare more readily the various credit terms available to him.”¹⁶ As mentioned above, TILA and Reg Z requires the calculation and disclosure of Annual Percentage Rate (APR) for all consumer loans.¹⁷ TILA does not include premiums for credit life, accident, or health insurance when calculating the loan’s finance charge, as long as the insurance products are voluntary, the lender tells borrower in writing that these products are voluntary, and the borrower consents in writing.¹⁸

Consumer Financial Protection Bureau

On July 21, 2010, the federal Dodd-Frank Wall Street Reform and Consumer Protection Act (Pub.L. 111-203, H.R. 4173, commonly referred to as “Dodd-Frank”) was signed into law. It has widely been described as the most expansive financial regulatory legislation since the 1930s, and was formed with the intent “to focus directly on consumers, rather than on bank safety and soundness or on monetary policy.”¹⁹ Title X of Dodd-Frank created the Consumer Financial Protection Bureau (CFPB) as an independent bureau housed within the Federal Reserve System, and reassigned most general rulemaking authority of TILA to the CFPB effective July 21, 2011. Dodd-Frank also:

- Assigned the CFPB broad authority to examine and enforce consumer protection regulations over all mortgage-related businesses, large non-bank financial companies, and banks and credit unions with assets greater than \$10 billion. In essence, Dodd-Frank makes the CFPB the primary regulator over non-depository lenders.
- Consolidated and transferred most federal consumer financial protection authority under the CFPB’s jurisdiction.²⁰
- Granted enforcement and rulemaking authority to the CFPB to protect consumers from unfair, deceptive, or abusive acts or practices under federal law in connection with consumer financial products or services.²¹ The CFPB is also authorized to write rules to ensure consumers receive full, accurate, and effective disclosures relating to consumer financial products and services.²²

Title XII of Dodd-Frank, titled “Improving Access to Mainstream Financial Institutions,”²³ which authorizes the Secretary of the Treasury to establish a multiyear program of grants, cooperative and financial agency agreements, and similar contracts to promote expanded access to mainstream financial institutions and low-cost alternatives to small dollar loans. Title XII also authorizes grants and financial assistance to help community development financial institutions to establish and maintain small dollar loan programs.²⁴

Additionally, the CFPB is considering proposed rules on payday lending, focusing on stricter underwriting requirements (including borrowers’ ability to repay), rollovers, an “off-ramp” for repaying the debt, and restricting lenders’ access to a borrower’s checking account, pursuant to its authority under Dodd-Frank. The CFPB’s proposals would establish a federal floor or minimum for consumer protection for “covered loans,” which could include payday loans, deposit advance products, vehicle

¹⁶ 15 U.S.C. §1601(a).

¹⁷ 15 U.S.C. §§ 1604 – 1606.

¹⁸ 15 U.S.C. §1605(b).

¹⁹ CONSUMER FINANCIAL PROTECTION BUREAU, *Creating the Consumer Bureau*, at <http://www.consumerfinance.gov/the-bureau/creatingthebureau/> (last visited Jan. 26, 2016).

²⁰ Dodd-Frank required the Secretary of the U.S. Treasury to establish a designated transfer date by which the CFPB would receive certain rulemaking, supervision, and enforcement powers from seven existing federal agencies. The Treasury Secretary established July 11, 2011, or one year after the enactment of Dodd-Frank, as the designated transfer date. *See* 75 FR 57272 (Sept. 20, 2010) and 76 FR 43569 (July 21, 2011).

²¹ 12 U.S.C. §5531.

²² 12 U.S.C. §5532.

²³ 12 U.S.C. subchapter VII. “The purpose of th[e] subchapter is to encourage initiatives for financial products and services that are appropriate and accessible for millions of American who are not fully incorporated into the financial mainstream.” 12 U.S.C. § 5621.

²⁴ “Community development financial institutions” must be depository institutions (such banks and credit unions) which meet the definition and criteria in 12 U.S.C. §2702(5).

title loans, high-cost installment loans, open-end lines of credit and other loans.²⁵ It appears that the CFPB's proposed rules will address loopholes in various state lending laws.²⁶

However, Dodd-Frank does not authorize the CFPB to establish interest rate limits for extensions of credit, so any adjustments to interest rates for payday loans must be addressed by the states in which they are offered.

California Small Dollar Loan Pilot Programs

Based on a business model developed by California-based Progreso Financiero (Progress Financial), the California State Assembly enacted the Affordable Credit Building Opportunities Pilot Program in 2010, placing it under its state finance lenders law. The goal was to increase consumers' access to capital by encouraging development of a more robust small dollar loan market in California. Due to a low lender participation rate, it was replaced by a 2013 pilot program which will remain in effect until January 1, 2018, unless extended by its state legislature and governor.

The revised California pilot program also allows the use of "finders" to connect borrowers with lenders. Finders cannot provide advice or counseling to borrowers. They can distribute lenders' marketing materials, provide factual information about loan terms and conditions, help borrowers with loan applications and obtain borrowers' signatures on documents, among other functions. Their fees are capped at \$45 or \$40, depending on the number of loans they originate in a month. The fees are paid by lenders, cannot be based on the principal amount of loans, and cannot be passed on to borrowers.

According to the California State Assembly staff analysis, the proponents view the use of finders as a way to lower costs of customer acquisition, which is the largest cost of maintaining a low dollar value loan program. Prior to the 2010 enactment of the bill, Progreso Financiero used word-of-mouth and booths inside supermarkets to attract potential customers and tested direct mail. The use of finders was intended to act in the same way a retail clerk acts a department store when he or she offers a customer the opportunity to apply for a store-branded credit card. If the customer accepted, the retail clerk or finder collects preliminary information at the point of sale and conducts a prequalification check.²⁷

The California pilot program legislation also required the state's Department of Business Oversight (DBO) to post a report summarizing findings of the pilot program. In June 2015, the California DBO's report noted the following findings from 2011-2014:

- *Lender participation:* The DBO received 13 applications, and approved 6. At the end of 2014, 6 lenders and 6 finders participated in the program.
- *Loan applications:* Borrower applications increased by 58.5 percent after the state revised the pilot program.
- *Dollar amounts:* Smaller loans (\$300-\$499) decreased by 42.3 percent, while larger loans (\$500-\$999) increased by 106 percent.
- *Interest rates:* Smaller loans generally carried an APR of 40-50 percent. Mid-range loans generally carried an APR of 35-50 percent. Larger loans (\$1,500-\$2,499) saw a more even APR distribution.
- *Delinquency rates:* In 2014, 22.5 percent were delinquent for seven days to 29 days, 7.3 percent were delinquent for 30 days to 59 days, and 3.9 percent were delinquent for 60 days or more.
- *Multiple loans:* The number of borrowers who took out more than one loan jumped dramatically from 2011 to 2012, but has since stabilized.

²⁵ CONSUMER FINANCIAL PROTECTION BUREAU, *CFPB Considers Proposal to End Payday Debt Traps*, <http://www.consumerfinance.gov/newsroom/cfpb-considers-proposal-to-end-payday-debt-traps/> (last visited Jan. 29, 2016).

²⁶ Jeff Guo, *Many states have cracked down on payday loans. Here's how lenders still get away with it*, THE WASHINGTON POST (Feb. 9, 2015), <http://www.washingtonpost.com/blogs/govbeat/wp/2015/02/09/many-states-have-cracked-down-on-payday-loans-heres-how-lenders-still-get-away-with-it/> (last visited Jan. 29, 2016).

²⁷ California Senate Committee on Banking, Finance, and Insurance, Bill Analysis of SB 1146, on file with the Insurance & Banking Subcommittee staff.

- *Credit scores:* The share of multiple-loan borrowers who obtained higher credit scores on subsequent loans averaged 61 percent annually over the four-year period.
- *Loan term:* In 2014, of the 164,300 loans made, 50.9 percent were for 360 days or more. The ratios for other terms: 120 days to 179 days, essentially 0 percent (only two loans); 180 days to 269 days, 20.2 percent; and 270 days to 359 days, 28.8 percent.
- *Loan purpose:* Of the 164,300 loans made in 2014, borrowers took out 45 percent (74,026) to build or repair credit. Ratios for other purposes: medical or other emergency, 18.4 percent; pay bills, 12.7 percent; consolidate debt, 5.7 percent; non-vehicle purchase, 5.3 percent; vehicle purchase, 2.7 percent; vehicle repair, 2.6 percent; other than personal or household purpose, 1.1 percent; other, 6.4 percent.
- *Number and types of violations found during examinations:* The DBO generally found very few pilot program violations and no violations on finders in the examination process. In 2013, it found instances where borrowers were not asked about outstanding payday loans, credit performance was not reported to a credit agency, and the borrower was not provided with a notice of rescission rights.

The California DBO noted that while the revised pilot program did increase lender participation from its inception in 2010, the total number of participating lenders remains less than 10. Additionally, the revisions did not significantly affect the amount of lending activity conducted by the individual companies.²⁸

Oportun, formerly known as Progreso Financiero, was founded in 2005 to provide credit-building affordable loans to financially-underserved Hispanics in the U.S. Currently, Oportun operates more than 170 locations in California, Illinois, Nevada, Texas, and Utah.²⁹ In 2012, Oportun's founder founded INSIKT, a white label loan origination and investing platform that uses scoring and loan syndication technology to lend to customers and any accredited investor to invest in consumer loan portfolios. In 2015, California enacted legislation, backed by INSIKT, to increase access to the small-dollar loans.³⁰ INSIKT now seeks to implement similar small dollar loan pilot programs in other states, including Florida.

Effect of the Bill

Access to Responsible Credit Pilot Program (Section 1)

The bill creates s. 516.40, F.S., which establishes the Access to Responsible Small-Dollar Loans Pilot Program. The program would allow consumers to enter into a "program loan" with a principal amount of at least \$300 up to a maximum of \$3,000, at a fixed interest rate not to exceed 36 percent per annum calculated by simple interest, for a term of not less than 120 days. Under current law, licensed consumer finance lenders may make loans in this amount at a maximum rate of 30 percent, with no minimum or maximum loan term.

The bill states that the new sections 516.40-516.47, F.S., do not exempt a licensee from a licensee from any other provision of the Act.

Definitions (Section 2)

The bill creates s. 516.41, F.S., to create the following definitions for purposes of the pilot program:

- Consumer reporting agency
- Credit score
- Data furnisher
- Pilot program or program

²⁸ California Department of Business Oversight, Report of Activity under Small Dollar Loan Pilot Programs (Jun. 2015), at http://www.dbo.ca.gov/Licensees/Finance_Lenders/pdf/Pilot%20Program%20Report%202015%20Final.pdf.

²⁹ OPORTUN, *About Us: Background*, at <http://www.oportun.com/about-progreso/> (last visited Jan. 29, 2016).

³⁰ PRWEB, *Governor Brown Signs Financial Lending Bill Aimed at Underserved Communities*, at <http://www.prweb.com/releases/2015/10/prweb13000745.htm> (last visited Jan. 29, 2016).

- Pilot program license
- Program licensee
- Program loan
- Referral partner
- Refinance program loan

Licensing Requirements (Section 3)

The bill creates s. 516.42, F.S., to require a pilot program license in order to impose any charge or fees or use a referral partner, and may be issued for more than one location in this state if the licensee offers and accepts loan applications through referral partners approved by the OFR. In order to participate in the program, a program licensee must be licensed as a consumer finance lender under the Act, be in good standing with the office, and not be subject to an outstanding enforcement action or have a deficiency at the time of application.

Section 5 of the bill also requires applicants to be a “data furnisher” with a consumer reporting agency³¹ at the time of application, meaning a creditor that furnishes information to a consumer reporting agency. However, the bill allows the OFR to issue a pilot program license if the OFR has a “reasonable expectation” that the applicant will qualify as a data furnisher (and meet the required lending volume to become a data furnisher) within 6 months after receiving a license. The bill also provides that the OFR must “withdraw” approval for pilot program participation from a program licensee if the applicant fails to become a data furnisher by a consumer reporting agency within 6 months of commencing lending under the pilot program.

The bill also provides that licensing fees shall be in an amount necessary to cover the expenses of administering this section.

Program Loan Requirements (Section 5)

The bill creates s. 516.44, F.S., to establish the following requirements for a “program loan”:

- Principal amount between \$300 to \$3,000;
- Must have a term of 120 days or longer;
- Cannot have a prepayment penalty;
- Must be unsecured;
- Maximum interest rate of 36 percent per annum, fixed for the life of the loan; must be calculated by simple interest and not add-on interest or other computations, notwithstanding the maximum rates and finance charges allowable under s. 516.031, F.S.
 - However, for refinance program loans,³² the principal amount may not include more than 60 days’ unpaid interest accrued on the previous program loan in accordance with s. 516.031(5), F.S. A program licensee may not refinance a program loan, unless the borrower is current on his or her outstanding program loan at the time of the application to refinance.
- Must include a borrower’s right to rescind (which the borrower may do by notifying the licensee and returning the principal advanced by the end of the business day after the day the program loan is consummated);
- *Receipts* - the bill requires the program licensee to provide a receipt to borrower for each payment made on account of the loan. If the licensee refuses to provide a receipt upon the borrower’s demand, the licensee must forfeit the entire interest on the principal, in accordance with s. 687.08, F.S. The receipt must contain:
 - Date of payment;

³¹ The bill defines “consumer reporting agency” as the same definition in federal Fair Credit Reporting Act: “[A]ny person which, for monetary fees, dues, or on a cooperative nonprofit basis, regularly engages in whole or in part in the practice of assembling or evaluating consumer credit information or other information on consumers for the purpose of furnishing consumer reports to third parties, and which uses any means or facility of interstate commerce for the purpose of preparing or furnishing consumer reports.”

³² Section 2 of the bill defines “refinance program loans” as “a program loan that replaces and revises an existing program loan contract with a borrower and which results in an extension of additional principal to that borrower.”

- Amount paid; and
- For what such payment is made; if for interest or principal, the receipt shall so state;
- Alternatively, the lender may provide an annual statement showing the amount of interest paid on the loan during the previous year as well as the remaining loan balance, except a simple receipt must be given to the borrower for each payment made in cash or when requested by the borrower.
- *Written disclosures* - the bill requires licensees to deliver a statement pursuant to s. 516.15(1), F.S., which requires:
 - The amount and date of the loan and date of its maturity;
 - The nature of the security, if any (inapplicable to small loans because they must be unsecured);
 - The name and address of the borrower and of the licensee; and
 - The rate of interest charged.
 - Notwithstanding s. 516.15(1), F.S., the bill provides that the loan contract and all written disclosures and statements may be provided in English or another language in which the loan is negotiated.
 - In addition, the bill requires the statement to include the following in 12-point type:
 - The payment amount of each monthly installment;
 - The delinquency charge amount;
 - A statement regarding the benefits of early payoff, and that there is no prepayment penalty;
 - A statement regarding the borrower's rescission rights;
- *Origination fees* are allowed, notwithstanding s. 516.031, F.S., and are fully earned immediately upon making the program loan in an amount not the exceed:
 - On the borrower's first loan, the origination fee may not exceed the lesser of 7 percent of principal or \$90.
 - On subsequent loans or refinances, the origination fee may not exceed the lesser of 6 percent of principal or \$75.
 - Program licensees may not charge the same borrower an origination fee more than once in any 4-month period.
 - In addition, the bill prohibits origination fees in connection with refinance program loan unless at least 8 months have elapsed since the receipt of a previous origination fee paid by the borrower. Otherwise, only one origination fee may be contracted for or received until the program loan has been fully repaid.
- *Delinquency charges* are allowed, notwithstanding s. 516.031, F.S., for up to \$14 for each payment in default for at least 7 days, if the parties agree to such charge in writing and in advance. Only one delinquency charge is allowed per delinquent payment, and no more than two delinquent charges may be imposed during a period of 30 consecutive days.
 - It is unclear how a delinquent charge could be imposed more than once in a monthly period. Section 516.36, F.S., requires all loans made under the Act be repaid in monthly installments as nearly equal as mathematically possible.
- *Minimum collection period* – the bill requires licensees to attempt to collect a delinquent payment for a period of at least 30 days after the due date, before selling or assigning the unpaid debt to an independent party for collection.
 - This provision may create confusion for borrowers, who could be charged delinquency fees for a payment that is at least 7 days late, and who may attempt to send payment to the lender while the loan is being assigned or transferred.³³
- *Bad check (NSF) charges* of up to \$25 are allowed.
- *Credit counseling/credit education* - before loan proceeds are disbursed, licensee must offer the borrower *consumer credit counseling* pursuant to s. 516.32, F.S., which is approved by the OFR, or may invite the borrower to a credit education program offered by an independent third

³³ The Florida Consumer Collection Practices Act (pt. VI, ch. 559, F.S.) applies to the collection of consumer debts in Florida. Section 559.715, F.S., does not prohibit creditors from assigning the right to bill and collect a consumer debt. However, the assignee must give the debtor written notice of such assignment as soon as practical after the assignment is made, but *at least 30 days* before any action to collect the debt.

party. However, the licensee cannot require borrower to attend either program and must provide the counseling at no cost.

- *Credit Reporting* - the bill requires program licensees to report all borrower payments to a consumer reporting agency. A licensee who becomes a data furnisher for a consumer reporting agency must report all payments to the data furnisher as soon as practicable. As described above in Licensing Requirements, the bill also requires program licensees to be “data furnishers” as a condition of licensure.
- *Program Loan Underwriting* - the bill requires program licensees to determine a borrower’s ability and willingness to repay the program loan, and prohibits licensees from making a program loan if it determines the borrower’s total monthly debt service payments (at the time of origination and inclusive of the program loan and all outstanding forms of credit) exceed 50 percent of the borrower’s gross monthly income. The licensee must also verify and document the borrower’s reported debts, using at least one credit report from a credit reporting agency, and must rely on either electronic means or services or Internal Revenue Service W-2 forms, tax returns, payroll receipts, and other third-party documents that provide reliable evidence of the borrower’s actual income. The bill also excludes loans from friends and family from debt.
- *Waivers* – the bill provides that licensees cannot require prospective borrowers to agree to certain choice of law or mandatory arbitration clauses as a condition of the loan. Waivers must be knowing, voluntary, and in writing; waivers that are required as a condition of the loan are presumed involuntary, unconscionable, against public policy, and unenforceable. The program licensee has the burden of proving that such a waiver was knowing, voluntary, and not expressly made a condition of the contract.

Referral Partners (Section 6)

The bill creates s. 516.45, F.S., to allow program licensees to contract with one or more referral partners to conduct any of these services at the referral partner’s physical business location, if they have a written referral partner agreement that contains an agreement to comply with this section:

- Distributing, circulating, using, or publishing brochures and other written materials relating to program loans that the program licensee may make or negotiate;
- Providing written factual information about program loan terms, conditions, or qualification requirements to prospective borrowers;
- Notifying prospective borrowers of the information needed to complete a program loan application;
- Entering information provided by the prospective borrower on application forms;
- Assembling credit applications;
- Contacting the program licensee to determine the status of an application, and communicating information to the prospective borrower;
- Obtaining signatures and delivering final documents to borrowers;
- Distributing loan proceeds to the borrower; and
- Receiving loan payments from the borrower.
 - The bill provides requirements specific to the receipt or disbursement (servicing) of loan proceeds, such as timely application of borrower payments, required items in a payment receipt, and recordkeeping of all disbursements made and loan payments received for a period of at least 2 years, or for one month following the completion of an examination by the OFR. The bill also states that a borrower who submits a loan payment to a referral partner is not liable for a failure or delay by the referral partner in transmitting the payment to the program licensee.

However, the bill *prohibits* referral partners from:

- Providing counseling or advice to borrowers with respect to any loan term;
- Negotiating the terms of the loan on behalf of the licensee or borrower;
- Providing loan-related marketing material that has not been previously approved; and
- Offering information pertaining to a single prospective borrower to more than one program licensee, except in cases where the program licensee has communicated in writing the decision to decline a program loan to a borrower.

When referral partners receive or process an application for a program loan, they must also provide a statement to the applicant on behalf of the licensee disclosing the referral fee, the name of the lender if the loan is approved, and ways to contact the licensee or the OFR if the borrower has any questions or complaints.

The bill requires licensees to preapprove referral partners' marketing materials, written materials, and loan information. The bill prohibits licensees from consummating a loan until all of the borrower's questions are answered. If a licensee contracts with a referral partner, the licensee must notify the OFR within 15 days of the contract, and must include specified items such as contact information and any other information requested by the OFR.

As agents of program loan licensees, referral partners must comply with the Act and all applicable rules of the OFR. The referral partners' locations must be reported to the OFR, but the referral partner may not be barred from providing services at that location by the OFR. While the bill does not require referral partners to be licensed, it does require program loan licensees to submit an application to the OFR, who must approve or deny an application within 30 days of receiving the application and the applicable fee. Unless the OFR denies the application within the 30-day period, the application is deemed approved by the OFR. In addition, the bill requires program licensees to notify the OFR within 15 days after entering into a contract with a referral partner regarding specified information on a form specified by commission rule.

Program loan licensees may not compensate referral partners unless the program loan is consummated, up to \$60 per loan and up to \$2 per loan payment received by the referral partner under specified conditions. Licensees cannot pass referral fees onto borrowers and the compensation cannot be based on the principal amount of the loan.

OFR Enforcement Authority

The bill creates s. 516.46, F.S., to provide the following:

- *Examinations* – the bill requires OFR to examine program licensees in accordance with the Act, provided the examination is conducted at least once every 24 months, which the OFR can waive if it determines is not necessary for the protection of the public due to the licensee's centralized operations or other factors acceptable to the OFR. Licensees must reimburse OFR for cost of exams, and the OFR may recover costs in any court of competent jurisdiction.
 - The bill also limits the scope of any investigation or examination to documents necessary to determine compliance with the Act, and provides that a program licensee may provide information or materials demonstrating compliance in an "aggregated or anonymized format" that excludes proprietary and trade secret information, and may redact proprietary and trade secret information in its books and records.
- *Enforcement* – the bill subjects small loan licensees and referral partners to the OFR's enforcement provisions of s. 517.07(2), F.S. Licensees are also held responsible for violations committed by their referral partners. Although the bill appears to subject referral partners to administrative action pursuant to s. 516.07, F.S., by the OFR, some of the grounds in s. 516.07, F.S., do not directly apply to referral partners. For example, the statute allows the OFR to deny or revoke licenses for material misstatements of fact in an application or failure to maintain at least \$25,000 in liquid assets, which apply only to the lender licensee.

Reporting by Program Licensees and by the OFR (Sections 4 and 8)

Section 4 of the bill requires licensees to file with OFR by every March 15 a report, in a manner prescribed by commission rule, that does not reference any borrower's nonpublic information or any proprietary or trade secret information of the program licensee, on each of the items specified in s. 516.47, F.S., which relates to the OFR's report on the pilot program, due by January 1, 2018.

Section 8 of the bill provides that by January 1, 2018, and annually thereafter, the OFR must publish its program report online. The report may not identify data by any specific licensee, but must include

several aggregate data points, such as the number of applicants for the pilot program, number of borrowers who obtains loans for certain purposes, the number and type of referral partners used by licensees, delinquency data, and recommendations for improving the pilot program.

The bill provides an effective date of July 1, 2016, and provides that the pilot program expires on January 1, 2022.

B. SECTION DIRECTORY:

Section 1. Creates s. 516.40, F.S., relating to the Access to Responsible Small-Dollar Loans Pilot Program.

Section 2. Creates s. 516.41, F.S., relating to definitions.

Section 3. Creates s. 516.42, F.S., relating to approval required; program application requirements; fees.

Section 4. Creates s. 516.43, F.S., relating to annual report.

Section 5. Creates s. 516.44, F.S., relating to requirements for program loans.

Section 6. Creates s. 516.45, F.S., relating to referral partners.

Section 7. Creates s. 516.46, F.S., relating to examinations and grounds for disciplinary action.

Section 8. Creates s. 516.47, F.S., relating to report by the office.

Section 9. Provides for the repeal date of January 1, 2022 for sections 1-8.

Section 10. Provides an effective date of January 1, 2017.

II. FISCAL ANALYSIS & ECONOMIC IMPACT STATEMENT

A. FISCAL IMPACT ON STATE GOVERNMENT:

1. Revenues:

Indeterminate. The bill provides for new application fees (of indeterminate amount) and examination fees paid by small loan licensees. It is unknown how many applicants and licensees will participate in this pilot program.

2. Expenditures:

- OFR resources will be required to process applications; process complaints; examine records of program licensees and referral partners; and, if necessary, initiate enforcement actions for non-compliance or fraud. The state of California currently has a total of eight program licensees. Assuming a comparable number of businesses apply to become a program licensee, the Division of Consumer Finance believes it can absorb the workload associated with the above-mentioned tasks. However, the OFR will reassess its funding needs based on volume of activity for this new program and may request additional funding in future fiscal years.
- Additionally, the bill will require updates to the OFR's licensing and examination software as well as information technology support and increased data storage to integrate applications by program licensees. The bill would likely require the OFR to create electronic forms for applications and reporting. The bill would require the OFR to post on its website a report that includes extensive information regarding the pilot program. Implementing such changes would cost the agency approximately \$116,650.
- In the bill's requirement that the OFR post an annual report, the bill directs the OFR to include "[c]omparable delinquency data for unsecured loans made under this chapter and by state-chartered banks and credit unions for principal loan amounts of at least \$300 but not more than

\$3,000.” Such data is not readily available. Inclusion of such information would be burdensome, and the cost of efforts to gather such data has not been taken into account in composing the fiscal impact of this legislation.

- The OFR would incur insignificant costs associated with rulemaking.³⁴

B. FISCAL IMPACT ON LOCAL GOVERNMENTS:

1. Revenues:

None.

2. Expenditures:

None.

C. DIRECT ECONOMIC IMPACT ON PRIVATE SECTOR:

Indeterminate. The number of lenders, referral partners, and borrowers who participate in this pilot program cannot be projected.

D. FISCAL COMMENTS:

None.

III. COMMENTS

A. CONSTITUTIONAL ISSUES:

1. Applicability of Municipality/County Mandates Provision:

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

2. Other:

None.

B. RULE-MAKING AUTHORITY:

The bill requires the Financial Services Commission to adopt rules regarding program loan licensee application forms, fees, and procedures, annual reports required of program loan licensees, and notifications to the OFR regarding contracted referral partners.

C. DRAFTING ISSUES OR OTHER COMMENTS:

- The bill provides that program licensees are subject to periodic examination by the OFR and recordkeeping requirements for disbursing loan proceeds and receiving loan payments, but then refers to the limited scope of investigation or examination of both program licensees and referral partners. The examination authority could be clarified to include referral partners.
- Section 6 of the bill requires program licensees to apply for the OFR’s approval to use a referral partner, and requires the OFR to approve or deny the application within 30 days after receipt of the application and the “applicable fee.” However, it is unclear what criteria the OFR may use in denying an application. Additionally, the bill also requires the program licensee to provide a notice to the OFR regarding its contract with a referral partner. It may be more efficient to combine the application and the notice, and possibly require approval by the OFR prior to the parties entering into an agreement.
- Section 5 of the bill requires applicants to be a data furnisher at the time of application, but allows licenses to be issued if the OFR “reasonably believes” that the applicant will qualify as a data furnisher within 6 months *after* issuance of the license. This is contrary to the licensing provision in the Administrative Procedure Act, s. 120.60(1), F.S., which sets forth uniform

³⁴ OFR Agency Analysis, pp. 7-8.
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timeframes and procedures for state agencies in processing applications for licensure. Specifically, an application is deemed “complete” upon receipt of all requested information and correction of all deficiencies for which the applicant was timely notified. This is critical for triggering the general 90-day timeframe for agencies to approve or deny an application for a license and thus provide a point of entry into administrative proceedings for an applicant if necessary.

- This language may be better placed in Section 2 of the bill, regarding program licensure requirements, instead of Section 5, which address program loan requirements.

Additionally, the OFR provided the following comments:

- The bill directs the OFR to include in the annual report “recommendations for improving the pilot program and recommendations regarding whether the program should be continued.” These tasks appear contrary to the OFR’s role as a regulator.
- The bill would allow the OFR to revoke approval for a licensee’s participation in the program if the small loan licensee fails to meet a certain requirement. Such language conflicts with the provisions in s. 120.60, F.S., which mandates that an agency must provide notice and an opportunity to request a hearing when an agency attempts to withdraw a license. Additionally, the language of the bill is silent as to what happens to loans held by program licensees once withdrawal has taken place.

The OFR also posed the following questions:

- Will the small loan licensee have to determine if a borrower resides in a low-income census tract, or is this an agency function?
- Under the proposed language in s. 516.40, F.S., would the prohibition against secured loans, apply to the holding of a borrower's personal check?
- The proposed language in s. 516.40, F.S., does not address the amounts included in a rescission. Is the entire loan rescinded, or would such rescission only apply to the loan proceeds? Are the origination fees considered earned, or are such fees rescinded, as well?
- Would this pilot program allow a borrower to take out multiple loans at the maximum (\$3,000) amount simultaneously, perhaps from more than one small loan licensee?
- The legislation requires a licensee to offer free consumer credit counseling services provided by the OFR or credit education programs offered by an independent third party to a prospective borrower during the loan application process, but the OFR does not currently offer consumer credit counseling services. Is the expectation of this legislation that the OFR would need to create such a free program?³⁵

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 strike-all amendment adopted the Senate companion, SB 1696, which differs from the House bill in the following ways:

- Provides more specific disclosure requirements in loan agreements,
- Prohibits choice of law clauses and loan agreements that condition the loan on the borrower's waiver of certain rights, and provides that such waivers are presumed to be against public policy and unenforceable,
- Requires licensees to determine the borrower's ability to repay and to obtain documentation to verify income,
- Allows delinquency charges only if the licensee and borrower first agree to the charge in writing, and
- Provides a more detailed definition of "referral partner" and more detailed list of permissible and prohibited activities.

The strike-all amendment also clarifies that:

- Except as provided by the bill, licensees are subject to the Act, including the administrative enforcement provisions,
- Referral partners' books and records are subject to examination by the OFR,
- The scope of examinations and investigations conducted by the OFR is limited in that licensees must provide only aggregated or anonymized information to the OFR that excludes proprietary and trade secret information, and
- Clarifies that licensees must report aggregate data to the OFR without reference to their proprietary or trade secret information, in addition to borrowers' nonpublic personal information.

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

³⁵ OFR Agency Analysis, pp. 8-9.
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