

HOUSE OF REPRESENTATIVES STAFF FINAL BILL ANALYSIS

BILL #: CS/HB 1353 Commercial Financing Product Brokers and Providers

SPONSOR(S): Commerce Committee, Bankson and others

TIED BILLS: **IDEN./SIM. BILLS:** CS/CS/SB 1624

FINAL HOUSE FLOOR ACTION: 113 Y's 1 N's **GOVERNOR'S ACTION:** Approved

SUMMARY ANALYSIS

CS/HB 1353 passed the House on April 26, 2023, and subsequently passed the Senate on May 4, 2023.

A commercial financing transaction, also known as revenue-based financing, is a loan that a business agrees to pay back over time by pledging a portion of its future revenue to the lender until a set amount is paid back. Unlike bank loans and private investors, commercial financing transactions help businesses access capital without the business owner having to incur a personal loan guarantee or forfeit equity. Commercial financing transactions are provided by private companies, often via brokers.

The Florida Office of Financial Regulation (OFR) is responsible for all activities relating to the regulation of banks, credit unions, other financial institutions, finance companies, and the securities industry. Florida's laws relating to the regulation of trade, commerce, and investments are codified in ch. 559, F.S. Currently, there are no Florida laws regulating commercial financing transaction brokers and providers.

The bill:

- Creates Part XIII of ch. 599, F.S., entitled "Florida Commercial Financing Disclosure Law;"
- Provides definitions for and establishes the scope of Part XIII;
- Requires certain disclosures by commercial financing transaction providers;
- Prohibits brokers from engaging in certain activities; and
- Grants the Attorney General exclusive authority to enforce Part XIII.

The bill will have an indeterminate impact on state expenditures and may have an indeterminate, but likely insignificant, impact on the private sector.

The bill was approved by the Governor on June 26, 2023, ch. 2023-290, L.O.F., and will become effective on July 1, 2023.

I. SUBSTANTIVE INFORMATION

A. EFFECT OF CHANGES:

Background

Business owners who need to meet unexpected demand, stock up on product, or quickly repair or replace failed equipment have options for financing such costs. Options include obtaining a small business loan from a bank or working with venture capitalists or angel investors. Oftentimes, however, banks require a personal guarantee for such loans and venture capitalists and angel investors seek equity in the business in exchange for providing capital.¹

A commercial financing transaction (CFT), also known as revenue-based financing, is a loan that a business agrees to pay back over time by pledging a portion of its future revenue to the lender until a set amount is paid back.² Unlike bank loans and private investors, CFTs can help businesses access capital without the business owner having to incur a personal loan guarantee or lose equity.³

CFTs are provided by private companies, often via brokers. In a CFT, the business essentially “sells” its future revenue to the CFT-providing company by entering into a contract. The company providing the CFT assumes the liability of potentially not being paid back the full amount of the CFT, making it an unsecured debt obligation. This is unlike obtaining a bank loan or working with investors, where the debt obligation is secured by property and partial ownership of the enterprise, respectively.

The Florida Office of Financial Regulation (OFR) is responsible for all activities relating to the regulation of banks, credit unions, other financial institutions, finance companies, and the securities industry.⁴ Florida’s laws relating to the regulation of trade, commerce, and investments are codified at ch. 559, F.S. Currently, there are no Florida laws regulating commercial financing transaction brokers and providers.

Effect of the Bill

Generally, the bill:

- Creates Part XIII of ch. 599, F.S., entitled “Florida Commercial Financing Disclosure Law;”
- Provides definitions for, and scope of, Part XIII, as more particularly described below;
- Creates disclosure requirements for commercial financing transaction providers;
- Prohibits brokers from engaging in certain activities; and
- Grants the Attorney General exclusive enforcement authority.

Definitions

As used in Part XIII, the bill creates the following definitions:

- “Accounts receivable purchase transaction” (ARPT) means a transaction in which a business forwards or otherwise sells to a person all or a portion of the business’ accounts, as defined in s.

¹ Business News Daily, *Using Revenue-Based Financing to Grow Your Business*, <https://www.businessnewsdaily.com/6659-revenue-based-financing-tips.html> (last visited Mar. 30, 2023).

² *Id.*

³ *Id.*

⁴ S. 20.121(3)(a)2., F.S.

679.1021, F.S.,⁵ or payment intangibles, as defined in s. 679.1021, F.S.,⁶ at a discount to the expected value of the account or payment intangibles. For purposes of Part XIII, the provider's characterization of an ARPT as a purchase is conclusive that the ARPT is not a loan or a transaction for the use, forbearance, or detention of money.

- “Advance fee” means any consideration that is assessed or collected by a broker before the closing of CFT.
- “Broker” means:
 - A person who, for compensation, arranges a CFT or an offer between a third party and a business in the state which would be binding upon that third party.
 - The term excludes a provider and any individual or entity whose compensation is not dependent upon the terms of the specific CFT obtained or offered.
- “Business” means an individual or group of individuals, sole proprietorship, corporation, limited liability company, trust, estate, cooperative, association, or limited or general partnership engaged in a business activity.
- “Commercial financing facility” means a provider's plan for purchasing multiple accounts receivable from the recipient over a period of time pursuant to an agreement that sets forth the terms and conditions governing the use of the facility.
- “Commercial financing transaction” means:
 - A commercial loan, ARPT, commercial open-ended credit plan, or each to the extent the transaction is a transaction the proceeds of which are provided to a business or are intended to be used to carry on a business and not for personal, family, or household purposes (i.e., a “business purpose transaction” (BPT)).
 - To determine whether a transaction is a BPT, the provider may rely on any written statement of intended purpose signed by the business.
- “Commercial loan” means a loan to a business, whether secured or unsecured.
- “Commercial open-end credit plan” (COECP) means commercial financing extended by any provider under a plan in which:
 - The provider reasonably contemplates repeat transactions.
 - The amount of financing that may be extended to the business during the term of the plan, up to any limit set by the provider, is generally made available to the extent that any outstanding balance is repaid.
- “Depository institution” means:
 - A bank, trust company, or industrial loan company doing business under the authority of, or in accordance with, a license, certificate, or charter issued by the U.S., Florida, or any other state, district, territory, or commonwealth of the U.S. which is authorized to transact business in Florida;
 - A federally chartered savings and loan association, federal savings bank, or federal credit union that is authorized to transact business in Florida; or
 - A savings and loan association, savings bank, or credit union organized under the laws of Florida or any other state which is authorized to transact business in Florida.
- “Provider” means:
 - A person who consummates more than five CFTs in any calendar year.

⁵ “Account” means a right to payment of a monetary obligation, whether or not earned by performance, for property that has been or is to be sold, leased, licensed, assigned, or otherwise disposed of; for services rendered or to be rendered; for a policy of insurance issued or to be issued; for a secondary obligation incurred or to be incurred; for energy provided or to be provided; for the use or hire of a vessel under a charter or other contract; arising out of the use of a credit or charge card or information contained on or for use with the card; or as winnings in a lottery or other game of chance operated or sponsored by a state, governmental unit of a state, or person licensed or authorized to operate the game by a state or governmental unit of a state. The term includes health-care-insurance receivables. The term does not include rights to payment evidenced by chattel paper or an instrument; commercial tort claims; deposit accounts; investment property; letter-of-credit rights or letters of credit; or rights to payment for money or funds advanced or sold, other than rights arising out of the use of a credit or charge card or information contained on or for use with the card. S. 679.1021(1)(b), F.S.

⁶ “Payment intangible” means a general intangible under which the account debtor's principal obligation is a monetary obligation. S. 679.1021(1)(iii), F.S.

- The term also includes a person who enters into a written agreement with a depository institution to arrange for the extension of a CFT by the depository institution to a business via an online lending platform administered by the person.
- The fact a provider extends a specific offer for a CFT on behalf of a depository institution may not be construed to mean the provider engaged in lending or financing or originated that loan or financing.

Scope

Part XIII applies to any CFT consummated on or after January 1, 2024, but does not apply to a:

- Provider that:
 - Is a federally insured depository institution or an affiliate or holding company of such institution;
 - Is a subsidiary or service corporation that is owned and controlled by a federally insured depository institution or that is under common ownership with a federally insured depository institution;
 - Is a lender regulated under the Farm Credit Act of 1971, 12 U.S.C. ss. 2001, *et seq.*;
 - Is licensed as a money transmitter in accordance with a license, certificate, or charter issued by Florida or any other state, district, territory, or commonwealth of the U.S.; or
 - Consummates no more than five CFTs in Florida in a 12-month period.
- CFT:
 - That is secured by real property; a lease; or a purchase money obligation that is incurred as all or part of the price of the collateral or for value given to enable the business to acquire rights in or the use of the collateral if the value is in fact so used; or
 - In which the recipient is a motor vehicle dealer or an affiliate thereof, or a vehicle rental company or an affiliate thereof, pursuant to a commercial loan or COECP of at least \$50,000 or a CFT offered by a person in connection with the sale or lease of products or services that such person manufactures, licenses, or distributes, or whose parent company or any of its subsidiaries manufactures, licenses, or distributes.
 - Of more than \$500,000.

Disclosures by Providers

The bill requires a provider that consummates a CFT to disclose the terms of the CFT. The bill mandates such disclosures be provided at the time of or before consummation of the CFT, requires only one disclosure for each CFT, and does not require a disclosure for any modification, forbearance, or change to a CFT.

A provider must disclose the following information in connection with each CFT:

- (a) The total amount of funds provided to the business under the terms of the agreement;
- (b) The total amount of funds disbursed to the business if less than the amount specified in paragraph (a) as a result of any fees deducted or withheld at disbursement, any amount paid to the provider to satisfy a prior balance, and any amount paid to a third party on behalf of the business;
- (c) The total amount to be paid to the provider under the terms of the agreement;
- (d) The total dollar cost under the terms of the agreement, calculated by finding the difference between the amount specified in paragraph (a) and the amount specified in paragraph (c);
- (e) The manner, frequency, and amount of each payment. If the payments may vary, the provider must instead disclose the manner, frequency, and the estimated amount of the initial payment and a description of the methodology for calculating any variable payment and the circumstances when payments may vary; and
- (f) A statement of whether there are any costs or discounts associated with prepayment, including a reference to the paragraph in the agreement which creates the contractual rights of the parties related to prepayment.

The bill allows a provider that consummates a commercial financing facility to provide the required disclosures based on an example of a transaction that could occur under the agreement, provided such example is based on an accounts receivable that has a total face amount owed of \$10,000. The bill permits such providers to submit only one disclosure for the commercial financing facility and does not require a disclosure for each modification, forbearance, or change to the facility.

Prohibited Acts for Brokers

The bill prohibits brokers from:

- Assessing, collecting, or soliciting an advance fee from a business to provide services as a broker.
 - Notably, however, this prohibition does not preclude a broker from soliciting a business to pay for, or preclude a business from paying for, actual services necessary to apply for a CFT (i.e., a credit check or appraisal of security) if such payment is made by check or money order payable to a party independent of the broker;
- Making or using any false or misleading representation or omitting any material fact in the offer or sale of the services of a broker, or engage in any act that operates or would operate as fraud or deception in connection with the offer or sale of the services of a broker, notwithstanding the lack of reliance by the business;
- Making or using any false or deceptive representation in its business dealings; and
- Offering the services of a broker by making, publishing, disseminating, circulating, or placing before the public within Florida an advertisement in which the offer or advertisement does not disclose the name, business address, and telephone number of the broker.
 - For purposes of the above, the broker must disclose the actual address and telephone number of the business of the broker in addition to the address and telephone number of any forwarding service the broker may use.

Enforcement of Part XIII

The bill provides exclusive authority to the Attorney General to enforce Part XIII. The Attorney General may: receive and act on complaints; take action designed to obtain voluntary compliance with Part XIII; and commence administrative or judicial proceedings to enforce compliance with Part XIII.

The bill provides that a violation of any provision of Part XIII is punishable by a fine of \$500 per incident, not to exceed \$20,000 for all aggregated violations arising from the use of the transaction documentation or materials found to be in violation.

A subsequent violation of any provision of Part XIII, after receipt of a written notice of a prior violation from the Attorney General, is punishable by a fine of \$1,000 per incident, not to exceed \$50,000 for all aggregated violations arising from the use of the transaction documentation or materials found to be in violation.

The bill provides a violation of any provision of Part XIII does not affect the enforceability or validity of the underlying CFT. The bill also provides that nothing in Part XIII creates or is intended to create a private right of action against any person or entity based upon compliance or noncompliance with the provisions of Part XIII.

II. FISCAL ANALYSIS & ECONOMIC IMPACT STATEMENT

A. FISCAL IMPACT ON STATE GOVERNMENT:

1. Revenues:

None.

2. Expenditures:

The bill will have an indeterminate impact on workload within the Department of Legal Affairs. To the extent that the Attorney General must enforce the provisions of the bill, workload may increase. Any impacts of the bill can likely be absorbed within existing resources. If additional workload is unmanageable, the department could request additional resources from the Legislature through the annual Legislative Budget Request process.

B. FISCAL IMPACT ON LOCAL GOVERNMENTS:

1. Revenues:

None.

2. Expenditures:

None.

C. DIRECT ECONOMIC IMPACT ON PRIVATE SECTOR:

The bill will have an indeterminate impact on private entities who qualify as providers under the bill. The bill may benefit or hinder some businesses to the extent that new regulations influence the outcome of their transactions. Any such impact is indeterminate, yet likely insignificant.

D. FISCAL COMMENTS:

None.