

**HOUSE OF REPRESENTATIVES STAFF ANALYSIS**

**BILL #:** HB 1353 Commercial Financing Product Brokers and Providers

**SPONSOR(S):** Bankson

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

REFERENCE	ACTION	ANALYST	STAFF DIRECTOR or BUDGET/POLICY CHIEF
1) Insurance & Banking Subcommittee		Fletcher	Lloyd
2) Justice Appropriations Subcommittee			
3) Commerce Committee			

**SUMMARY ANALYSIS**

A commercial financing product, 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 products can help businesses access capital without the business owner having to incur a personal loan guarantee or lose equity. Commercial financing products 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 at ch. 559, F.S. Currently, there are no Florida laws regulating commercial financing product brokers and providers.

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 product providers;
- Prohibits brokers from engaging in certain activities; and
- Grants the Attorney General the exclusive authority to enforce Part XIII.

The bill has no impact on state revenues or local government revenues and expenditures, but has an indeterminate negative impact on state expenditures and an indeterminate positive impact on the private sector.

The bill provides an effective date of July 1, 2023.

# FULL ANALYSIS

## I. SUBSTANTIVE ANALYSIS

### A. EFFECT OF PROPOSED 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.<sup>1</sup>

A commercial financing product, also known as revenue-based financing (RBF), 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.<sup>2</sup> Unlike bank loans and private investors, commercial financing products can help businesses access capital without the business owner having to incur a personal loan guarantee or lose equity.<sup>3</sup>

Commercial financing products are provided by private companies, often via brokers. In a commercial financing product transaction (CFPT), the business essentially “sells” its future revenue to the RBF-providing company by entering into a contract. The company providing the RBF assumes the liability of potentially not being paid back the full amount of the RBF, 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.

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#### 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 product 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.

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<sup>1</sup> Business News Daily, *Using Revenue-Based Financing to Grow Your Business*, <https://www.businessnewsdaily.com/6659-revenue-based-financing-tips.html> (last visited Mar. 22, 2023).

<sup>2</sup> *Id.*

<sup>3</sup> *Id.*

<sup>4</sup> S. 20.121(3)(a)2., F.S.

679.1021, F.S.,<sup>5</sup> or payment intangibles, as defined in s. 679.1021, F.S.,<sup>6</sup> 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 CFPT.
- “Broker” means:
  - A person who, for compensation, arranges a CFPT 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 CFPT 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 product” 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 CFPTs in any calendar year.
  - The term also includes a person who enters into a written agreement with a depository institution to arrange for the extension of a commercial financing product by the depository institution to a business via an online lending platform administered by the person.

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<sup>5</sup> “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.

<sup>6</sup> “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 fact a provider extends a specific offer for a commercial financing product 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 CFPT 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;
  - 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 CFPTs in Florida in a 12-month period.
- CFPT:
  - 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 commercial financing product 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 CFPT to disclose the terms of the CFPT. The bill mandates such disclosures be provided at the time of or before consummation of the CFPT, requires only one disclosure for each CFPT, and does not require a disclosure for any modification, forbearance, or change to a CFPT.

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

- (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.
- (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.

### 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 commercial financing product (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. Specifically, 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 sets forth the following with regard to violations of Part XIII:

- 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 of Part XIII;
- 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 of Part XIII;

The bill provides a violation of any provision of Part XIII does not affect the enforceability or validity of the underlying CFPT. 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.

### B. SECTION DIRECTORY:

**Section 1:** Creates Part XIII of ch. 559, F.S., relating to Florida Commercial Financing Disclosure Law.

**Section 2:** Provides an effective date of July 1, 2023.

## II. FISCAL ANALYSIS & ECONOMIC IMPACT STATEMENT

### A. FISCAL IMPACT ON STATE GOVERNMENT:

#### 1. Revenues:

None.

2. Expenditures:

The bill has an indeterminate negative impact on the Department of Legal Affairs to the extent that the Attorney General pursues enforcement of the bill. See Fiscal Comments, below.

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 businesses to the extent that they have access to new capital to assist or expand their endeavors.

Businesses who qualify as a provider under Part XIII would need to make the disclosures relating to CFPT required by the bill.

D. FISCAL COMMENTS:

The bill could increase the workload of the Attorney General's office. It is currently unknown whether additional resources would be needed to address the additional workload impact, but it is likely current resources would be sufficient to handle the initial impact. Any potential impact for staffing could be addressed later through the traditional Legislative Budget Request process.<sup>7</sup>

### 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.

2. Other:

None.

B. RULE-MAKING AUTHORITY:

Not applicable. The bill does not provide rule-making authority.

C. DRAFTING ISSUES OR OTHER COMMENTS:

The bill provides the scope of Part XIII does not apply to CFPTs of more than \$500,000. It might be appropriate to amend the bill to remove this limitation of scope, as CFPTs of more than \$500,000 would not be subject to any other regulatory authority.

Additionally, because OFR is traditionally responsible for all activities relating to the regulation of banks, credit unions, financial institutions, finance companies, and the securities industry in Florida, it might be

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<sup>7</sup> Email from Adam Keith, Budget Chief, Justice Appropriations Subcommittee, RE: Rep Bankson – HB 1353 Commercial Financing Product Brokers and Providers (Mar. 17, 2023).

appropriate to amend the bill to expressly grant OFR regulatory authority over commercial financing product providers and brokers and related CFPTs.

#### **IV. AMENDMENTS/COMMITTEE SUBSTITUTE CHANGES**