

The Florida Senate
BILL ANALYSIS AND FISCAL IMPACT STATEMENT

(This document is based on the provisions contained in the legislation as of the latest date listed below.)

Prepared By: The Professional Staff of the Appropriations Committee on Criminal and Civil Justice

BILL: CS/SB 1624

INTRODUCER: Banking and Insurance Committee and Senator Brodeur

SUBJECT: Commercial Financing Transaction Brokers and Providers

DATE: April 17, 2023

REVISED: _____

	ANALYST	STAFF DIRECTOR	REFERENCE	ACTION
1.	<u>Johnson</u>	<u>Knudson</u>	<u>BI</u>	<u>Fav/CS</u>
2.	<u>Atchley</u>	<u>Harkness</u>	<u>ACJ</u>	<u>Pre-meeting</u>
3.	<u> </u>	<u> </u>	<u>FP</u>	<u> </u>

Please see Section IX. for Additional Information:

COMMITTEE SUBSTITUTE - Substantial Changes

I. Summary:

CS/SB 1624 creates the “Florida Commercial Financing Disclosure Law.” The bill requires a provider that extends an offer of commercial financing of \$500,000 or less to give the business certain written disclosures regarding the total cost of the transaction, and the manner, frequency, and amount of each payment. The bill provides that a provider’s characterization of accounts receivable purchase transaction as a purchase is conclusive that the transaction is not a loan or a transaction for the use, forbearance, or detention of money. The commercial financing disclosures will assist small businesses in comparing the types and cost of financial products available in the marketplace.

Disclosures. The provider is required to disclose in writing the following at or before consummation of a commercial financing product transaction:

- The total amount of funds provided to the business under the terms of the commercial financing product;
- The total amount of funds disbursed to the business under the terms of the commercial financing product, if less than the total amount of funds provided, as a result of any fees deducted or withheld at disbursement and any amount paid to a third party on behalf of the business;
- The total amount to be paid to the provider pursuant to terms of the commercial financing product agreement;
- The total dollar cost of the commercial financing product under the terms of the agreement, derived by subtracting the total amount of funds provided from the total of payments;

- The manner, frequency and amount of each payment; and
- A statement of whether there are any costs or discounts associated with prepayment of the commercial financing product including a reference to the provision in the agreement that creates the contractual rights of the parties related to prepayment.

Prohibited Acts. The bill prohibits a broker from engaging in any of the following acts:

- Assessing, collecting, or soliciting an advance fee from a business to provide services to a broker. However, this prohibition would not preclude a broker from soliciting a business to pay for, or a preclude a business from paying for, actual services necessary to apply for commercial financial product, such as a credit check or an appraisal of security, if certain conditions are met.
- 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 would operate as fraud or deception upon any person in connection with the offer or sale of the services of the broker, notwithstanding the absence the absence of reliance by the business.
- Make or use any false or deceptive representation in its business dealings.
- Offer the services of a broker by any advertisement without disclosing the actual address and telephone number of the business of the broker.

Enforcement. The bill provides that violations of this act are punishable by a fine of \$500 per incident, not to exceed \$20,000 for all aggregated violations. Any person who violates any provision of this act after receiving written notice of a prior violation from the Attorney General shall be 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 this act. The Attorney General has exclusive authority to impose fines for noncompliance with the disclosure requirements and prohibited acts.

II. Present Situation:

Revenue Based Financing Transaction

In a revenue based financing transaction, a business sells a fixed sum of its future receipts in exchange for an agreed-upon purchase price. In such an agreement:

- The business remits a contractually specified percentage of its revenue. If revenue decreases, then the business has the right to correspondingly decrease its remittances.
- The financing company or provider takes the risk that the business's revenue will be generated slower than expected and the risk that the business will fail or go bankrupt.¹

Revenue based finance factoring products allow small businesses to access funds for unanticipated events such as a major equipment failure or a seasonal inventory surge. Some finance companies offering these products provide financing between \$10,000 and \$500,000 to small businesses.² The fees associated with a revenue-based financing arrangement may range from 1 percent to 3 percent of monthly revenues of a business.³

¹ [About Us – RBFC \(revenuebasedfinancecoalition.com\)](#) (last visited Mar. 20, 2023).

² *Id.*

³ [Revenue-Based Financing Versus AR Financing And Factoring \(forbes.com\)](#) (Sep. 8, 2022) (last visited March 18, 2023).

As an example of a transaction, if a financing company purchases 10 percent of a business's future revenue up to a purchased amount of \$10,000, the transaction would be completed whenever the business succeeded in generating \$100,000 in revenue, and remitted 10 percent of that revenue to the financing company.⁴ This milestone could be achieved in a month, a year, or never.

Accounts Receivable Financing

A company may seek accounts receivable financing (i.e., a bank loan against the value of the accounts receivable) when they exhaust other financing options and use the cash value of accounts receivable as collateral for the loan.⁵ Accounts receivable financing agreements can be structured in multiple ways usually with the basis as either an asset sale or a loan.⁶ Since there is a risk for the bank, the loan may only be 80 percent to 90 percent of the value of the customer's accounts receivable.⁷ In an accounts receivable purchase program, a bank typically purchases a corporation's receivables as soon as the company delivers goods to its customer and issues an invoice.⁸ Advantages of such a program can include less expensive financing, favorable off-balance sheet treatment of receivables assets, and reduced credit risk related to the particular obligor.⁹ The bank has recourse back to the seller for any dilution items, such as any non-credit reductions to the receivable, which could include discounts, billing errors, commercial disputes, returns, etc.¹⁰

Merchant Cash Advances¹¹

A merchant cash advance, or MCA, is an alternative type of business financing, and is not considered a loan. In this transaction, a company gives a business an upfront sum of cash that the business repays using a percentage of future debit and credit card sales, plus a fee. Repayment periods are based on sales and can range anywhere from three to 18 months; the higher the credit card revenues, the faster the repayment of the advance. As an alternative, MCA companies can also withdraw funds directly from a business bank account. In this case, fixed repayments are made daily or weekly from the account regardless of how much the business earns in sales, and the fixed repayment amount is determined based on an estimate of the monthly revenue of the business.

In 2021, a Florida appellate court¹² held that a MCA purchase and sale agreement is not a loan where the "repayment obligation is not absolute, but rather contingent on or dependent upon the success of the underlying venture." Therefore, it was not subject to Florida's usury statute. The

⁴ *Id.*

⁵ *Id.*

⁶ [What Is Accounts Receivable Financing? Definition and Structuring \(investopedia.com\)](#) (Oct. 29, 2020) (last visited Mar. 25, 2023).

⁷ *Supra* at ft. 4

⁸ [TreasuryPulse \(fpssc.com\)](#) (last visited Mar. 20, 2023).

⁹ *Id.*

¹⁰ *Id.*

¹¹ [Is a Merchant Cash Advance Right for Your Business? - NerdWallet](#)

¹² *Craton Entertainment, LLC vs. Merchant Capital Group, LLC*, No. 3D19-1643 (Jan. 6, 2021).

court also cites authority recognizing that a transaction is not a loan where “a portion of the investment is at speculative risk.”

Commercial Financing Disclosure Laws

California¹³, Utah¹⁴, New York¹⁵, and Virginia¹⁶ have enacted commercial financing disclosure laws. Virginia’s law focuses solely on sales based financing disclosures and registration of providers. Sales based financing are transactions repaid as a percentage of sales or revenue, in which the payment amount is dependent upon the recipient’s sales volume or revenue. The Virginia law exempts transactions of more than \$500,000 and those originated by depository institutions.¹⁷ Additionally, providers and brokers that enter into no more than five covered transactions in a twelve-month period are not covered.¹⁸ Further, providers of covered sales-based transactions are subject to registration.¹⁹

Proposed Federal Rule Relating to Commercial Lending Disclosures²⁰

In 2021, the CFPB proposed a rule that is designed to help small businesses gain access to credit by increasing transparency in the lending marketplace. The proposed rule would require lenders to disclose information about their lending to small businesses, allowing community organizations, researchers, lenders, and others to better support small business and community development needs. Under the proposal, lenders would be required to report the amount and type of small business credit applied for and extended, demographic information about small business credit applicants, and key elements of the price of the credit offered.

III. Effect of Proposed Changes:

Section 1 creates Part XIII of ch. 559, F.S., “Florida Commercial Financing Disclosure Law.”

Definitions (s. 559.9611, F.S.)

The bill defines the following terms as follows:

“Accounts receivable purchase transaction,” means a transaction in which a business forwards or otherwise sells to a person all or a portion of the business’s accounts or payment intangibles, as those terms are defined in s. 679.1021, F.S., at a discount to the expected value of the account or payment intangibles. For purposes of this part, the provider’s characterization of an accounts receivable purchase transaction as a purchase is conclusive that the accounts receivable purchase transaction is not a loan or a transaction for the use, forbearance, or detention of money.

¹³ Cal. Fin. Code ss. 22800 to 22805.

¹⁴ Utah Code Ann. Ss. 7-27-101 to 7-27-301. Utah’s law requires registration of specified commercial financiers.

¹⁵ N.Y. Fin. Serv. Law ss. 801 *et seq.*; 23 NYCRR ss. 600 *et seq.*

¹⁶ Va. Code Ann. ss. 6.2-2228 to 6.2-2238; 10 Va. Admin. Code ss. 5-240-10 to 5-240-40.

¹⁷ Va. Code Ann. s. 6.2-2229.

¹⁸ *Id.*

¹⁹ Va. Code Ann. s. 6.2-2230.

²⁰ [CFPB Proposes Rule to Shine New Light on Small Businesses’ Access to Credit | Consumer Financial Protection Bureau \(consumerfinance.gov\)](https://www.consumerfinance.gov) (Sep. 1, 2021) (last visited Mar. 20, 2023). Comments must be received on or before January 20, 2023.

Advance fee” means any consideration that is assessed or collected by a broker before the closing of a commercial financing product transaction.

“Broker” means a person who, for compensation or the expectation of compensation, arranges a commercial financing product transaction or an offer between a third party and a business in the state which would, if executed, be binding upon that third party. The term excludes a provider and any individual or entity whose compensation is not based or dependent upon on the terms of the specific commercial financing product transaction obtained or offered.

“Business” means an individual or group of individuals, a sole proprietorship, a corporation, a limited liability company, a trust, an estate, a cooperative, an association, or a limited or general partnership engaged in a business activity.

“Commercial financing transaction” means a commercial loan, accounts receivable purchase transaction, commercial open-end credit plan, or each to the extent the transaction is a business purpose transaction. As used in the definition of commercial financing transaction, the term “business purpose transaction” means 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. For purposes of determining whether a transaction is a business purpose transaction, the provider may rely on any written statement of intended purpose signed by the business. The statement may be a separate statement or may be contained in an application, agreement, or other document signed by the business or the business owner.

“Commercial loan” means a loan to a business, whether secured or unsecured.

“Commercial open-end credit plan” means commercial financing extended by any provider under a plan in which the provider reasonably contemplates repeat transactions and 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, a trust company, or an industrial loan company doing business under the authority of, or in accordance with, a license, certificate, or charter issued by the United States, this state, or any other state, district, territory, or commonwealth of the United States which is authorized to transact business in this state;
- A federally chartered savings and loan association, federal savings bank, or federal credit union that is authorized to transact business in the state; or
- A savings and loan association, savings bank, or credit union organized under the laws of this or any other state which is authorized to transact business in the state.

“Provider” means a person who consummates more than five commercial financing product transactions to a business located in the state 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. The fact that a provider extends a specific offer for a commercial financing product on behalf of a depository institution may not be

construed to mean that the provider engaged in lending or financing or originated that loan or financing.

Scope of Part XIII (s. 559.9612, F.S.)

This part does not apply to:

- A provider that is a federally insured depository institution or an affiliate or holding company of such institution; or a subsidiary or service corporation that is owned and controlled by a federally insured depository institution.
- A provider that is a lender regulated under the Farm Credit Act of 1971, 12 U.S.C. ss. 2001 et seq.
- A commercial financing product transaction 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.
- A commercial financing product transaction in which the recipient is a motor vehicle dealer or an affiliate of such a dealer, or a vehicle rental company or an affiliate of such a company, pursuant to a commercial loan or commercial open-end credit plan 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 directly or indirectly owned and controlled subsidiaries manufactures, licenses, or distributes.
- A provider that is licensed as a money transmitter in accordance with a license, certificate, or charter issued by this state or any other state, district, territory, or commonwealth of the United States.
- A provider that consummates no more than five commercial financing product transactions in the state in a 12-month period.
- A commercial financing product transaction of more than \$500,000.

Disclosures (s. 559.9613, F.S.)

The provider must provide the following written disclosures at or before consummation of the transaction:

- The total amount of funds provided to the business under the terms of the commercial financing product;
- The total amount of funds disbursed to the business under the terms of the commercial financing product, if less than the total amount of funds provided, 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;
- The total amount to be paid to the provider pursuant to terms of the commercial financing product agreement;
- The total dollar cost under the terms of the agreement, calculated by finding the difference between the total amount of funds provided from the total of amount of funds disbursed;
- The manner, frequency and amount of each payment; and

- Whether there are any costs or discounts associated with prepayment of the commercial financing product including a reference to the provision in the agreement that creates the contractual rights of the parties related to prepayment.

Prohibited Acts (s. 559.9614, F.S.)

A broker may not:

- Assess, collect, or solicit an advance fee from a business to provide services to a broker. However, this prohibition would not preclude a broker from soliciting a business to pay for, or a preclude a business from paying for, actual services necessary to apply for commercial financial product, such as a credit check or an appraisal of security, if certain conditions are met.
- Make or use any false or misleading representation or omit any material fact in the offer or sale of the services of a broker or engage in any act that would operate as fraud or deception upon any person in connection with the offer or sale of the services of the broker, notwithstanding the absence the absence of reliance by the business.
- Make or use any false or deceptive representation in its business dealings.
- Offer the services of a broker by any advertisement without disclosing the actual address and telephone number of the business of the broker.

Enforcement (s. 559.9615, F.S.)

The bill provides that the Attorney General has exclusive authority to enforce part XIII of ch. 559, F.S. Further, the bill provides that violations of this act are punishable by a fine of \$500 per incident, not to exceed \$20,000 for all aggregated violations. Any person who violates any provision of this act after receiving written notice of a prior violation from the Attorney General shall be 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 this act

The section also provides that a violation of any provision of part XIII of ch. 559, F.S., does not affect the enforceability or validity of the underlying commercial financing product transaction. Lastly, this part does not create a private right of action against any person or entity based upon compliance or noncompliance with the provisions of this part.

Section 2 provides the bill takes effect July 1, 2023.

IV. Constitutional Issues:**A. Municipality/County Mandates Restrictions:**

None.

B. Public Records/Open Meetings Issues:

None.

C. Trust Funds Restrictions:

None.

D. State Tax or Fee Increases:

None.

E. Other Constitutional Issues:

None.

V. Fiscal Impact Statement:

A. Tax/Fee Issues:

None.

B. Private Sector Impact:

The required disclosures will assist small businesses in comparing the types and cost of financial products available in the marketplace.

Providers subject to the disclosure requirements would be subject to investigation and fines for noncompliance.

C. Government Sector Impact:

Indeterminate. It is unclear how many providers would be subject to the requirements of the bill and what the potential investigation and enforcement costs are for the Department of Legal Affairs.

VI. Technical Deficiencies:

None.

VII. Related Issues:

None.

VIII. Statutes Affected:

This bill creates the following sections of the Florida Statutes: 559.961, 559.9611, 559.9612, 559.9613, 559.9614, and 559.9615.

IX. Additional Information:

- A. **Committee Substitute – Statement of Substantial Changes:**
(Summarizing differences between the Committee Substitute and the prior version of the bill.)

CS by Banking and Insurance on March 29, 2023:

The CS specifies that disclosures must be in writing and provides technical changes.

B. Amendments:

None.

This Senate Bill Analysis does not reflect the intent or official position of the bill's introducer or the Florida Senate.
