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Senate Bill 474 (as introduced 3-13-03)

Sponsor: Senator Valde Garcia

Committee: Economic Development, Small Business and Regulatory Reform

Date Completed: 5-28-03

CONTENT

The bill would create the "Deferred Presentment Services Act" to do the following:

- **Prohibit a person from engaging in the business of providing deferred presentment services without a license.**
- **Prescribe the procedure for obtaining a license from the Commissioner of the Office of Financial and Insurance Services (OFIS).**
- **Require the Commissioner to establish license fees sufficient to cover OFIS's administrative costs.**
- **Require a licensee to document a deferred presentment service transaction by entering into a deferred presentment service agreement with the customer.**
- **Limit a deferred presentment service agreement to a maximum of \$1,000.**
- **Allow a licensee to charge a service fee of up to 18% of the amount paid to a customer.**
- **Require a licensee to display certain notices, and include other notices in a service agreement.**
- **Allow a licensee to include mandatory arbitration provisions in a service agreement.**
- **Allow a customer to complain to a license of a violation and/or file a complaint with the Commissioner, and require the Commissioner to investigate a customer's complaint.**
- **Authorize the Commissioner to issue a cease and desist order, suspend or revoke a license, and impose civil fines.**

"Deferred presentment service" would mean a transaction between a licensee and a customer under which the licensee agreed to pay to the

customer an agreed-upon amount in exchange for a fee, and to hold one or more of the customer's checks for a period of time before negotiation, redemption, or presentment of the checks. A "customer" would be an individual who inquired into the availability of a deferred presentment service and/or entered into a deferred presentment service agreement.

The bill would take effect July 1, 2004.

Licensing

Application. The bill would prohibit a person from engaging in the business of providing deferred presentment services without a license. A separate license would be required for each location from which deferred presentment services were conducted.

To obtain a license, an applicant would have to have and maintain liquid assets of at least \$50,000 for each licensed location, subject to a maximum of \$250,000 in liquid assets for any one licensee. Further, the person would have to demonstrate to the Commissioner that the applicant had the financial responsibility, financial condition, business experience, character, and general fitness reasonably to warrant a belief that the applicant would conduct its business lawfully and fairly. In determining whether this requirement was satisfied, and for the purpose of investigating compliance with the bill, the Commissioner could review the applicant's relevant business records and the capital adequacy; the competence, experience, integrity, and financial ability of any person who was a member, partner, director, or officer, or a shareholder with 25% or more interest in the applicant; and any record regarding any of those people or the applicant of any criminal activity, fraud, or other act of personal

dishonesty, an act, omission, or practice that constituted a breach of a fiduciary duty, or any suspension, removal, or administrative action by any agency or department of the United States or any state. When a license application was received, the Commissioner would have to investigate to determine whether the qualifications had been satisfied and, if so, issue to the applicant a license to engage in the deferred presentment services business.

Each application for a license would have to include identifying information specified in the bill; the location of the applicant's registered office; and other data and information the Commissioner required with respect to the applicant, its directors, officers, members, shareholders, managing employees, or agents.

If the Commissioner determined that an applicant was not qualified to receive a license, he or she would have to give the applicant written notice that the application had been denied, stating the basis for denial. If the Commissioner denied an application, or failed to act within 60 days after a properly completed application was filed, the applicant could submit a written demand to the Commissioner for a hearing on the question of whether he or she should grant a license. If a hearing were held, the Commissioner would have to reconsider the application and issue a written order granting or denying it.

License Fees; Bond. A licensee would have to pay a license fee, in an amount determined by the Commissioner, within 60 days of submitting its license application, and then annually. Each year, the Commissioner would have to establish a schedule of license fees based upon each licensee's business volume, number of locations, and any other business factors considered reasonable by the Commissioner in order to generate funds sufficient to pay, but not to exceed, OFIS's reasonably anticipated costs of administering the bill. A licensee would have to pay the actual travel, lodging, and meal expenses incurred by office employees who traveled out of State to examine the records of or investigate the licensee. Money received under the bill would have to be deposited in the State Treasury and credited to OFIS to be used only for its operations.

A licensee also would have to furnish a \$50,000 surety bond to secure the performance of its obligations, issued by a

bonding company authorized to do business in the State, in a form satisfactory to the Commission.

General Licensure Provisions. A licensee would have to post a copy of its license in a conspicuous location at its place of business.

After the date of issuance, a license would remain in effect through September 30, unless surrendered, suspended, or revoked. A license would expire September 30 each year. A licensee could renew a license for a year by submitting an application that showed continued compliance with the bill, and paying the renewal fee.

A license would not be transferable or assignable. The Commissioner's prior written approval would be required for the continued operation of a deferred presentment services business if there were a change in control of a licensee. The Commissioner could require information considered necessary to determine whether a new application was required. The person that requested the approval would have to pay the cost incurred by the Commissioner in investigating the change in control request. A licensee would have to give notification five days before any change in the licensee's business location or name. (Under these provisions, "control" would mean either: 1) for a corporation, direct or indirect ownership, or the right to control, 25% or more of its voting shares, or the ability of a person to elect a majority of the directors or otherwise effect a change in policy; or 2) for any other entity, the ability to change the principals of the organization, whether active or passive.)

Reports. Within 15 days after the occurrence of any of the following events, a licensee would have to file with the Commissioner a written report describing the event and its expected impact on the licensee's activities: the filing for bankruptcy or reorganization by the licensee; the institution of revocation or suspension proceedings against the licensee by any state or governmental authority; any felony indictment or conviction of the licensee or any of its members, directors, officers, or shareholders; and any other events the Commissioner determined and identified by rule.

Deferred Presentment Service Agreement

Notice. The bill would require a licensee to

post a notice prominently in an area designed to be seen by a customer before he or she entered into a deferred presentment service agreement. The notice would have to be in at least 32-point type and contain a statement prescribed in the bill. The statement, in part, would have to provide that the customer could have only one service agreement at a time, limited to a maximum of \$1,000, and could cancel an agreement under certain conditions; and that the licensee could not renew a deferred presentment service transaction. The licensee also would have to post prominently, in at least 32-point type, a schedule of fees and charges imposed for deferred presentment services.

Content. A licensee would have to document a deferred presentment service transaction by entering into a written deferred presentment service agreement signed by both the customer and the licensee. A licensee would have to include all of the following in the agreement:

- The customer's name, the licensee's name, street address, and telephone number, and the date of the agreement.
- The signature of the individual who entered into the agreement on behalf of the licensee.
- The amount of the check presented to the licensee by the customer.
- An itemization of the fees and interest charges to be paid by the customer and a clear description of his or her payment obligation under the agreement.
- A schedule of all fees and charges associated with the loan, the maturity date, and an example of the amounts the issuer would pay based on the amount of the loan.
- The licensee's agreement to defer presentment, defer negotiation, or defer entering the check into the check-clearing process until the maturity date.
- A description of the process a customer could use to file a complaint against the licensee.

The agreement also would have to include, in at least 12-point type, a notice prescribed in the bill. The notice would have to include warnings to the customer that the service should be used only to meet short-term cash needs; the rights and responsibilities of the customer, including information on how he or she could complain about a violation of the law; and the rights and responsibilities of the licensee.

At the time of entering into a deferred presentment service agreement, a licensee would have to give a copy of the signed agreement to the customer.

Limitations. A licensee could enter into a deferred presentment service agreement with a customer for any amount up to \$1,000, plus a service fee. A licensee could charge a service fee for each deferred presentment service transaction, not to exceed 18% of the amount paid by the licensee to the customer. A service fee would be earned by the licensee on the date of the transaction and would not be considered interest.

At the time of entering into an agreement, a licensee could not charge interest; include a maturity date that was more than 31 days after the date of the agreement; charge an additional fee for cashing the licensee's business check if the licensee paid the proceeds to the customer by business check; include a confession of judgment in the agreement; or charge or collect any other fees for a deferred presentment service, except as provided in the bill.

Conditions. A licensee could not enter into an agreement with a customer if he or she had one or more outstanding agreements with the licensee or with any other licensees, and the total unpaid principal amount of all of the customer's loans exceeded \$1,000. In determining whether a licensee could make a loan, the licensee could rely on a written representation from the customer that he or she did not have any outstanding deferred presentment service agreements with the licensee or any other licensee, if the licensee independently verified the accuracy of the customer's written representation through commercially reasonable means. A customer who entered into an agreement in violation of these provisions would not be entitled to the remedies provided under the bill or through OFIS as otherwise provided.

Other Provisions. A licensee could not renew an agreement, but could extend it if the licensee did not charge a fee in connection with the extended transaction. A licensee who extended an agreement could not create a balance owed above the amount owed on the original agreement.

A customer would satisfy his or her obligation under an agreement when the check the licensee was holding was paid by the financial institution or redeemed by the customer by

paying to the licensee an amount equal to the full amount of the check. If the customer satisfied his or her obligation under an agreement, the licensee or any other licensee could enter into a new agreement with that customer.

A licensee would have to maintain each deferred presentment service agreement until two years after the date it was satisfied, and make available for examination by the Commissioner all agreements and related documents in its possession or control including any applications, credit reports, employment verifications, or loan disclosure statements. A licensee also would have to preserve and keep available for examination by the Commissioner all documents pertaining to a rejected application for a deferred presentment service for any period of time required by law.

Rescission or Redemption

A customer could rescind a deferred presentment service agreement without cost to him or her and for any reason if the customer, by the close of business on the business day following the date of the agreement, delivered to the licensee cash or a cash equivalent in an amount equal to the amount of cash the customer received. The licensee would have to return to the customer the check received under the agreement and any service fee paid by the customer to the licensee. A customer who rescinded an agreement would not be eligible for restitution with regard to the rescinded agreement.

A customer could redeem a check from the licensee at any time before the maturity date. A licensee would have to return the check to the customer upon receipt of cash or its equivalent in the full amount of the check. A licensee could not contract for or collect a charge for accepting partial payments from the customer if the full amount were paid by the maturity date.

Payment & Presentment. At the time of entering into a deferred presentment service agreement, a licensee would have to pay the proceeds under the agreement to the customer in cash, if requested. Otherwise, the licensee could pay the proceeds under the agreement to the customer in the form of the licensee's business check, money order, cash, or any other valid method of monetary transfer.

A licensee could not present a check for payment before the maturity date. A licensee that did so would be liable for all expenses and damages caused to the customer and the financial institution upon which the check was drawn as a result of the violation, in addition to the remedies and penalties provided in the bill.

Before negotiating or presenting a customer's check for payment, a licensee would have to endorse the check with the actual name under which the licensee was doing business. A licensee could contract for and collect a returned check charge that did not exceed \$25, if one or more of a customer's checks that the licensee was holding under an agreement were returned by a financial institution due to insufficient funds, a closed account, or a stop payment order. The licensee could contract for and collect only one returned check charge in a transaction with a customer. A licensee also could exercise any other remedy available under any law applicable to the return of a check because of a closed account or a stop payment order.

A customer would not be subject to any criminal penalty for entering into an agreement and would not be subject to any criminal penalty in the event his or her check was dishonored.

Violations/Complaints

Complaint to Licensee. A customer who believed that a licensee had violated the bill could notify the licensee in person, by the close of business on the day he or she signed an agreement. Also, within five business days after signing an agreement, a customer who believed that a licensee had violated the bill could deliver to the licensee a written notice of the licensee's violation. In either case, the customer would have to identify the nature of the violation and include documentary or other evidence in the notice. By the close of the third business day after receiving a notice, the licensee would have to determine if it had violated the law as alleged in the notice.

If the licensee determined that it had violated the law, it would have to return to the customer the check received under the agreement, and any service fee paid by the customer to the licensee. The customer would have to deliver to the licensee cash or a cash equivalent in an amount equal to the amount of cash the customer received under the

agreement. In addition, the licensee would have to make restitution to the customer for each violation in an amount equal to five times the amount of the fee charged in the customer's agreement, but not less than \$15 or more than the face amount of the check. A licensee that made restitution for a violation would not be subject to any other remedy provided for a violation under the bill with respect to that violation.

If the licensee determined that it did not violate the law, it immediately would have to notify the Commissioner and the customer of that determination. The licensee would have to give the Commissioner detailed information about the terms of the agreement and provide other information requested by the Commissioner. The licensee would have to include in the notification to the customer that he or she had the right to file a written complaint with OFIS if he or she did not agree with the licensee's determination. The licensee would have to include in the notice detailed information on how the customer could contact OFIS to obtain a complaint form. The customer then could file a written complaint with OFIS on a form prescribed by the Commissioner. The customer would have to include with the complaint documentary or other evidence of the violation.

If the licensee had otherwise complied with the bill and determined that it did not violate the law, the licensee could present the check for payment on or after the maturity date. If a check presented for payment were not honored, a licensee could initiate any lawful collection effort.

The Commissioner promptly would have to investigate a complaint filed by a customer under these provisions. If he or she concluded that the licensee committed a violation, the Commissioner could order the licensee to make restitution to the customer in an amount equal to 15 times the amount of the fee charged in the customer's agreement, but not less than \$45 or more than three times the full amount of the check. The licensee also would be subject to any other applicable penalties and remedies available under the bill.

Complaint to OFIS. A customer could file a written complaint with OFIS, on a form prescribed by the Commissioner, regarding a licensee. The customer would have to include with the complaint documentary or other

evidence of the violation or activities of the licensee. The Commissioner would have to investigate the complaint.

The Commissioner could investigate or conduct examinations of a licensee and conduct hearings as he or she considered necessary to determine whether a licensee or any other person had violated the bill, or whether a licensee had conducted business in a manner that justified suspension or forfeiture of its authority to engage in the business of deferred presentment services.

The Commissioner could subpoena witnesses, documents, and other evidence in any manner over which he or she had jurisdiction, control, or supervision. If a person failed to comply with a subpoena issued by the Commissioner, or to testify with respect to any matter about which the person could be lawfully questioned, the Commissioner could petition the Circuit Court for Ingham County to issue an order requiring the person to attend, give testimony, or produce evidence.

Administrative Sanctions

Cease & Desist Order. If, in the opinion of the Commissioner, a licensee was engaging in, had engaged in, or was about to engage in a practice that posed a threat of financial loss or threat to the public welfare, or was violating, had violated, or was about to violate the bill, State or Federal law, or an applicable rule or regulation, the Commissioner could serve a notice of intention to issue a cease and desist order. The notice would have to contain a statement of the facts constituting the alleged practice or violation and fix a time and place for a hearing, at which the Commissioner would determine whether to issue an order to cease and desist against the licensee.

If a licensee failed to appear at the hearing, it would mean that the licensee consented to the issuance of the cease and desist order. If a licensee consented, or upon the record made at the hearing the Commissioner found that the practice or violation specified in the notice had been established, the Commissioner could serve upon the licensee an order to cease and desist from the practice or violation. The order could require the licensee and its executive officers, employees, and agents to cease and desist from the practice or violation, and to take affirmative action to correct conditions resulting from the practice or violation.

Except to the extent it was stayed, modified, terminated, or set aside by the Commissioner or a court, a cease and desist order would be effective on the date of service. A cease and desist order issued with the consent of the licensee would be effective at the time specified in the order and remain effective and enforceable as provided in it.

License Suspension or Revocation. After notice and hearing, the Commissioner could suspend or revoke any license if he or she found that the licensee had knowingly or through lack of due care done any of the following:

- Failed to pay the annual license fee, or an examination fee imposed by the Commissioner.
- Committed any fraud; engaged in any dishonest activities; or made any misrepresentations; violated the bill or any rule or order issued under it or violated any other law in the course of the licensee's dealings as a licensee.
- Made a false statement in the license application or failed to give a true reply to a question in it.
- Demonstrated incompetency or untrustworthiness to act as a licensee.
- Engaged in a pattern or practice that posed a threat of financial loss or threat to the public welfare.

If the reason for revocation or suspension of a license at any one location were of general application to all locations operated by a licensee, the Commissioner could revoke or suspend all licenses issued to a licensee.

The commissioner would have to comply with the Administrative Procedures Act concerning any notice or hearing under these provisions. A notice would have to contain a statement of the facts constituting the violation or pattern of practice and would have to fix a time and place at which the Commissioner would hold a hearing to determine whether an order to suspend or terminate one or more licenses of the licensee should be issued.

If a licensee failed to appear at a hearing, it would mean that the licensee consented to the issuance of an order to suspend or terminate one or more licenses. If a licensee consented, or upon the record made at the hearing the Commissioner found that the pattern of practice or violation specified in the notice had been established, the Commissioner could serve upon the licensee an order suspending

or terminating one or more licenses.

Except to the extent it was stayed, modified, terminated, or set aside by the Commissioner or a court, an order suspending or terminating one or more licenses would be effective on the date of service. An order issued with the consent of the licensee would be effective at the time specified in the order and remain effective and enforceable as provided in it.

Fines. If the Commissioner found that a person had violated the bill, State or Federal law, or an applicable rule or regulation, the Commissioner could order the person to pay a civil fine of between \$1,000 and \$10,000 for each violation. If the Commissioner found that a person had violated the bill and knew or reasonably should have known that he or she was in violation, the Commissioner could order the person to pay a civil fine of at least \$5,000 but not more than \$50,000 for each violation. The Commissioner also could order the person to pay the costs of the investigation.

In determining the amount of a fine, the Commissioner would have to consider the extent to which the violation was knowing and willful, the extent of the injury suffered because of it, the corrective action taken by the licensee to ensure that it would not be repeated, and the record of the licensee in the complying with the bill.

If a civil fine were assessed it could be sued for and recovered by and in the name of the Commissioner, and could be collected and enforced by summary proceedings by the Attorney General.

Hearing. A licensee ordered to cease and desist or pay a fine, or whose license was suspended or terminated, would be entitled to a hearing before the Commissioner if a written request for a hearing were filed with the Commissioner not more than 30 days after the effective date of the order.

Any administrative proceedings under the bill would be subject to the Administrative Procedures Act.

Arbitration

A licensee could include a mandatory arbitration provision in a deferred presentment service agreement. If an agreement contained such a provision, all of the following would apply:

- The arbitration provision would have to disclose the name of the person who administered the arbitration program and that person's telephone number, street address, and website, if any.
- Any arbitrator selected would have to be competent, qualified, independent, and impartial, and disclose any circumstance likely to affect his or her impartiality, including any bias, financial interest, or personal interest, or any past or present relationship, arbitration experience, or other experience with the licensee or customer.
- The arbitration provision would have to give each party to the deferred presentment service agreement the right to proceed in a small claims division of the district court or a small claims court for any dispute or claim within the scope of that court's jurisdiction.
- If a licensee received written notice from a customer that he or she intended to submit a claim to arbitration, but was unable to pay the filing fee or any other administrative cost required to institute an arbitration proceeding, the licensee would have to pay that fee or administrative cost, or \$500, whichever was less, to the administrator of the arbitration program.
- The arbitrator would have to hold the arbitration proceeding in the county in which the consumer resided, or at another location to which the consumer and licensee agreed.
- The arbitrator would have to make his or her decision in writing.

Other Provisions

The bill would require the Commissioner to investigate consumer credit counseling services that provide debt management and financial management service, compile a list of recommended agencies, and make the list available to customers, licensees, and the public on request.

The Commissioner could issue orders and regulations that he or she considered necessary to enforce and implement the bill. The Commissioner would have to give a copy of any order or regulation issued to each license holder at least 30 days before it took effect.

To assure compliance with the bill, the Commissioner could annually examine the relevant business, books, and records of any licensee, at the licensee's expense. Each

licensee would have to keep and use in its business any books, accounts, and records the Commissioner required. A licensee would have to preserve the documents for at least two years, unless applicable State or Federal law concerning record retention required a longer period.

The Commissioner could promulgate rules under the Administrative Procedures Act to enforce and administer the bill.

A person who provided deferred presentment services before July 1, 2004, would be considered to have complied with applicable State law if the person provided the services in substantial conformity with the rulings and interpretive statements then in effect that were issued by OFIS or its predecessor agency.

Legislative Analyst: George Towne

FISCAL IMPACT

These licensed businesses would be required to pay a fee that would be sufficient to cover the administrative costs of regulating this industry, making the addition of this industry under the regulated category revenue neutral.

The bill also would create civil fines that could be assessed for noncompliance, which would be deposited into the General Fund. Without knowing how many civil fines would be assessed and at what levels, it is difficult to determine the revenue that would be generated from this bill.

Fiscal Analyst: Maria Tyszkiewicz

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This analysis was prepared by nonpartisan Senate staff for use by the Senate in its deliberations and does not constitute an official statement of legislative intent.