HOUSE OF REPRESENTATIVES STAFF ANALYSIS

BILL #: PCS for HB 389 Money Services Businesses
SPONSOR(S): Insurance & Banking Subcommittee
TIED BILLS: **IDEN./SIM. BILLS:**

REFERENCE	ACTION	ANALYST	STAFF DIRECTOR or BUDGET/POLICY CHIEF
Orig. Comm.: Insurance & Banking Subcommittee		Hinshelwood	Luczynski

SUMMARY ANALYSIS

The Office of Financial Regulation's (OFR) Division of Consumer Finance licenses and regulates various aspects of the non-depository financial services industries, including money services businesses (MSBs) regulated under ch. 560, F.S. MSB applicants must submit fingerprints to the Florida Department of Law Enforcement (FDLE) for a state criminal history background check, and the fingerprints must be submitted to the Federal Bureau of Investigation (FBI) for a federal criminal history background check. The OFR must review the results of the state and federal criminal history background checks and determine whether the applicant meets licensure requirements.

Access to the FBI's criminal history record information system (CHRI) was previously authorized for fingerprints pursuant to ch. 560, F.S. However, in order to obtain CHRI for applicants to the recently created Financial Technology Sandbox, FDLE sent correspondence to the FBI's Criminal Justice Information Law Unit (CJILU) to obtain an Originating Agency Identifier (ORI). The ORI validates legal authorization to access criminal justice information and identifies the specific agency requesting the information. CJILU responded to this request stating that the MSB licensing statute does not qualify for CHRI because the terms "responsible person" and "control of a money services business", as used in that statute to specify persons who are required to submit fingerprints, are overly broad and, thus, do not sufficiently define the categories of people subject to the background check. The CJILU acknowledged that MSB fingerprinting was previously approved by the CJILU and that the FBI will continue to honor fingerprints submitted for MSB licensure. However, the CJILU has placed MSB fingerprinting on a grace period of unspecified length in order to allow Florida to amend MSB fingerprinting statutes such that the statutes specifically identify the categories of licensees or employees falling within the purview of the statutes; CJILU will not allow fingerprinting of additional categories of applicants (i.e., those applying under the Financial Technology Sandbox) during this grace period.

The bill creates the term "control person", repeals the definitions of "officer" and "responsible person", and repeals the statute that defines when a person has a controlling interest in an MSB. Some of the elements from these repealed definitions and statute are made part of the "control person" definition, and the bill inserts "control person" throughout ch. 560, F.S., in place of these repealed definitions and statute. Thus, a person who meets the definition of "control person", as defined in the bill, must submit fingerprints and be vetted by the OFR.

The bill repeals the requirement that a person or group of persons proposing to acquire a controlling interest in an MSB submit an application for licensure prior to the acquisition. The bill deletes portions of current law that relate to the change of control application process, including a provision that caps fees when a change of control application is filed. If a new "control person", as defined in the bill, is added, such person must submit fingerprints and be vetted by the OFR.

The bill has an indeterminate negative fiscal impact on the state, an indeterminate positive fiscal impact on the private sector, and no fiscal impact on local governments.

The bill provides an effective date of October 1, 2022.

FULL ANALYSIS

I. SUBSTANTIVE ANALYSIS

A. EFFECT OF PROPOSED CHANGES:

Background

The Office of Financial Regulation (OFR) regulates banks, credit unions, other financial institutions, finance companies, and the securities industry.[1] The Division of Consumer Finance within the OFR licenses and regulates various aspects of the non-depository financial services industries, including money services businesses (MSBs) regulated under ch. 560, F.S. An MSB is any person located in or doing business in this state, from this state, or into this state from locations outside this state or country who acts as the following:[2]

- *Payment instrument seller*: A payment instrument seller sells, issues, provides, or delivers payment instruments.[3]
- *Foreign currency exchanger*: A foreign currency exchanger exchanges, for compensation, currency[4] of the United States or a foreign government to currency of another government.[5]
- *Check casher*: A check casher sells, issues, provides, or delivers currency[6] in exchange for payment instruments[7] received, except travelers checks.[8]
- *Money transmitter*: A money transmitter receives currency,[9] monetary value,[10] or payment instruments[11] for the purpose of transmitting the same by any means, including transmission by wire, facsimile, electronic transfer, courier, the Internet, or through bill payment services or other businesses that facilitate such transfer within this country, or to or from this country.[12]

An MSB may engage in deferred presentment transactions, commonly known as "payday loans", by filing a declaration of intent with the OFR.[13] A money transmitter or payment instrument seller may engage in the activities authorized for check cashers and foreign currency exchangers without paying additional licensing fees.[14] State and federally chartered depository institutions, such as banks and credit unions, are exempt from licensure as an MSB.[15]

An applicant for an MSB license must submit the following to the OFR:

- An application;[16]
- A nonrefundable application fee;[17]

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[1] S. 20.121(3)(a)2., F.S.
[2] S. 560.103(22), F.S.
[3] S. 560.103(30) and (34), F.S. The term "payment instrument" means a check, draft, warrant, money order, travelers check, electronic instrument, or other instrument, payment of money, or monetary value whether or not negotiable. The term does not include an instrument that is redeemable by the issuer in merchandise or service, a credit card voucher, or a letter of credit. S. 560.103(29), F.S.
[4] The term "currency" means the coin and paper money of the United States or of any other country which is designated as legal tender and which circulates and is customarily used and accepted as a medium of exchange in the country of issuance. Currency includes United States silver certificates, United States notes, and Federal Reserve notes. Currency also includes official foreign bank notes that are customarily used and accepted as a medium of exchange in a foreign country. S. 560.103(11), F.S.
[5] S. 560.103(17), F.S.
[6] Definition of "currency", *supra* note 4.
[7] Definition of "payment instrument", *supra* note 3.
[8] S. 560.103(6) and (34), F.S.
[9] Definition of "currency", *supra* note 4.
[10] The term "monetary value" means a medium of exchange, whether or not redeemable in currency. S. 560.103(21), F.S.
[11] Definition of "payment instrument", *supra* note 3.
[12] S. 560.103(23), F.S.
[13] S. 560.403, F.S.
[14] S. 560.204(2), F.S.
[15] S. 560.104, F.S.
[16] S. 560.141(1)(a), F.S.
[17] Ss. 560.141(1)(b) and 560.143, F.S.

- A copy of the applicant's written anti-money laundering program required by federal law;[18] and
- Fingerprints for the following individuals:[19]
    - An officer, which is defined as an individual, other than a director, who participates in, or has authority to participate in, the major policymaking functions of an MSB, regardless of whether the individual has an official title or receives a salary or other compensation.[20]
    - A director.
    - A responsible person, which is defined as an individual who is employed by or affiliated with an MSB and who has principal active management authority over the business decisions, actions, and activities of the MSB in this state.[21] In turn, "affiliated party" means a director, officer, responsible person, employee, or foreign affiliate of a money services business, or a person who has a controlling interest in a money services business.[22]
    - The compliance officer, which is defined as the individual in charge of overseeing, managing, and ensuring that an MSB is in compliance with all state and federal laws and rules relating to MSBs, as applicable, including all money laundering laws and rules.[23]
    - A controlling shareholder.
    - Any other person who has a controlling interest, meaning a person who:[24]
        - Possesses the power, directly or indirectly, to direct the management or policies of the MSB, whether through ownership, by contract, or otherwise;
        - Directly or indirectly may vote 25 percent or more of a class of a voting security or sell or direct the sale of 25 percent or more of a class of voting securities; or
        - In the case of a partnership, may receive upon dissolution or has contributed 25 percent or more of the capital.

Fingerprints are not required if the applicant is a publicly traded corporation.[25] If fingerprints are required, the fingerprints must be submitted for live-scan processing.[26] Live-scan is a device that electronically takes fingerprints and other information and uploads that information to the Florida Department of Law Enforcement (FDLE) who, in turn, sends the fingerprints to the Federal Bureau of Investigation (FBI) for a fingerprint background check.[27] The fingerprints may be submitted through a third-party vendor authorized by FDLE to provide live-scan fingerprinting.[28] FDLE must conduct the state criminal history background check, and a federal criminal history background check must be conducted through the FBI.[29] The costs of fingerprint processing, including the cost of retaining the fingerprints, must be borne by the person subject to the background check.[30] The OFR must review the results of the state and federal criminal history background checks and determine whether the applicant meets licensure requirements.[31]

An MSB license must be renewed every two years.[32]

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[18] S. 560.141(d), F.S.
[19] Ss. 560.141(c) and 560.127, F.S.
[20] S. 560.103(26), F.S.
[21] S. 560.103(33), F.S.
[22] S. 560.103(1), F.S.
[23] S. 560.103(8), F.S.
[24] S. 560.127, F.S.
[25] S. 560.141(1)(c)6., F.S.
[26] S. 560.141(1)(c), F.S.
[27] Florida Live Scan, https://livescanflorida.com/#:~:text=LiveScan%20is%20a%20device%20that,for%20a%20fingerprint%20background%20check. (last visited Jan. 25, 2022).
[28] S. 560.141(1)(c)1., F.S.
[29] S. 560.141(1)(c)2., F.S.
[30] S. 560.141(1)(c)4., F.S.
[31] 560.141(1)(c)5., F.S.
[32] Ss. 560.141(2) and 560.142, F.S.

Once licensed, an MSB is required to report any change in the partners, officers, members, joint venturers, directors, controlling shareholders, or responsible persons.[33] If such person does not have a controlling interest in the MSB, then the person must simply comply with fingerprint requirements and be vetted by the OFR.[34] If any person, directly or indirectly or acting by or through one or more persons, proposes to purchase or acquire a controlling interest in an MSB, such person or group must submit a new application for licensure at least 30 days before such purchase or acquisition.[35] Such a change of control application is not required where the person or group of persons has previously complied with applicable licensing provisions, provided that they are currently affiliated with the MSB, or where the person or group of persons is currently licensed with the OFR as an MSB.[36] A change of control application must be accompanied by the payment of an initial licensing fee and a fee per branch or authorized vendor, up to a maximum of $20,000.[37]

As previously mentioned, when fingerprinting is required, the fingerprints must be submitted to FDLE for a state and federal criminal history background check. The federal background check is conducted through the FBI's criminal history record information (CHRI) system. Federal law Pub. L. 92-544 authorizes the exchange of CHRI with officials of state and local governmental agencies for licensing and employment purposes.[38] One of the primary purposes for enacting Pub. L. 92-544 was to establish a national policy with adequate sanctions and administrative safeguards regarding the dissemination of FBI's CHRI to state and local governments for non-criminal justice licensing and employment purposes.[39] The FBI, with the assistance of the United States Department of Justice, has determined the parameters of Pub. L. 92-544.[40] The criteria for granting access to the FBI's CHRI are as follows:

a. The statute must exist as a result of a legislative enactment;
b. It must require the fingerprinting of applicants who are to be subjected to a national criminal history background check;
c. It must, expressly ("submit to the FBI") or by implication ("submit for a national check"), authorize the use of FBI records for the screening of applicants;
d. It must identify the specific category(ies) of licensees/employees falling within its purview, thereby avoiding over breadth;
e. It must not be against public policy; and
f. It may not authorize receipt of the CHRI by a private entity.

Access to the FBI's CHRI was previously authorized for fingerprints pursuant to ch. 560, F.S. However, in order to obtain CHRI for applicants to the recently created Financial Technology Sandbox under s. 559.952, F.S., created in the 2020 legislative session,[41] FDLE sent correspondence to the FBI's Criminal Justice Information Law Unit (CJILU) to obtain an Originating Agency Identifier (ORI). The ORI validates legal authorization to access criminal justice information and identifies the specific agency requesting the information. CJILU reviewed s. 559.952, F.S., which derives its fingerprinting authority from s. 560.141, F.S. CJILU responded to this request stating that s. 560.141, F.S., does not qualify for CHRI because the terms "responsible person" and "control of a money services business" as used in s. 560.141, F.S., are overly broad and, thus, do not sufficiently define the categories of people subject to the background check.[42] The CJILU acknowledged that MSB fingerprinting was previously approved by the CJILU and that the FBI will continue to honor fingerprints submitted for MSB licensure.[43] However, the CJILU has placed MSB fingerprinting on a grace period of unspecified length in order to allow

[33] S. 560.126(3), F.S.
[34] S. 560.126(3)(b), F.S.
[35] S. 560.126(3)(a), F.S.; r. 69v-560.201(3), F.A.C.
[36] S. 560.126(3)(c), F.S.; r. 69v-560.201(6), F.A.C.
[37] Ss. 560.126(3) and 560.143(1), F.S.
[38] 20 C.F.R. § 20.33.
[39] Federal Bureau of Investigation, *Testimony of Dennis Lormel Before the House Financial Services Committee (Mar. 06, 2001)*, https://archives.fbi.gov/archives/news/testimony/fbis-perspective-on-criminal-history-record-information-checks-on-individuals-conducting-insurance-business (last visited Jan. 25, 2022).
[40] Email from Heather R. Postlethwait, FBI Office of the General Counsel, to Nathan Pate, Florida Department of Law Enforcement, RE: ORI Request - Florida Office of Financial Regulation (Mar. 22, 2021).
[41] Ch. 2020-161, Laws of Fla.
[42] Email from Heather R. Postlethwait, *supra* note 40.
[43] *Id*.

Florida to amend MSB fingerprinting statutes such that the statutes specifically identify the categories of licensees or employees falling within the purview of the statutes; CJILU will not allow fingerprinting of additional categories of applicants (i.e., those applying under the Financial Technology Sandbox) during this grace period.[44]

Effect of the Bill

The bill creates the term "control person" and defines the term as:

- A person that possesses the power, directly or indirectly, to direct the management or policies of a money services business, whether through ownership of securities, by contract, or through other means, and regardless of whether such person has an official title or receives a salary or other compensation. The following persons are each presumed to be a control person:
  - The president, chief executive officer, chief financial officer, chief operations officer, chief legal officer, and compliance officer.
  - A person holding any of the officer positions named in the money services business's governing documents.
  - A person holding any position named by the money services business's liability insurance coverage for directors and officers, if the business has such coverage.
  - A director of the money services business's board of directors.
- For a corporation that is not publicly traded,[45] all shareholders that, directly or indirectly, own 25 percent or more or that have the power to vote 25 percent or more of a class of voting securities.
- For a partnership, all general partners, and those limited or special partners that have contributed 25 percent or more or that have the right to receive, upon dissolution, 25 percent or more of the partnership's capital.
- For a trust, all trustees.
- For a limited liability company, all managers, and those members that have contributed 25 percent or more or that have the right to receive, upon dissolution, 25 percent or more of the limited liability company's capital.

The bill repeals the definitions of "officer" and "responsible person" and repeals s. 560.127, F.S., which defines when a person has a controlling interest in a money services business. Some of the elements from these repealed definitions and statute are made part of the "control person" definition, and the bill inserts "control person" throughout ch. 560, F.S., in place of these repealed definitions and statute. Thus, a person who meets the definition of "control person", as defined in the bill, must submit fingerprints and be vetted by the OFR.

The bill repeals the requirement that a person or group of persons proposing to acquire a controlling interest in an MSB submit an application for licensure prior to the acquisition. The bill deletes portions of current law that relate to the change of control application process, including a provision that caps fees when a change of control application is filed. If a new "control person", as defined in the bill, is added, such person must submit fingerprints and be vetted by the OFR.

The bill provides an effective date of October 1, 2022.

B. SECTION DIRECTORY:

Section 1. Amends s. 560.103, F.S., relating to definitions.

Section 2. Amends s. 560.118, F.S., relating to reports.

Section 3. Amends s. 560.123, F.S., relating to Florida Control of Money Laundering in Money Services Business Act.

[44] *Id.*

[45] The term "publicly traded" is currently defined s. 560.141(1)(c)6., F.S., and only applies to paragraph (c). The bill relocates the definition of "publicly traded" to s. 560.103, F.S., which contains definitions applicable to the entire chapter.

Section 4. Amends s. 560.126, F.S., required notice by licensee.

Section 5. Repeals s. 560.127, F.S., relating to control of a money services business.

Section 6. Amends s. 560.141, F.S., relating to license application.

Section 7. Amends s. 560.143, F.S., relating to fees.

Section 8. Reenacts s. 559.952, F.S., relating to Financial Technology Sandbox.

Section 9. Reenacts s. 560.114, F.S., disciplinary actions; penalties.

Section 10. Provides an effective date of October 1, 2022.

II. FISCAL ANALYSIS & ECONOMIC IMPACT STATEMENT

A. FISCAL IMPACT ON STATE GOVERNMENT:

1. Revenues:

   The repeal of the requirement to submit a change of control application may result in a decrease in revenue to the OFR. As such, this change may have an indeterminate negative fiscal impact on the state.

2. Expenditures:

   None.

B. FISCAL IMPACT ON LOCAL GOVERNMENTS:

1. Revenues:

   None.

2. Expenditures:

   None.

C. DIRECT ECONOMIC IMPACT ON PRIVATE SECTOR:

The repeal of the requirement to submit a change of control application will have a positive but indeterminate fiscal impact on the private sector.

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 Financial Services Commission (commission)[46] will need to amend rules to conform to changes made by the bill.

C. DRAFTING ISSUES OR OTHER COMMENTS:

The changes proposed by the bill have not yet been reviewed by the FBI. Continued access to national criminal history record information for persons required to submit fingerprints pursuant to ch. 560, F.S., is reliant upon the FBI's approval of the changes made by the bill.[47] FDLE has stated that, based on past FDLE legislative analysis, the FBI may continue to consider the term "control person" to be overly vague and not acceptable (as they did with "responsible person") when re-evaluating the fingerprinting provisions of ch. 560, F.S.[48]

IV. AMENDMENTS/ COMMITTEE SUBSTITUTE CHANGES

[46] S. 657.028(6), F.S. The commission is composed of the Governor, Attorney General, Chief Financial Officer, and Commissioner of Agriculture. S. 20.121(3), F.S. The commission members are the OFR's agency head for the purpose of rulemaking. S. 20.121(3)(c), F.S.

[47] Florida Department of Law Enforcement, Agency Analysis of 2022 Senate Bill 1536 (Jan. 10, 2022).

[48] *Id*.