

SENATE STAFF ANALYSIS AND ECONOMIC IMPACT STATEMENT

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

Prepared By: Banking and Insurance Committee

BILL: CS/SB 1984

SPONSOR: Banking and Insurance Committee & Senator Crist

SUBJECT: Collection Practices

DATE: April 20, 2005

REVISED: _____

	ANALYST	STAFF DIRECTOR	REFERENCE	ACTION
1.	<u>Knudson</u>	<u>Deffenbaugh</u>	<u>BI</u>	<u>Fav/CS</u>
2.	_____	_____	<u>CM</u>	_____
3.	_____	_____	<u>JU</u>	_____
4.	_____	_____	<u>GA</u>	_____
5.	_____	_____	<u>WM</u>	_____
6.	_____	_____	_____	_____

I. Summary:

Committee Substitute (CS) for Senate Bill 1984 substantially revises provisions of the Florida Commercial and Consumer Collection Practices Act under the administrative and regulatory umbrella of the Office of Financial Regulation.¹ Specifically, the CS provides the following:

- Grants the Office of Financial Regulation (office or OFR) broad administrative, regulatory, and enforcement authority over commercial and consumer collection agencies;
- Authorizes the office to do the following: issue subpoenas; obtain testimony; conduct investigations and examinations of applicants and registrants; receive complaints regarding registrants; issue cease and desist orders; seek injunctive and other forms of relief from courts; obtain attorneys fees and costs; issue restitution orders; and retain receivers to administer the property of collection agencies under specified circumstances;
- Authorizes broad powers for the office to deny applicants for commercial and consumer collection agency registrations and to revoke or suspend such registrations;
- Requires commercial and consumer collection agencies to maintain books and records so that the office can determine compliance with the Act;
- Requires consumer collection agencies to obtain a \$25,000 corporate surety bond;
- Increases application fees from \$200 to \$650 for consumer collection agency applicants and registrants and increases fees for commercial collection agency applicants and registrants from \$500 to \$650;
- Reduces the fee for consumer collection agency registration renewal from \$450 to \$275;

¹ The Florida Commercial Collection Practices Act is under part V of ch. 559, F.S., (ss. 559.541-559.548, F.S.) and the Florida Consumer Collection Practices Act is under part VI of ch. 559, F.S., (ss. 559.55-559.785, F.S.).

- Requires a late fee on re-registration of \$250.
- Provides for administrative fines of up to \$2,500 for each willful violation and \$1,000 for each non-willful violation.
- Clarifies enforcement authority against out-of-state consumer debt collectors;
- Provides that a violation of any provision of the federal Fair Debt Collection Practices Act, 15 U.S.C. s. 1692 et seq., also constitutes a violation of the consumer collection agency provisions of ch. 559, F.S.;
- Clarifies that precedence will be given to the 11th circuit Court of Appeals in the event of a conflict in federal case law; and
- Provides for an appropriation of \$366,614, for fiscal year 2005-06 and authorization for four financial examiners and one registration analyst, from the Regulatory Trust Fund of the office.

This bill substantially amends the following sections of the Florida Statutes: 559.543, 559.544, 559.545, 559.546, 559.55, 559.552, 559.553, 559.555, 559.72, 559.725, 559.730, 559.77, and 559.785

The bill creates the following sections of the Florida Statutes: 559.5471, 559.5473, 559.5474, 559.5475, 559.5476, 559.5477, 559.5479, 559.556, 559.726, 559.7262, 559.7263, 559.7264, 559.7265, 559.735, and 559.786

The bill repeals the following sections of the Florida Statutes: 559.547 559.563, and 559.565

II. Present Situation:

Florida Commercial Collection Practices Act

In 1993, the legislature enacted part V of ch. 559, F.S., entitled the Florida Commercial Collection Practices Act (Act).² Under the law, a commercial claim is an obligation for the payment of money arising out of a transaction wherein credit has been offered to any person, and the money or service which was the subject of the transaction was primarily for commercial purposes and not for personal, family, or household purposes. A collection agency is defined as a person engaged in the business of soliciting commercial claims for collection asserted to be owed or due to another person, regardless of whether the collection efforts are directed at the primary debtor or some other source of payment.³

Under Florida law, a commercial collection agency must register with the Office of Financial Regulation (office) by submitting an application, paying a \$500 registration fee, and providing evidence that it has obtained a \$50,000 surety bond.⁴ During fiscal year 2003-04, 77 commercial collection agencies renewed their registration and 39 entities applied for agency registration. A commercial collection agency application requires the applicant to provide information including

² Chapter 93-275, L.O.F.

³ Section 559.543, F.S.

⁴ Certain entities are exempt from the provisions of the Act including attorneys; financial institutions authorized to do business in this state; licensed real estate brokers; title insurance companies; collection agencies which are not primarily engaged in the collection of commercial claims; consumer finance companies; persons licensed under ch. 520, F.S. (retail installment sales); credit grantors; out of state collectors; and FDIC-insured institutions. (s. 559.544, F.S.)

the applicants' business and trade names; the location of each office; identifying information as to owners and officers; the names of other businesses that any of the officers, directors or owners operated as a collection agency within the last 5 years; statements outlining any actions against any professional or occupational license held by the registrant that was the subject of suspension, revocation, or other disciplinary action; and statements outlining any finding of guilt of any crime involving moral turpitude or dishonest conduct on the part of any principal of the registrant. The law also provides that each of the following acts constitutes a felony of the third-degree: operating or soliciting a business as a commercial collection agency without first registering with the office; and registering by means of fraud, misrepresentation, or concealment.⁵

According to representatives with the office, the current statute does not provide the office with the authority to enforce the commercial collection agency registration requirements in order to effectively regulate the industry. The office has no authority to take administrative actions (such as suspension or revocation of an agency's registration) against an agency for violations of the Act, e.g., failure to maintain a surety bond. The office also lacks authority to investigate such agencies, or to audit or examine their books and records.

Florida Consumer Collection Practices Act

Part VI of ch. 559, F.S., is known as the Florida Consumer Collection Practices Act (Act).⁶ The Act provides a series of measures designed to regulate consumer collection agencies and protect Florida citizens from certain debt collection practices that involve fraud, harassment, threats, and other activities. The provisions apply to debts of a consumer arising out of a transaction that is primarily for personal, household, or family purposes.

Consumer collection agencies must register with the office by submitting an application and paying a \$200 registration fee. Information required on the application includes submission of business and trade names; the location of the business; statements identifying information as to owners, officers, directors and resident agents; and statements identifying and explaining any occasion on which a professional or occupational license held by the registrant or principal was the subject of any suspension or revocation proceeding.⁷ According to representatives with the office, 751 consumer collection agencies renewed their registration during fiscal year 2003-04 and 287 entities applied for agency registration.

Section 559.72, F.S., outlines 19 prohibited practices as they relate to the collection of consumer debts which range from prohibitions against persons simulating a law enforcement officer or governmental agency to using threats of force or violence.⁸ The Act allows a debtor to bring a civil action against a person violating the debt collection provisions under s. 559.72, F.S. Section 559.77, F.S., provides that upon adverse adjudication, the defendant is liable for actual damages and for additional statutory damages of up to \$1,000, together with court costs and attorney's fees. The statute also provides for punitive damages in the court's discretion and for equitable

⁵ Part VI was enacted in 1993 (ch. 93-275, L.O.F.); s. 559.548, F.S.

⁶ Under ss. 559.55-559.785, F.S.

⁷ Section 559.555, F.S.

⁸ The prohibited practices contained in the Act do not apply just to collection agencies and debt collectors. Section 559.72, F.S., mandates "no person" shall engage in the prohibited activities.

relief, including enjoining the defendant from further violations. Section 559.77, F.S., provides for reasonable attorney's fees and costs to be awarded to the defendant in the event the court finds the suit failed to raise a justiciable issue of law or fact.

Under s. 559.725, F.S., the office may investigate a consumer complaint only by written communication with the accused collection agency. When the office has been unable to resolve a complaint through written communication, the office may take certain administrative actions.⁹ However, the office may not revoke or suspend a registration if the collection agency can show by a preponderance of the evidence that the violations were not intentional and resulted from a bona fide error.¹⁰ The office must also consider the registrant's volume of business when deciding whether to suspend or revoke a registration. The law allows the office to fine a registrant \$1,000 for violations of the prohibited practices provisions and any action by the office to revoke, suspend or issue an administrative fine must be taken within 2 years of the date of the last violation upon which the action is founded. Also, it is a first-degree misdemeanor to operate a consumer collection agency without first registering with the office, unless the entity is exempt.¹¹

According to officials with the office, it does not have authority to impose sanctions for consumer collection agencies which fail to register and the office has limited authority to take action against a consumer collection agency for violations of the prohibited collection practices provisions as noted above. Further, the office has no authority to investigate or examine a consumer collection agency to determine the factual basis of a complaint because complaints may only be handled by written communication with the complainant and the accused agency. Further, there is no bond requirement for consumer collection agencies as there is for commercial collection entities.

Officials with the Office of Financial Regulation assert that it has received numerous complaints as to the practices of both commercial and consumer collection agencies concerning their techniques of collecting debts. It has become clear, according to these officials, that the current industry regulations are largely ineffective.

Federal Fair Debt Collection Practices Act/Federal Trade Commission Act

The federal version of the consumer collection agency act is known as the Fair Debt Collection Practices Act (FDCPA) (15 U.S.C. s. 1692, et seq.). Many of the provisions of the FDCPA are similar to the Florida Consumer Collection Law. However, there are provisions in the FDCPA which are not included under Florida's law including provisions pertaining to communications in connection with debt collection; acquisition of location information; false or misleading representations; unfair practices; validation of debts; and the furnishing of deceptive forms. The federal Trade Commission enforces the provisions of the FDCPA. The federal Trade

⁹ The office may issue a written warning notice when a collection agency has less than 5 unresolved complaints and the office may issue a written reprimand when 5 or more complaints remain unresolved over a 12-month period. Further, the office may issue a notice of intent to either revoke or suspend a registration when repeated violations of s. 559.72, F.S., have occurred. (s. 559.725, F.S.).

¹⁰ Section 559.730, F.S.

¹¹ The exemptions under s. 559.553, F.S., are similar to the exemptions for commercial collection agencies. See footnote 4.

Commission Act, under 15 U.S.C. s. 41 et seq., contains provisions regulating unfair or deceptive practices.

III. Effect of Proposed Changes:

Florida Commercial Collection Practices Act (ss. 559.541—559.548, F.S.)

Section 1. Amends s. 559.543, F.S., to define that the terms “debtor” or “consumer” mean any natural person obligated or allegedly obligated to pay a debt.

Section 2. Amends s. 559.544, F.S., regarding the registration requirements for a commercial collection agency and exemptions from registration. The bill deletes the registration requirements put forth in this section (the bill amends the registration requirements and moves them to s. 559.545, F.S.) and makes clarifying changes to the exemptions.

Section 3. Amends s. 559.545, F.S., which contains the procedures for registering as a consumer collection agency. The bill amends and adds the registration requirements currently in s. 559.544, F.S., to this section.

The bill makes multiple changes to the procedures to be followed in registering a commercial collection agency, or renewing registration:

- The application fee for registration is raised from \$500 to \$650, and is now non-refundable.
- The \$500 fee for registration renewal is now non-refundable.
- Allows the Financial Services Commission to adopt rules for electronic filing of documents and payment of fees.
- The applicants must include its form and place of organization, along with a copy of the current articles of incorporation, partnership agreement, or articles of organization of a limited liability company (which ever is applicable).
- The applicant must provide unspecified information and documentation necessary for the office to make a determination of eligibility for registration.
- The applicant must provide any information that the OFR requires regarding:
 - A partner, officer, or director of the applicant or any person having a similar status or performing similar functions;
 - A person who directly or indirectly controls the applicant—having the power to direct the management or policies of the company by any means. A person with the right to vote 25 percent of the voting stock or securities or who is entitled to 25 percent or more of its profits is presumed to control the company.
- An application is deemed received for s. 120.60, F.S. purposes upon receipt of the completed application, the \$650 fee, and any other applicable fees.
- Registration of a commercial collection agency expires on December 31 of the year it became active, unless registration is renewed.
- In addition to the \$500 fee, a renewal of registration must be accompanied by any amount lawfully due and owing to the OFR.
- A commercial collection agency that fails to renew its registration timely may request reactivation of its registration by January 31 of the following month after expiration. The

- request must contain any information the OFR requires, plus the \$500 renewal fee, plus a \$250 reactivation fee. A reactivation is deemed retroactive to January 1 of that year.
- Any registrant acting as a commercial collection agency after its registration has expired commits a violation punishable under ss. 559.548(1) [third degree felony] and 555.5477(6), F.S., [up to a \$1,000 fine per day].
 - The registrant has 30 days to file an amendment updating information in an application or amendment to an application.
 - A registration is not transferable or assignable unless:
 - Changes in registration because of changes in personnel of a partnership or the principals, copartners, officers, or directors of a registrant must be reported by written amendment;
 - If a party proposes to acquire a controlling interest in a registrant, such party must submit an initial application for registration as a commercial collection agency before the acquisition. The commission must adopt rules providing for waiver of the application if a registrant is being acquired by another registrant.
 - The OFR may deny registration if the applicant, any principal of the applicant, or any person having control of the applicant, if the applicant:
 - Committed a prohibited practice under s. 559.72, F.S.;
 - Is the subject of a pending criminal prosecution or government action, until the conclusion of the prosecution or action;
 - Is subject to an enforcement action for violations of the Fair Debt Collection Practices Act or the Federal Trade Commission Act;
 - Has been found guilty of, or entered a nolo contendere or guilty plea to an offense involving fraud, dishonest dealing, or moral turpitude;
 - Is subject to an injunction, temporary restraining order, or final judgment or order, a stipulated judgment or order, an assurance of voluntary compliance, or a similar document involving:
 - Racketeering, fraud, theft, embezzlement, fraudulent conversion, or misappropriation of property;
 - The use of an untrue, deceptive, or misleading representation in an attempt to sell or dispose of real or personal property;
 - The use of an unfair, unlawful, or deceptive trade practice, whether or not there is any litigation pending against the applicant.
 - Is subject to or was a controlling person in a business that was subject to an injunction, temporary restraining order, or final judgment or order, a stipulated judgment or order, an assurance of voluntary compliance, or a similar document involving business activity that was brought because of action by a governmental agency.
 - Falsified or willfully omitted any required information in an application, document, or record required to be submitted by statute or rule.
 - Made a material false statement of fact in an application for registration or in response to any request or investigation by the office.
 - Has been the subject of an adverse decision, finding, injunction, suspension, prohibition, revocation, denial, or judgment regarding a violation of any law, rule, or regulation relating to business or professional licensing by any court or administrative law judge, state or federal agency, or business, professional, or occupational association.

The bill deletes the current registration procedures contained in subsections (2) and (3) of s. 559.545, F.S.

Section 4. Substantially rewords s. 559.546, F.S., which contains the bonding requirements for consumer collection agencies. The bill requires the applicant to give the OFR a corporate surety bond of \$50,000. Currently, the applicant need only provide proof that it has been issued the bond. The bill also prohibits the cancellation of a filed corporate surety bond by either the registrant or corporate surety unless written notice is given to the office. A cancellation is not effective less than 30 days after the office receives written notice of cancellation. Any time a corporate surety pays a claim, it must give written notice to the OFR within 10 days, identifying the claimant and claim paid.

Section 5. Creates sections 559.5471, 559.5473, 559.5474, 559.5475, 559.5476, 559.5477, and 559.5479, F.S.

Section 559.5471, F.S., is created, specifying what the powers and duties of the Office of Financial Regulation are pursuant to the Florida Commercial Collection Practices Act. The OFR may conduct an investigation of any person which the office believes is necessary to determine whether a person has violated the chapter or commission rules. The bill authorizes the commission to adopt rules to implement the enforcement provisions for the office; to implement procedures to accommodate a person with a technological or financial hardship; and adopt rules to accept certification of compliance in lieu of requiring submission of specified documents. The bill provides that all fees, charges, and fines collected by the office be deposited to the Regulatory Trust Fund of the office. The bill provides for broad enforcement authority to the office to include the following:

- Issue, revoke, quash or serve subpoenas to compel attendance of witnesses and production of documents;
- Administer oaths;
- Take testimony and depositions;
- Petition a court to compel a person to appear and produce documents; request injunctive and other forms of relief;
- Request attorneys fees and costs; and
- Assess reasonable costs and expenses associated with investigations.

Section 559.5473, F.S., is created, pertaining to injunctions to restrain violations, to provide the office with the authority to seek injunctive relief to enjoin any person who has violated or is about to violate any provision of the Act. The bill provides authority for the court, upon application by the office, to issue subpoenas; impound property, assets, and the business of the registrant; and appoint a receiver to administer the property of the registrant.

Section 559.5474, F.S., is created, relating to cease and desist orders, to provide authority for the office to serve upon a person an order to cease and desist and take corrective action whenever the office has reason to believe that the commercial collection agency is violating, has violated, or is about to violate the Act. Procedural matters relating to cease and desist orders are to be governed by ch. 120, F.S. (Administrative Procedures Act). The bill also permits the OFR to seek an order of restitution from a court of competent jurisdiction for collected funds due creditors, or any sum collected from a debtor without valid proof of debt.

Section 559.5475, F.S., is created, relating to evidence and investigative reports, to provide that an official written report, sworn complaint or other document made by a financial examiner is admissible into evidence if such examiner is available for cross-examination; authenticates the report; and testifies that such report was prepared as a result of an examination of the books and records of the registrant.

Section 559.5476, F.S., is created, relating to maintenance of books and accounts, to require registrants to maintain books, accounts, records, documents, and receipts for payments made to a creditor by a registrant, for a period of 3 years after the date of original entry so that the office may determine the registrant's compliance with the Act. The bill provides for rulemaking authority to prescribe what must be contained in the registrant's books, accounts, records and documents.

Creates s. 559.5477, F.S., regarding the administrative remedies available to the department in enforcing the Florida Commercial Collection Practices Act.

The OFR may revoke or suspend the registration of a registrant who:

- Has been found guilty, adjudicated to, or entered a nolo contendere or guilty plea to a crime involving fraud, dishonest dealing, or moral turpitude.
- Has a final judgment against him or her in a civil action on grounds of fraud, embezzlement, misrepresentation, or deceit.
- Has had a business, professional or occupational license suspended or revoked.
- Fails to maintain the surety bond requirements of s. 559.546, F.S.
- Fails to maintain books and records pursuant to s. 559.5476, F.S.
- Violates this part, an adopted rule, or an agreement with the OFR.
- Pays for registration with a check that fails to clear.
- Falsifies or willfully omits material information asked for under this part or rule.
- Makes a material false statement of fact in an registration application or investigation by the OFR.
- Has a person who directly or indirectly controls the applicant per s. 559.545(4), F.S., who is subject to an action or commits an act regarding the above in this section.

Termination of registration may be requested via written notice to the OFR, though delivery of the termination notice does not affect civil or criminal liability of registrant, or the OFR's enforcement authority. The office may deny the request if it believes the registrant has committed an act that would be grounds for denial, suspension or revocation of registration. Final action by the OFR to revoke or suspend a registration is subject to Ch. 120, F.S., review in the same manner as revocation of a license.

The OFR may impose an administrative fine of up to \$1,000 per non-willful violation of ss. 559.545, 559.546, 559.5476, or 559.5477, F.S., up to an aggregate amount of \$10,000 for violations arising from the same action. For a willful violation, the OFR may impose up to a \$2,500 fine per violation, up to \$100,000 for violations arising out of the same action. Final action by the OFR to impose the fine is subject to review via ss. 120.569 and 120.57, F.S. The OFR may also impose a fine not to exceed \$1,000 per day for each day a person violates this part

by engaging in commercial collection with being registered. Administrative fines are payable to the OFR, which must deposit the monies into the Regulatory Trust Fund of the OFR.

An administrative action by the OFR to impose revocation, suspension or a fine must be brought within 5 years after the date of the last violation upon which the action is founded. All remedies in this section are in addition to remedies under state or local law.

Creates s. 559.5479, F.S., to require the OFR to consider the appropriateness of imposing certain administrative remedies or penalties.

Florida Consumer Collection Practices Act (ss. 559.55—559.785, F.S.)

Section 6. Amends s. 559.55, F.S., to include within the definition of “debt,” any unsatisfied obligation for the payment of money arising out of a child support order. The bill amends the definition of “out-of-state consumer debt collector” to eliminate the requirement of a business presence by a creditor, and to include purchasers in the definition. The term does not include a person who solicits consumer debt accounts from creditors who have a business presence in Florida. To qualify as an out-of-state debt collector, an entity must collect consumer debt from debtors located in this state by means of interstate communication originating from outside this state and solicit creditors who have a presence in this state. Presence in this state means a creditor has an office or resides in this state. The bill defines a “credit grantor” as a person who offers or extends credit that creates a debt, not including a person who receives an assignment or transfer of debt in a default solely for the purpose of facilitating collection of the debt for another.

The bill provides a definition of the “Federal Trade Commission Act” which means federal legislation regulating unfair or deceptive practices as set forth in 15 U.S.C. s. 41 et seq. “Principal of a registrant or applicant” is defined as an applicant’s or registrant’s owners, the corporate officers and directors (other than a not-for-profit corporation), or the Florida resident agent if a corporation is the applicant or registrant.

Section 7. Amends s. 559.552, F.S., to provide that the any violation of the Federal Fair Debt Collection Practices Act constitutes a prohibited practice under s. 559.72, F.S. The bill provides that the Act shall be construed in accordance with interpretations of the Federal Trade Commission Act and the Fair Debt Collection Practices Act by the Federal Trade Commission. In the event of any inconsistency between provisions of the Act and any federal law, including federal case law, the provision that is more protective of the consumer or debtor will prevail unless it conflicts with decisions by Florida courts, federal courts in Florida, or the 11th Circuit Court of Appeals.

Section 8. Amends s. 559.553, F.S., regarding exemptions from licensure as a consumer collection agency. The registration requirements do not apply to a credit grantor. Members of the Florida Bar remain exempt under the bill, but the bill does require registration if that person is primarily engaged (over one half of the person’s income) in collecting consumer debt. All out-of-state consumer debt collectors are also now exempt.

Section 9. Amends s. 559.555, F.S., regarding the registration requirements and procedures for consumer collection agencies. The bill substantially rewrites s. 559.553, F.S., and places the new provisions in this section.

The bill makes multiple changes to the procedures to be followed in registering a consumer collection agency, or renewing registration:

- The application fee for registration is raised from \$200 to \$650, and is now non-refundable;
- The fee for registration renewal is reduced from \$450 to \$275, and is now non-refundable;
- Allows the Financial Services Commission to adopt rules for electronic filing of documents and payment of fees;
- The applicants must include its form and place of organization, along with the a copy of the current articles of incorporation, partnership agreement, or articles of organization of a limited liability company (whichever is applicable);
- The applicant must provide unspecified information and documentation necessary for the office to make a determination of eligibility for registration.
- The applicant must provide any information that the OFR requires regarding:
 - A partner, officer, or director of the applicant or any person having a similar status or performing similar functions;
 - A person who directly or indirectly controls the applicant—having the power to direct the management or policies of the company by any means. A person with the right to vote 25 percent of the voting stock or securities or who is entitled to 25 percent or more of its profits is presumed to control the company.
- An application is deemed received for s. 120.60, F.S., purposes upon receipt of the completed application, the \$650 fee, and any other applicable fees;
- Registration of a consumer collection agency expires on December 31 of the year it became active, unless registration is renewed;
- In addition to the \$275 fee, a renewal of registration must be accompanied by any amount lawfully due and owing to the OFR;
- A consumer collection agency that fails to renew its registration timely may request reactivation of its registration by January 31 of the following month after expiration. The request must contain any information the OFR requires, plus the \$275 renewal fee, plus a \$250 reactivation fee. A reactivation is deemed retroactive to January 1 of that year;
- Any registrant acting as a consumer collection agency after its registration has expired commits a violation punishable under ss. 559.785(1) [third degree felony] and 555.730(6), F.S., [up to a \$1,000 fine per day];
- The registrant has 30 days to file an amendment updating information in an application or amendment to an application.
- A registration is not transferable or assignable unless:
 - Changes in registration because of changes in personnel of a partnership or the principals, copartners, officers, or directors of a registrant must be reported by written amendment.
 - If a party proposes to acquire a controlling interest in a registrant, such party must submit an initial application for registration as a commercial collection agency

before the acquisition. The commission must adopt rules providing for waiver of the application if a registrant is being acquired by another registrant.

- The OFR may deny registration if the applicant, any principal of the applicant, or any person having control of the applicant, if the applicant:
 - Committed a prohibited practice under s. 559.72, F.S.;
 - Is the subject of a pending criminal prosecution or government action, until the conclusion of the prosecution or action;
 - Is subject to an enforcement action for violations of the Fair Debt Collection Practices Act or the Federal Trade Commission Act;
 - Has been found guilty of, or entered a nolo contendere or guilty plea to an offense involving fraud, dishonest dealing, or moral turpitude;
 - Is subject to an injunction, temporary restraining order, or final judgment or order, a stipulated judgment or order, an assurance of voluntary compliance, or a similar document involving:
 - Racketeering, fraud, theft, embezzlement, fraudulent conversion, or misappropriation of property;
 - The use of an untrue, deceptive, or misleading representation in an attempt to sell or dispose of real or personal property;
 - The use of an unfair, unlawful, or deceptive trade practice, whether or not there is any litigation pending against the applicant.
 - Is subject to or was a controlling person in a business that was subject to an injunction, temporary restraining order, or final judgment or order, a stipulated judgment or order, an assurance of voluntary compliance, or a similar document involving business activity that was brought because of action by a governmental agency;
 - Falsified or willfully omitted any required information in an application, document, or record required to be submitted by statute or rule;
 - Made a material false statement of fact in an application for registration or in response to any request or investigation by the office;
 - Has been the subject of an adverse decision, finding, injunction, suspension, prohibition, revocation, denial, or judgment regarding a violation of any law, rule, or regulation relating to business or professional licensing by any court or administrative law judge, state or federal agency, or business, professional, or occupational association.

Section 10. Creates s. 559.556, F.S., to require that an applicant provide the OFR a corporate surety bond of \$25,000. The bill also prohibits the cancellation of a filed corporate surety bond by either the registrant or corporate surety unless written notice is given to the office. A cancellation is not effective less than 30 days after the office receives written notice of cancellation. Any time a corporate surety pays a claim, it must give written notice to the OFR within 10 days, identifying the claimant and claim paid. When the principal sum of the bond is reduced by a payment, the registrant must furnish a new or additional bond that meets the \$25,000 requirement of this section, or an endorsement by the corporate surety reinstating the bond to its required amount.

Section 11. Amends s. 559.72, F.S., relating to standards of conduct for consumer collection agencies, to provide that in collecting consumer debts, a person may *not* use any other means

(including using or threatening force or violence) to threaten to harm the physical person, property, or reputation of a person to collect a debt; mail a communication to a debtor that indicates that the purpose of the communication is to collect a debt on the outside of the envelope; or, communicate with a debtor at an unusual time or place known or should be known to be inconvenient for the debtor.

Subsection (2) states that a debt collector communicating with any person other than the consumer for the purpose of acquiring location information of the consumer must:

- Not state the consumer owes a debt;
- Identify him or herself, state that he or she is confirming or correcting location information regarding the consumer, and only identify his or her employer if asked;
- Not communicate with such person more than once unless that person requests it, or the debt collector reasonably believes the earlier response was erroneous or incomplete and that such person now has correct information;
- Not communicate by postcard.

A debt collector cannot communicate with a consumer at the consumer's place of employment if the debt collector knows or should know that the employer prohibits the consumer from receiving such communication, unless prior consent of the consumer is given directly to the debt collector.

New subsection (4) states that other than as provided in subsection (2), without prior consent of the consumer given directly to the debt collector, court permission, or as necessary to effectuate a postjudgment remedy, a debt collector cannot communicate regarding a debt with any person other than a consumer, the consumer's attorney, a consumer reporting agency if otherwise permitted by law, a creditor, the creditor's attorney, or the debt collector's attorney.

Subsection (5) provides that if a consumer notifies a debt collector in writing that the consumer refuses to pay a debt or that the consumer wishes the debt collector to cease further communication with the consumer, the debt collector may not communicate further with the consumer regarding the debt except to advise the consumer that the debt collector's further efforts are ending, to notify the consumer that the debt collector or creditor may invoke specified remedies, or to notify the consumer the debt collector or creditor will invoke a specified remedy. "Consumer" includes the consumer's spouse, parent of a consumer who is a minor, guardian, executor, or administrator.

The bill in subsection (7) prohibits a debt collector from using a false, deceptive or misleading representation or means in connection with collecting a debt. The following conduct violates this prohibition:

- False representation regarding the debt itself or any services rendered or compensation that may be received by the debt collector;
- Stating or implying that nonpayment will result in imprisonment, or the seizure, garnishment, attachment or sale of property or wages unless such action is lawful and the debt collector or creditor intends to take such action;

- False representation that a sale, referral, or transfer of an interest in a debt causes the consumer to lose a claim or defense to payment of the debt, or become subject to a practice prohibited by s. 559.72, F.S.;
- False representation that the consumer committed a crime or other conduct in order to disgrace the consumer;
- False representation used to collect a debt or obtain information regarding a consumer.
- Failure to disclose in the initial communication that the debt collector is attempting to collect a debt and any information obtained will be used for that purpose;
- Failure to disclose in each communication that the communication is from a debt collector;
- False representation that accounts have been turned over to innocent purchaser for cash value;
- Use of a false name to identify debt collector's business, company or organization;
- False representation that documents are not legal process forms or do not require consumer action;
- False representation that a debt collector operates or is employed by a consumer reporting agency.

Subsection (8) prohibits a debt collector from using unfair or unconscionable means to collect a debt. The following conduct violates this prohibition:

- Collecting any amount unless expressly authorized by the agreement creating the debt or permitted by law;
- Acceptance by a debt collector of a check postdated by more than 5 days, unless the person is notified in writing of an intent to deposit the check between 3 and 10 business days before the deposit is made;
- Solicitation of a postdated check or payment in order to threaten criminal prosecution;
- Depositing or threatening to deposit a postdated check or payment instrument before the date on the check;
- Taking or threatening nonjudicial action to effect disposition of property if there is no present right to possess the property through an enforceable security interest, there is not present intent to take it, or the property is exempt from dispossession by law;
- Communicating with a consumer regarding debt by postcard.

Subsection (9) requires a debt collector to send written notice to the consumer within five (5) days of an initial communication that states the amount of the debt, the name of the creditor, that the consumer has 30 days to contest the debt or the debt collector will assume it is valid, that if the debt is contested the debt collector will obtain verification and mail it to the consumer, and a statement that upon request within the 30-day period the debt collector will provide the consumer with the name and address of the original creditor. Per subsection (10), if the consumer notifies the debt collector in writing within the 30-day period that the debt is disputed, the debt collector must stop collecting the debt until verification of the debt is obtained and mails such information to the consumer. The failure of a consumer to dispute the validity of the debt cannot be construed by a court as an admission of liability on the consumer's part, according to subsection (11).

According to subsection (12), if a consumer owes multiple debts and makes a single payment, the debt collector cannot apply the payment to a disputed debt, and must apply payment in accordance with the consumer's directions.

Subsection (13) states that a debt collector bringing legal action against a consumer regarding real property must bring the action where the real property is located. If the action concerns other types of property, the action must be in a judicial district where the consumer signed the contract at issue or the consumer resides at the start of the action. The subsection does not authorize the bringing of legal actions by debt collectors.

The bill states in subsection (14) that a person may not make a form knowing that it will be used to mislead the consumer into falsely believing that someone other than the creditor is participating in collection of a debt.

Section 12. Amends s. 559.725, F.S., regarding consumer complaints and the administrative duties of the OFR. The administrative duties provisions of s. 559.725, F.S., are stricken and replaced with s. 559.726, F.S. The bill states that any person having reason to believe that the Consumer Collection Practices Act has been violated may make a written complaint with the OFR or the Division of Consumer Services of the DFS. The bill specifies that any governmental office or agency receiving a complaint must advise all other offices or agencies having jurisdiction, including the OFR.

Section 13. Creates ss. 559.726, 559.7262, 559.7263, 559.7264, and 559.7265, F.S.

Creates s. 559.726, F.S., regarding the powers and duties of the OFR under the Florida Consumer Collection Practices Act. The bill authorizes the commission to adopt rules to implement the enforcement provisions for the office; to implement procedures to accommodate a person with a technological or financial hardship; and adopt rules to accept certification of compliance in lieu of requiring submission of specified documents. The bill provides that all fees, charges, and fines collected by the office be deposited to the Regulatory Trust Fund of the office. The bill provides for broad enforcement authority to the office to include the following:

- Issue, revoke, quash or serve subpoenas to compel attendance of witnesses and production of documents;
- Administer oaths;
- Take testimony and depositions;
- Petition a court to compel a person to appear and produce documents; request injunctive and other forms of relief;
- Request attorneys fees and costs; and
- Assess reasonable costs and expenses associated with investigations.

Creates s. 559.7262, F.S., pertaining to injunctions to restrain violations, to provide the office with the authority to seek injunctive relief to enjoin any person who has violated or is about to violate any provision of the Act. The bill provides authority for the court, upon application by the office, to issue subpoenas; impound property, assets, and the business of the registrant; and appoint a receiver to administer the property of such registrant.

Creates s. 559.7263, F.S., relating to cease and desist orders, to provide authority for the office to serve upon a person an order to cease and desist and take corrective action whenever the office has reason to believe that the person is violating, has violated, or is about to violate the Act. Procedural matters relating to cease and desist orders are to be governed by ch. 120, F.S. (Administrative Procedures Act). The office may seek an order of restitution for collected funds due to creditors or any sum collected from a debtor without valid proof of debt.

Creates s. 559.7264, F.S., relating to evidence and investigative reports, to provide that an official written report, sworn complaint or other document made by a financial examiner is admissible into evidence if such examiner is available for cross-examination; authenticates the report; and testifies that such report was prepared as a result of an examination of the books and records of the registrant.

Creates s. 559.7265, F.S., relating to maintenance of books and accounts, to require registrants to maintain books, accounts, records, and documents for a period of 3 years after the date of original entry so that the department may determine the registrant's compliance with the Act. The bill provides for rulemaking authority to prescribe what must be contained in the registrant's books, accounts, records and documents.

Section 14. Amends s. 559.730, F.S., regarding the administrative remedies available to the department in enforcing the Florida Commercial Collection Practices Act.

The OFR may revoke or suspend the registration of a registrant who:

- Has been found guilty, adjudicated to, or entered a nolo contendere or guilty plea to a crime involving fraud, dishonest dealing, or moral turpitude;
- Has a final judgment against him or her in a civil action on grounds of fraud, embezzlement, misrepresentation, or deceit;
- Has had a business, professional or occupational license suspended or revoked;
- Fails to maintain the surety bond requirements of s. 559.556, F.S.;
- Fails to maintain books and records pursuant to s. 559.7265, F.S.;
- Violates this part, an adopted rule, or an agreement with the OFR;
- Pays for registration with a check that fails to clear;
- Falsifies or willfully omits material information asked for under this part or rule;
- Makes a material false statement of fact in a registration application or investigation by the OFR;
- Employs a person who directly or indirectly controls the applicant per s. 559.555(4), F.S., who is subject to an action or commits an act regarding the above in this section.

Termination of registration may be requested via written notice to the OFR, though delivery of the termination notice does not affect civil or criminal liability of registrant, or the OFR's enforcement authority. The office may deny the request if it believes the registrant has committed an act that would be grounds for denial, suspension or revocation of registration. Final action by the OFR to revoke or suspend a registration is subject to Ch. 120, F.S., review in the same manner as revocation of a license.

The OFR may impose an administrative fine for each violation of ss. 559.555, 559.556, 559.72, 559.7265, or 559.730, F.S. Final action by the OFR to impose the fine is subject to review via ss. 120.569 and 120.57, F.S. A fine of \$1,000 may be imposed for each nonwillful violation that is not a bona-fide error, up to \$10,000 arising from the same action. A fine of \$2,500 per violation may be imposed for each willful violation, up to \$100,000 arising from the same action. The OFR may also impose a fine not to exceed \$1,000 per day for each day a person violates this part by engaging in commercial collection without being registered. Administrative fines are payable to the OFR, which must deposit the monies into the Regulatory Trust Fund of the OFR.

An administrative action by the OFR to impose revocation, suspension or a fine must be brought within 5 years after the date of the last violation upon which the action is founded. All remedies in this section are in addition to remedies under state or local law.

Section 15. Creates s. 559.735, F.S., to require the OFR to consider the appropriateness of imposing certain administrative remedies or penalties.

Section 16. Amends s. 559.77, F.S., which permits a debtor to bring a civil action if threatened with violence or a loss of reputation as prohibited by s. 559.72(1), F.S. The bill provides that nothing shall prohibit a plaintiff or a defendant from utilizing the offer of judgment mechanisms provided by s. 768. 79, or Fla. R. Civ. P. 1.442. Current law allows the civil action to be brought if any of the current provisions of s. 559.72, F.S. are provided, thus the bill greatly limits the circumstances in which a consumer may bring a civil action.

The bill also says that great weight in interpreting the civil remedy section should be given to interpretations by the FTC and federal courts of the Federal Trade Commission Act. This is in addition to the Fair Debt Collection Practices Act, which is already considered. If there is an inconsistency between the Florida Consumer Collection Practices Act and the federal acts, the provision that is more protective of the consumer or debtor shall prevail, unless it conflicts with Florida state court opinions, the opinions of federal courts sitting in Florida, or the 11th Circuit Court of Appeals.

Section 17. Amends s. 559.785, F.S., to increase criminal penalties from a first-degree misdemeanor to a third-degree felony for any person to operate or solicit business as a consumer collection agency in this state without first registering with the office; to engage in any consumer debt collection activity after revocation or suspension of the registrant's registration; or engaging in collection activity while under a temporary or permanent injunction. The bill also provides that certain acts constitute a second-degree misdemeanor such as relocating a business without written notice to the office or assigning or attempting to assign a registration. The OFR may invalidate the registration of any registrant who is found guilty of specified conduct. Further, the office may refer evidence concerning a violation of the Act to any criminal prosecuting agency.

Section 18. Creates s. 559.786, F.S., to require the OFR to submit a report on January 1, 2006, and biennially thereafter regarding the effectiveness of the consumer and commercial collection practices acts in preventing fraud, abuse, and unlawful activity. The report is to be presented to the Senate President and the Speaker of the House of Representatives.

Section 19. Repeals s. 559.547 and s. 559.563, F.S., (regarding when registration is void, provisions for which are contained in sections 2 and 14 of the bill). It also repeals s. 559.565, F.S. (regarding enforcement action against out-of-state consumer debt collectors).

Section 20. Makes a \$366,614 appropriation from the Regulatory Trust Fund to the OFR to fund four financial examiners and one registration analyst.

Section 21. The act takes effect on July 1, 2005.

IV. Constitutional Issues:

A. Municipality/County Mandates Restrictions:

None.

B. Public Records/Open Meetings Issues:

None.

C. Trust Funds Restrictions:

None.

V. Economic Impact and Fiscal Note:

A. Tax/Fee Issues:

None.

B. Private Sector Impact:

Commercial and consumer collection agencies will be subject to broader regulation and administrative oversight by the Office of Financial Regulation. Collection agencies that violate provisions of the Act would now be subject to increased penalties and administrative fines of \$1,000 per non-willful violation and \$2,500 per willful violation. Applicants for consumer collection agency registrations would be required to obtain a surety bond of \$25,000 under the bill's provisions. Application fees for commercial collection entities are increased from \$500 to \$650, while similar fees are increased from \$200 to \$650 for consumer collection agencies (*See*, Government Sector Impact, below). Renewal fees will increase \$75 (from \$200 to \$275) for consumer collection agencies. Additionally, the bill provides for a reactivation fee of \$250.

Consumers who are deemed "debtors" under this bill will benefit by the various protections afforded under the bill's provisions. Also, under s. 559.725, F.S., any person who believes that the provisions of the bill have been violated may file a written complaint to the office and the office may conduct an investigation to determine whether violations have occurred.

C. Government Sector Impact:

The Office of Financial Regulation will have enhanced administrative and enforcement powers under the provisions of the bill to regulate both the commercial and consumer collection agency laws. The fiscal impact statement offered by the Office of Financial Regulation is set forth below:

Impact on the Office of Financial Regulation

	(FY 05-06)	(FY 06-07)*	(FY 07-08)*
	Amount (FTE)	Amount (FTE)	Amount (FTE)
A. Revenues*			
1.Recurring *	\$ 209,075	\$ 209,075	\$ 209,075
2.Non-Recurring	N/A		
B. Expenditures			
1.Recurring	\$ 268,998	\$ 336,614	\$ 336,614
2.Non-Recurring	\$ 49,878	\$ 0	\$ 0
3.Total Expenditure	\$ 310,583		

* Also expect some increased revenues due to fines from enforcement actions but unable to project amount with any accuracy.

Estimated Fiscal Impact on Private Sector

The fiscal impact on the private sector is difficult to project. All firms licensed or applying for licensure will have to obtain and maintain a surety bond. The cost of the surety bond will largely be driven by the financial condition of the company. If the entity’s financial strength is good, their collateral requirement could range from 0 to a small percentage of the bond amount. If the entity’s financial strength is weak, their collateral requirement could be up to 100 percent of the bond amount. In either case, there is an annual premium that generally runs in the 3-5 percent range of the bond amount.

Upon passage of CS/SB 1984, the initial application fee to register consumer and commercial agencies will increase to \$650, resulting in an increase of \$450 for consumer collection agencies, and \$150 for commercial collection agencies. Renewal fees for consumer collection agencies will be set at \$275, an increase of \$75, and remain unchanged at \$500 for commercial collection agencies.

Comments

Passage of the bill will place additional requirements on applicants at the time of licensure and renewal, such as disclosure of information relating to the entity’s and affiliated individual’s background. The additional information must be reviewed by staff to determine if it contains any negative findings. This will create a significant workload for the registration staff. Additionally, there are currently no resources to determine on-going compliance with regulations or to assist consumers with issues related to the industry.

Recurring Costs

Positions	Location	Class Code	Pay Grade
Financial Examiner/Analyst I (43900510)	Tampa	1554	020 Comp & Enf
Financial Examiner/Analyst I (43900510)	Fort Laud	1554	020 Comp & Enf
Financial Examiner/Analyst II (43900510)	Fort Laud	1564	023 Comp & Enf
Financial Examiner/Analyst II (43900510)	Orlando	1564	023 Comp & Enf
Financial Examiner/Analyst II (43900520)	Tallahassee	1564	023 Regulatory Review

Salaries and Benefits	\$ 230,464.00
Expense	\$19,150.00
Additional Expenses	\$120,000.00
Total	\$ 366,614.00

Non-Recurring Costs

Expense	\$ 32,565.00	State Standard Amount (\$6,513 x 7)
OCO	\$ 9,000.00	State Standard Amount (\$1,800 x 6)
Total	\$ 41,565.00	

Revenues (FY 03-04) \$ 255,200.00

Projected Increase in Revenue

	New*	Renewal*	Fee Increase	Total New Revenue
Consumer Collections	287	751	\$450/\$75	\$185,475
Commercial Collections	39	77	\$150/NA	\$ 5,850
Reactivation		71	\$250	\$ 17,750
<u>Total Revenue Increase</u>				<u>\$ 209,075</u>

* Numbers are based on actual FY 2003-04

VI. Technical Deficiencies:

None.

VII. Related Issues:

None.

VIII. Summary of Amendments:

None.

This Senate staff analysis does not reflect the intent or official position of the bill's sponsor or the Florida Senate.
