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House Bill 4834 (Substitute H-3 as passed by the House)

Sponsor: Representative Bill McConico

House Committee: Banking and Financial Institutions

Senate Committee: Economic Development, Small Business and Regulatory Reform

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CONTENT

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

- Prohibit a person from engaging in the business of providing deferred presentment services without a license from the Commissioner of the Office of Financial and Insurance Services (OFIS).
- Prohibit providers of deferred presentment service transactions from having more than one transaction open with a customer at one time, or from providing service to a customer with open transactions at more than one other provider.
- Require the Commissioner to develop, implement, and maintain a statewide common database that would allow a licensee to determine whether customers had other open deferred presentment service transactions.
- 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 \$600 and 31 days.
- Allow a licensee to charge a service fee of between 11% and 15%, depending on the amount of the transaction.
- Require a licensee to display certain notices, and to include other notices in a service agreement.
- Allow a customer to complain to a licensee 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 transaction" 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 a customer's check for a period of time before negotiation, redemption, or presentment of the check. A "customer" would be an individual who inquired into the availability of or applied for a deferred presentment service transaction and/or entered into a deferred presentment service transaction with a licensee.

The bill would take effect on July 31, 2007.

Licensing

Application. The bill would prohibit a person from engaging in the business of providing deferred presentment service transactions without a license. A separate license would be required for each location from which transactions were conducted. The proposed Act would not apply to a State- or nationally chartered bank or State- or Federally chartered savings and loan association,

savings bank, or credit union whose deposits or member accounts are insured by an agency of the United States government.

All of the following would apply to a person engaged in the business of providing deferred presentment services in the State on the bill's effective date:

- By December 31, 2007, the Commissioner by administrative bulletin, order, or rule would have to establish an application process and an application timeline that included a deadline for submitting a complete application.
- If the person intended to continue to provide deferred presentment service transactions, the person would have to submit a complete application to the Commissioner by the application deadline.
- The person could continue to engage in the business of providing deferred presentment service transactions in the State after the bill's effective date without a license until the person failed to meet the application deadline or the Commissioner acted on the person's completed application.
- The person would have to comply with the bill's requirements concerning notices, deferred presentment service agreements, limitations on transactions, payment, complaints, and violations during the time period described above.

A license applicant would need to have and maintain net worth of at least \$50,000 for each licensed location, subject to a maximum of \$250,000 in required net worth for any one licensee, determined in accordance with generally accepted accounting principles. 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 capital adequacy; the competence, experience, integrity, and financial ability of any person who was a member, partner, director, or officer, or a shareholder with 10% 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, any 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.

Each license application would have to include information concerning the identity and location of the applicant and, if the applicant were not an individual, each executive officer and each person who owned or controlled 10% or more of the ownership interest in the applicant; if the applicant would not operate a physical business location in this State or if, in addition to its location in the State, the applicant would make deferred presentment service transactions by other means, a detailed description of the manner in which transactions would be offered to customers in Michigan; and any other information the Commission considered necessary.

An applicant would have to include with the application an application fee in an amount determined by the Commissioner.

Upon receiving a completed license application, the Commissioner would have to investigate to determine whether the proposed requirements were satisfied and, if so, issue to the applicant a license to engage in deferred presentment service transactions.

If the Commissioner determined that an applicant was not qualified to receive a license, the Commissioner would have to notify the applicant in writing that the application had been denied, stating the basis for denial. If the Commissioner denied an application, or failed to act on an application within 60 days after the filing of a properly completed application, or within a longer time period agreed to by the Commissioner and the applicant, the applicant could submit a written demand to the Commissioner for a hearing before the Commissioner on the question of whether the Commissioner 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 the application after the hearing.

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 he or she considered reasonable in order to generate funds sufficient to pay, but not to exceed, OFIS's reasonably anticipated costs of administering the proposed Act. A licensee would have to pay the actual travel, lodging, and meal expenses incurred by OFIS employees who traveled out of State to investigate the licensee or examine its records. An OFIS employee who traveled would have to comply with all travel regulations and rate schedules currently in effect for the reimbursement of expenses incurred by classified State employees in connection with official State business. Money received under the bill would have to be deposited in an interest bearing account in the State Treasury and credited to OFIS 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 or insurance company authorized to do business in the State, in a form satisfactory to the Commissioner. If one person owned 20% or more of the ownership interest in two or more licensees, however, the group of licensees having that common ownership would be obligated to furnish only one \$50,000 surety bond.

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

The Commissioner could determine and identify by order or rule events that could occur to a licensee that required the licensee to file a written report with the Commissioner describing the event and its expected impact on the activities of the licensee, on a form prescribed by the Commissioner for the event.

Prior written approval of the Commissioner would be required for the continued operation of a licensee if there were a change in control of that 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 of control

request. (Under these provisions, "control" would mean either: 1) for a corporation, direct or indirect ownership of, or the right to control, 10% 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.)

After a license was issued, it would remain in effect through September 30 of each year, unless surrendered, suspended, or revoked. A license would expire September 30 each year. A licensee could renew a license for a year by submitting a complete application that showed continued compliance with the proposed Act, and paying the renewal fee to the Commissioner. The licensee would have to submit a renewal application by August 1. Before April 1, 2007, the Commissioner could issue a license to an applicant for a period longer than 12 months and that expired on September 30, 2008.

A license would not be transferable or assignable.

A licensee would have to comply with any request for information or documentation made by the Commissioner under the Act and would have to comply with any reasonable written time deadlines imposed by the Commissioner on that request.

Required Notice. At least 15 days before providing deferred presentment service transactions at any new location, a licensee would have to provide written notice to the Commissioner on a form prescribed by the Commissioner of the name, street address, and telephone number of the new location, or detailed description of the manner in which services would be provided if the applicant did not operate a physical business in the State.

At least 15 days before discontinuing deferred presentment service transactions, a licensee would have to give the Commissioner written notice of the name, street address, and telephone number of the discontinued location, or the detailed description of the services, as required for licensees that did not operate a physical business in the State.

Customer Database

By December 31, 2006, the Commissioner would have to develop, implement, and maintain a statewide, common database. The database would be required to have real-time access through an internet connection, be accessible at all times to licensees, and to the Commissioner for the purposes of investigation and enforcement actions, and meet other listed requirements.

The Commissioner could operate the database or could select and contract with a single third-party provider to operate it. If the Commissioner contracted with a third-party provider, all of the following would apply.

- The Commissioner would have to operate or ensure that a third party provider selected as the database provider operated the database pursuant to the proposed Act.
- The Commissioner would have to consider cost of service and ability to meet all the Act's requirements in selecting a third-party provider as the database provider.
- In selecting a third-party provider, the Commissioner would have to give strong consideration to the provider's ability to prevent fraud, abuse, and other unlawful activity associated with deferred presentment service transactions, provide additional credit information relevant to a customer's ability to pay, and provide additional tools for the administration and enforcement of the Act.
- The database provider would be allowed to use the data collected only as prescribed in the Act and the contract with OFIS and for no other purpose.

A database provider and a licensee could voluntarily enter into a contract in which the database provider obtained, from that licensee only, the same data that the licensee was required to provide to the State database.

The database would have to allow a licensee gaining access to it to do all of the following:

- Check a customer's social security number and report to the Commissioner or licensee if that number was invalid, was issued within the five-year period preceding the date of the inquiry, or was issued to a deceased individual.

- Verify whether a customer had any open deferred presentment service transactions with any licensee that had not been closed.
- Provide information necessary to ensure licensee compliance with any requirements imposed by the Federal Office of Foreign Asset Control under Federal law.
- Track and monitor the number of customers who notified a licensee of violations of the Act, the number of times a licensee agreed that a violation occurred; and the number of times that a licensee did not agree that a violation occurred, the amount of restitution paid, and any other information the Commissioner considered necessary.
- Determine whether a customer was eligible for repayment of the deferred presentment service transaction in installments and notify the licensee of that eligibility.
- If the information were available in the database, provide additional credit information relevant to a customer's ability to pay if the Commissioner determined that this was appropriate and reasonable under the Act.

The database provider could make the additional relevant credit information available to licensees at their option and sole expense. The additional data could include the following:

- Past performance data on deferred presentment service transactions that the customer had entered into within or outside of the State.
- Inquiry information from deferred presentment service providers outside of the State that indicated that the customer had entered into deferred presentment service transactions outside of the State.
- Any other data the Commissioner determined by rule as appropriate, necessary, and reasonable under the Act.

The database provider would have to establish and maintain a process for responding to transaction verification requests due to technical difficulties occurring with the database that prevented the licensee from gaining access to the database through the internet.

When the database provider received notification that a deferred presentment

service transaction was closed, the database provider would have to designate the transaction as closed in the database immediately, but in no event after 11:59 p.m. on the day the Commissioner or database provider received notification.

The database provider automatically would have to designate a deferred presentment service transaction as closed in the database five days after the transaction maturity date unless a licensee reported to the database provider before that time that the transaction remained open because of the customer's failure to make payment; that the transaction was open because the customer's check or electronic redeposit was in the process of clearing the banking system; or that the transaction remained open because the customer's check was being returned to the licensee for insufficient funds, a closed account, or stop payment order, or any other factors determined by the Commissioner. If a licensee reported the status of a transaction as open in a timely manner, the transaction would remain an open transaction until it was closed and the database provider was notified that the transaction was closed.

If a licensee stopped providing deferred presentment service transactions, the database provider would have to designate all open transactions with that licensee as closed in the database 60 days after the date the licensee stopped offering deferred presentment service transactions, unless the licensee reported to the database provider before the expiration of the 60-day period which of its transactions remained open and the specific reason each transaction remained open. The licensee also would have to give the Commissioner a reasonably acceptable plan that outlined how the licensee would continue to update the database after it stopped offering deferred presentment service transactions. The Commissioner promptly would have to approve or disapprove the plan and immediately notify the licensee of his or her decision. If the plan were disapproved, the licensee could submit a new or modified plan for the licensee to follow.

If at any time the Commissioner reasonably determined that a licensee that had stopped offering deferred presentment service transactions was not updating the database in accordance with its approved plan, the Commissioner immediately would have to

close or instruct the database provider immediately to close all remaining open transactions of that licensee.

The response to an inquiry to the database provider by a licensee could state only that a person was eligible or ineligible for a new deferred presentment service transaction and describe the reason for that determination. Only the person seeking the transaction could make a direct inquiry to the database provider to request a more detailed explanation of a particular transaction that was the basis for the ineligibility determination. Any information regarding any person's transactional history would be confidential, would not be subject to public inspection, and would not be a public record subject to the disclosure requirements of the Freedom of Information Act.

The database provider could charge licensees a verification fee for access to the database, in amounts approved by the Commissioner.

The Commissioner could gain access to the database only for purposes of the proposed Act and could not have access to the additional data available to the licensees.

The Commissioner would have to investigate violations of and enforce the Act's provisions regarding the database. The Commissioner could not delegate these responsibilities to a third-party provider.

Within 30 days after the implementation of the database, as determined by the Commissioner, a licensee would have to enter into the database all transactions entered into with customers during the period from the bill's effective date to the date of the implementation of the database.

The Commissioner, by order or rule, could stipulate that data would be retained in the database only as required to ensure licensee compliance with the proposed Act and that data recorded in the database would be archived when no longer needed for the administration of the Act or for enforcement or compliance purposes. The Commissioner, by order or rule, could specify that any identifying customer information would be deleted from the database when data were archived. The Commissioner could maintain access to archived data for future legislative or policy review.

If the Commissioner had not implemented a customer database or the database were not fully operational, as determined by the Commissioner, a licensee would have to provide an annual written report of its business operations, including business volume and other information on the business of providing deferred presentment service transactions. Additionally, every February 1, May 1, August 1, and November 1, the licensee would have to report the following to the Commissioner on a form prescribed by him or her:

- The number of customers who, during the preceding calendar quarter, notified the licensee of a violation of the Act.
- A breakdown of the number of times the licensee agreed that a violation of the Act occurred and the number of times that the licensee did not agree that a violation occurred.
- If the licensee agreed that the violation occurred, the amount of restitution that was paid to any customer under the Act.
- Any other information the Commissioner considered necessary.

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 transaction agreement. The notice would have to be in at least 36-point type and contain a statement prescribed in the bill. The statement, in part, would have to inform the customer that the transaction was not intended to meet long-term financial needs; the licensee could defer cashing his or her check only for up to 31 days; the licensee was required to give the customer a copy of the signed agreement; the licensee could not enter into a transaction if the customer already had a deferred presentment services agreement in effect; the customer could cancel an agreement; the licensee could not renew an agreement for a fee; the customer was entitled to information about filing a complaint against the licensee; and that State law allowed customers who could not pay their transaction to request that it be repaid in installments in some circumstances.

The licensee also would have to post prominently, in at least 36-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, facsimile number, 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 date of the transaction.
- The transaction number assigned by the database provider, if any.
- An itemization of the fees to be paid by the customer.
- A calculation of the cost of the fees and charges to the customer, expressed as a percentage rate per year.
- A clear description of the customer's payment obligation under the agreement.
- A schedule of all fees associated with the deferred presentment service transaction and an example of the amounts the customer would pay based on the amount of the transaction.
- The maturity date.
- A provision that the licensee would defer presentment, negotiation, and entering a 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 information similar to that contained in the posted notice.

A licensee could include an arbitration provision in a deferred presentment service transaction agreement if the arbitration provision met all of the following:

- Provided that the licensee agreed to pay any costs of the arbitration.
- Provided that an arbitration proceeding would have to be held within 10 miles of the customer's address contained in the deferred presentment service transaction agreement unless the customer

consented to another location after an arbitrable dispute occurred.

- Provided that an arbitration proceeding would have to be conducted by a neutral arbitrator who had not been and was not currently being paid by the licensee and who had no financial interest in a party to the arbitration.
- Required that the arbitrator provide the customer with all the substantive rights that the customer would have if his or her claim were asserted in a court proceeding and could not limit any other claim or defense the customer had concerning the claim.

Limitations. A licensee could enter into a deferred presentment services agreement with a customer for any amount up to \$600, plus a service fee of between 11% and 15% based on the size of the transaction (as described in the bill). Additionally, a licensee could charge the amount of any database verification fee.

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 transaction, except as provided in the bill.

A licensee could not refuse to provide a deferred presentment service transaction to a customer solely because the customer had exercised his or her rights under the Act.

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. The licensee could not create a balance owed above the amount owed on the original agreement.

Conditions. A licensee could not enter into a deferred presentment service transaction with a customer if the customer had an open deferred presentment service transaction with the licensee or had more than one opened deferred presentment service transaction with any other licensee, and would have to verify whether the customer had an open transaction with the licensee or

had more than one open transaction with any other licensee.

Verification. A licensee would have to verify a customer's eligibility to enter into a deferred presentment service transaction by doing one of the following, as applicable:

- If the Commissioner had not implemented the customer database, or the database were not fully operational, as determined by the Commissioner, verifying that the customer did not have an open deferred presentment service transaction with the licensee. The licensee would have to maintain a database of all the licensee's transactions at all of its locations and search that database to meet its obligation.
- If the Commissioner had implemented a database and the database were fully operational, as determined by the Commissioner, gaining access to the database and verifying that the customer did not have an outstanding deferred presentment service transaction with the licensee and did not have more than one open deferred presentment service transaction that had not been fully repaid with any other licensee.

If the Commissioner had not implemented a customer database, the database were not fully operational, or the licensee were unable to gain access to the database and the alternative mechanism for verification were also unavailable, a licensee could rely upon the written verification of the borrower in a statement that he or she had no outstanding deferred presentment service transactions with the licensee and did not have more than one outstanding transaction with another provider.

If the licensee was unable to gain access to the customer database due to technical difficulties occurring with it, as determined by the Commissioner, the licensee would have to use the alternative process established by the Commissioner.

If approved by the Commissioner, the database provider could impose a database verification fee for the actual costs of entering, gaining access to, and verifying data in the customer database to verify that a customer did not have any other open deferred presentment service transactions with the licensee and did not have more than one open deferred presentment service

transaction with any other licensees. A database verification fee would be payable to the database provider in a manner prescribed by the Commissioner. A licensee could charge a customer all or part of the database verification fee but could not charge a customer any other fee except as authorized by the Act.

A licensee could rely on the information contained in the customer database as accurate and would not be subject to any administrative penalty or civil liability as a result of relying on inaccurate information contained in the database.

Before entering into a deferred presentment service transaction, a licensee would have to submit to the database provider the customer's name, social security number, address, and driver license number or other method of State identification, if available, the amount of the transaction, the customer's check number, the date of the transaction, the maturity date of the transaction, and any other information reasonably required by the Commissioner or the database provider, in a format reasonably required by the Commissioner.

When a deferred presentment service transaction was closed, the licensee would have to designate the transaction as closed and immediately notify the database provider, but in no event after 11:59 p.m. on the day the transaction was closed. The Commissioner would have to assess an administrative fine of \$100 for each day that the licensee failed to notify the database provider that the transaction had been closed. It would be a defense to the assessment of an administrative fine that notifying the database provider was not possible due to temporary technical problems with the database or to circumstances beyond the licensee's control.

Document Retention. A licensee would have to maintain each deferred presentment services agreement until three years after the date it was satisfied, and make available for examination by the Commissioner any agreements and all 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 all documents pertaining to a rejected application for a deferred presentment

service transaction for any period of time required by law.

Rescission or Redemption

A customer could rescind a deferred presentment services 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 transaction, either delivered to the licensee cash or a cash equivalent in an amount equal to the amount of cash the customer received or returned to the licensee the licensee's check the customer received, if one were received in the transaction. The licensee would have to return to the customer the check received in the transaction and any service fee paid by the customer. The customer 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. The licensee would have to return the check upon receiving 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 transaction, 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 to the customer in the form of the licensee's business check, money order, cash, or any other valid method of monetary transfer.

If a customer entered into eight deferred presentment service transactions with a licensee in any 12-month period, the licensee would have to provide the customer an option to repay that eighth transaction and each additional transaction in that 12-month period pursuant to a written repayment plan. A licensee would have to advise a customer of the repayment option at the time he or she was eligible.

If a customer believed that he or she had been illegally denied the repayment option, he or she would be entitled to contact OFIS. If a customer had entered into eight

deferred presentment service transactions in any 12-month period, the database provider would have to notify the licensee when the licensee submitted the required customer information to the database for that customer that he or she was entitled to a repayment plan. The database provider would have to instruct the licensee to provide the customer with a notice that informed him or her of the customer's right to installment payments if he or she had entered into eight transactions in a 12-month period.

During the term of a repayment plan by a customer, the database provider would have to notify the licensee at the time the licensee submitted the required customer information to the database for that customer that he or she was presently in a repayment plan with one or more other licensees and the licensee could not enter into a deferred presentment transaction with that individual.

A licensee could not present a check for payment before the maturity date or during the term of the repayment plan. In addition to the remedies and penalties under the proposed Act, a licensee that presented a check for payment before the maturity date or during the term of the repayment plan would be liable for all expenses and damages caused to the customer and the drawee as a result of the violation. If a customer had not requested a repayment plan by the maturity date, the licensee could redeem, present for payment, or enter the check into the check-clearing process under the terms of the original deferred presentment service transaction agreement.

A customer would satisfy his or her obligation under a deferred presentment service agreement when the drawee paid the check the licensee was holding or the customer redeemed the check by paying to the licensee an amount equal to the full amount of the check.

Before negotiating or presenting a customer's check for payment, a licensee would have to endorse it 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 the check 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 a transaction and would not be subject to any criminal penalty in the event his or her check was dishonored.

Violations/Complaints

Tying Agreements. A licensee would not be allowed to enter into a tying arrangement through which the licensee conditioned the sale of one financial service to a consumer on the agreement by the consumer to purchase one or more other financial services from the licensee or an affiliate or subsidiary of the licensee. A licensee also would be prohibited from knowingly permitting a person to violate an order that had been issued under the proposed Act or any other financial licensing act that prohibited the person from being employed by, an agent of, or a control person of the licensee.

Complaint to Licensee. A customer who believed that a licensee had violated the proposed Act could notify the licensee in person, by the close of business on the day he or she signed an agreement. Also, at any time before signing a new agreement with a licensee, a customer who believed that the licensee had violated the Act could give 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 in the transaction, and any service fee paid by the customer. 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 in the

transaction. 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 transaction, but not less than \$15 or more than the face amount of the check. The licensee would have to notify the Commissioner immediately that it made restitution, and give detailed information about the terms of the agreement as well as other information requested by the Commissioner. A licensee that made restitution for a violation could be subject to a civil action under the Act.

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 transaction 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 also 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 these provisions and determined that it did not violate the law, the licensee could present the check for payment on or after the maturity date. If the check were not honored, and the licensee were not in violation of the proposed Act in connection with the transaction, the 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 three times the amount of the fee charged in the customer's agreement, but not less than \$45 or more than three times the face amount of the check. The licensee also would be subject to

any other applicable penalties and remedies available under the Act.

A licensee would have to enter information regarding alleged violations and determinations into the customer database as required by the Commissioner.

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 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 Act, 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 service transactions.

The Commissioner could subpoena witnesses, documents, and other evidence in any matter 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. The Commissioner could serve a notice of intention to issue a cease and desist order if, in the opinion of the Commissioner, a licensee were engaging in, had engaged in, or were about to engage in a practice that posed a threat of financial loss or threat to the public welfare, or were violating, had violated, or were about to violate the proposed Act, State or Federal law, or an applicable rule or regulation. 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.

A licensee who failed to appear at the hearing would consent to the issuance of the cease and desist order. If the 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. An order issued with the licensee's consent 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 a 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, an examination fee, or any other fee imposed by the Commissioner.
- Committed any fraud, engaged in any dishonest activities, or made any misrepresentations.
- Violated the proposed Act 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, failed to give a true reply to a question in it, or failed to reply to a request of the Commissioner authorized in the Act.
- 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 the licensee.

A notice would have to contain a statement of the facts constituting a 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 he or she should issue an order to suspend or terminate one or more licenses of the licensee.

A licensee who failed to appear at a hearing would consent 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 licensee's consent 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 proposed Act, 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 Act 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 Act.

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.

Fraud

If, in the opinion of the Commissioner, a person had engaged in fraud, the Commissioner could serve upon that person a written notice of intention to prohibit that person from being employed by, an agent of, or an executive officer of a licensee under the Act. "Fraud" would include actionable fraud, actual or constructive fraud, criminal fraud, extrinsic or intrinsic fraud, fraud in the execution, in the inducement, in fact, or in law, or any other form of fraud.

The notice of the alleged fraud would have to contain a statement of the facts supporting the prohibition and, except as otherwise provided, set a hearing on a date within 60 days after the date of the notice. If the person did not appear at the hearing, he or she would be considered to have consented to the issuance of an order in accordance with the notice. If, after a hearing, the Commissioner found that any grounds specified in the notice had been established, the Commissioner could issue an order of suspension or prohibition from being a licensee or from being employed by, an agent of, or an executive officer of any licensee under the Act. An order would be effective when served on a person. The Commissioner also would have to serve a copy of the order upon the licensee of which the person was an employee, agent, or executive officer. The order would remain in effect until it was stayed, modified, terminated, or set aside by the Commissioner or a reviewing court. After five years from the date of an order, the person subject to the order could apply to the Commissioner to terminate it.

If the Commissioner considered that a person served a notice of alleged fraud posed an imminent threat of financial loss to customers, the Commissioner could serve upon the person an order of suspension from being employed by, an agent of, or an executive officer of any licensee. The suspension would be effective on the date the order was issued and, unless stayed by a court, would remain in effect until the Commissioner completed the required review and the Commissioner had dismissed the charges specified in the order. Unless otherwise agreed to by the Commissioner and the person served with the order, the Commissioner would have to hold a hearing to review the suspension not earlier than

five days or later than 20 days after the date of the notice.

If a person were convicted of a felony involving fraud, dishonesty, or breach of trust, the Commissioner could issue an order suspending or prohibiting that person from being a licensee and from being employed by, an agent of, or an executive officer of any licensee under the Act. After five years from the date of the order, the person subject to the order could apply to the Commissioner to terminate it.

The Commissioner would have to mail a copy of any notice or order related to the fraud notice or order to the licensee of which the person subject to the notice or order was an employee, agent, or executive officer. Within 30 days after the Commissioner had notified the parties that the case had been submitted to him or her for final decision, the Commissioner would have to render a decision that included findings of fact supporting the decision and serve upon each party to the proceeding a copy of the decision and an order consistent with it.

Except for a consent order, a party to a fraud proceeding or a person affected by a order for fraud could obtain a judicial review of the order. A consent order could be reviewed as provided under the Administrative Procedures Act (APA). Except for an order under judicial review, the Commissioner could terminate or set aside an order under judicial review with the permission of the court. Unless ordered by the court, the commencement of proceedings for judicial review would not stay the Commissioner's order. The Commissioner could apply to the Circuit Court of Ingham County for the enforcement of any outstanding order.

Any current or former executive officer or agent who violated a final order related to fraud would be guilty of a misdemeanor punishable by a maximum fine of \$5,000 or imprisonment for up to one year, or both.

An executive officer who was subject to an order for fraud would not be in violation of the order if he or she did not in any manner, directly or indirectly, participate in the control or management of a licensee after the date the order was issued, and transferred any interest he or she owned in the licensee to an unrelated third party

within six month after the date the order was final.

Other Provisions

The Commissioner could issue orders and regulations that he or she considered necessary to enforce and implement the proposed Act. The Commissioner would have make a copy of any order or rule issued available to each licensee within a reasonable time after issuance.

If any information previously submitted to the Commissioner by a licensee under the Act were no longer accurate, the licensee promptly would have to file in writing with the Commissioner a correction of the information. If requested by the Commissioner, the licensee would have to provide a written report of its business operations within a reasonable time after the Commissioner's request.

To assure compliance with the proposed Act, the Commissioner could examine the relevant business, books, and records of any licensee. 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 three years, unless applicable State or Federal law concerning record retention required a longer period.

The Commissioner could promulgate rules under the APA to enforce and administer the proposed Act.

A person who provided deferred presentment services before the bill's effective date, 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.

A licensee who was ordered to cease and desist, whose license was suspended or terminated, or who was ordered to pay a fine under the Act would be entitled to a hearing before the Commissioner if a written request for a hearing were filed with the Commissioner within 30 days after the effective date of the order. Any administrative proceedings under the proposed Act would be subject to the APA.

A person injured by a licensee's violation of the Act could maintain a civil cause of action against the licensee and recover actual damages and an amount equal to the service fee paid in connection with each deferred presentment service transaction that was found to violate the Act, plus reasonable attorney fees.

BACKGROUND

On April 25, 1995, the Financial Institutions Bureau (now within OFIS) issued a declaratory ruling that addressed whether a "payday advance transaction" was subject to the Regulatory Loan Act (In re: Request by Oak Brook/Cash Now Partners d/b/a/ Cash Connection for a Declaratory Ruling...). The business proposed to offer a service in which there would be an oral agreement to hold a present-dated check for up to 14 days. For a charge of 10% to cash the check and an additional 5% to hold it for later presentment, the check would be exchanged for cash, and the issuer of the check would promise to have funds in his or her account on the agreed-upon date. The Financial Institutions Bureau (FIB) determined, "...the substance of the transaction, notwithstanding its form, clearly indicates that a Payday Advance, as described, creates an obligation to repay the sum advanced, and thus is a loan...as that term is used under the Regulatory Loan Act." (That Act requires a lender to be licensed if the interest on a loan exceeds the maximum annual rate permitted under the general usury law, i.e., 5% or, if the parties stipulate in writing, 7%.)

The FIB also concluded that the 5% fee for holding a check was interest, citing a 1985 opinion of the Michigan Supreme Court, "'Interest is compensation allowed by law or fixed by the respective parties for the use or forbearance of money, 'a charge for the loan or forbearance of money,' or a sum paid for the use of money, or for the delay in payment of money.'" **Town & Country Dodge v Mich. Dept. of Treasury**, 420 Mich. 226...". The FIB determined that, if annualized, "...the effective interest rate charged on the typical Payday Advance amounts to 153.3% per annum... As a result, it is clear that the Payday Advance, as described, falls within the class of loans intended to be regulated by the Legislature when it enacted the Regulatory Loan Act."

In 1998, the Financial Institutions Bureau was presented with another payday advance program under which "...the Company will cash a personal check for a customer for the normal charge and will also agree to defer the deposit and presentment of that check for up to 14 days for an additional fee at a rate not to exceed five percent per annum." In a letter to the company's legal counsel, the FIB Commissioner determined that the company did not need to obtain a license under the Regulatory Loan Act, and did not charge an interest rate in excess of the applicable rate ceiling (April 29, 1998).

On January 11, 2000, the FIB Commissioner replied to an inquiry from the Consumer Federation of America about Michigan law. The Commissioner stated, "In response to the [1995 declaratory] ruling, companies of which we are aware developed pricing strategies that brought the interest portion of the payday advance charge within the limits allowed under Michigan's Usury Act. By charging a rate of interest not in excess of the 7% usury cap, companies are not subject to the licensing requirements of the Regulatory Loan Act of 1963."

In 2003, the Michigan Senate and House of Representatives passed Senate Bill 474, which would have created the "Deferred Presentment Service Transactions Act" to regulate the industry. The bill was vetoed by Governor Jennifer M. Granholm. In her veto message, she stated that she "...support[ed] the intent of this legislation and acknowledge[d] the need to create a regulatory framework designed to protect Michigan workers from fraud, abuse, and other unlawful activity associated with payday lending...", but the proposed transaction fees were too high, allowing lenders to charge rates as high as 15.27% on a \$500 check.

Legislative Analyst: J.P. Finet

FISCAL IMPACT

The bill would require these licensed businesses to pay a fee that would be sufficient to cover the administrative costs of regulating this industry, which would make 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.

To the extent that it would allow additional civil actions, the bill could increase local court costs.

There are no data to indicate how many offenders would be convicted of the proposed misdemeanor. Local units of government incur the costs of misdemeanor probation and incarceration in a local facility, both of which vary by county. Additional penal fine revenue would benefit public libraries.

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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.