

**HOUSE OF REPRESENTATIVES STAFF ANALYSIS**

**BILL #:** PCB GGPC 10-03 Debt Collection

**SPONSOR(S):** General Government Policy Council

**TIED BILLS:** **IDEN./SIM. BILLS:**

	<b>REFERENCE</b>	<b>ACTION</b>	<b>ANALYST</b>	<b>STAFF DIRECTOR</b>
Orig. Comm.:	General Government Policy Council	10 Y, 0 N	Barnum	Hamby
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**SUMMARY ANALYSIS**

Part VI of ch. 559, F.S., regulates consumer collection agencies and protects consumers from certain debt collection practices that involve fraud, harassment, threats, and other unscrupulous activities.

Current Florida Statutes designate the Department of Financial Services (DFS) as the registry for consumer complaints, while the Office of Financial Regulation (OFR) is responsible for registration of consumer collection agencies. In January 2008, the DFS and the OFR mutually agreed to delegate responsibility for the registry to the OFR.

The proposed council bill:

- Transfers responsibility for receiving and maintaining records of consumer correspondence and complaints regarding debt collection from the Division of Consumer Services of the Department of Financial Services to the OFR.
- Increases the maximum administrative fine from \$1,000 to \$10,000 for an out-of-state consumer debt collector that collects or attempts to collect debt in Florida prior to registering with the OFR.
- Authorizes the Attorney General to take action on behalf of the state against an out-of-state consumer debt collector in any state court of competent jurisdiction.
- Authorizes the Attorney General to take action against in-state debt collectors for any violations of the Florida Consumer Collection Practices Act.
- Requires that a written notice be provided to the debtor prior to an assignee taking any action to collect the debt.
- Eliminates the requirement that there must be at least five, unresolved, sworn complaints filed by five different consumers within a 12-month period against a consumer collection agency prior to the OFR initiating action to investigate a complaint.
- Specifies that a complainant must certify, subject to penalty of perjury, a summary of the nature of an alleged violation and the facts that allegedly support the complaint, using a prescribed form.
- Requires that registrants maintain books and records for three (3) years and provides that OFR will have access to those records.
- Authorizes the OFR to issue subpoenas, and cease and desist orders.
- Requires that a registered consumer collection agency respond, in writing, to the OFR within 45 days after receipt of a written request from the OFR concerning a consumer complaint. Failure to respond timely can result in an administrative fine of up to \$250 per request per day.
- Authorizes administrative fines of up to \$10,000 for a violation of a prohibited practice.

The bill will result in a negative fiscal impact on state government of \$91,947 in Fiscal Year 2010-2011 and a negative fiscal impact of \$82,193 in the subsequent years.

The bill provides for an October 1, 2010 effective date.

**This document does not reflect the intent or official position of the bill sponsor or House of Representatives.**

**STORAGE NAME:** pcb03a.GGPC.doc

**DATE:** 4/14/2010

## HOUSE PRINCIPLES

Members are encouraged to evaluate proposed legislation in light of the following guiding principles of the House of Representatives

- Balance the state budget.
- Create a legal and regulatory environment that fosters economic growth and job creation.
- Lower the tax burden on families and businesses.
- Reverse or restrain the growth of government.
- Promote public safety.
- Promote educational accountability, excellence, and choice.
- Foster respect for the family and for innocent human life.
- Protect Florida's natural beauty.

## FULL ANALYSIS

### I. SUBSTANTIVE ANALYSIS

#### A. EFFECT OF PROPOSED CHANGES:

##### **Background:**

The debt relief industry is comprised of businesses providing products and services, including credit counseling, credit repair, debt management, debt settlement, and debt collection. Many federal laws have been enacted to protect consumers from deceptive and fraudulent practices related to debt relief services. The Federal Trade Commission (FTC) has jurisdiction to enforce certain federal consumer protection laws through the Federal Trade Commission Act,<sup>1</sup> the Telemarketing and Consumer Fraud Act,<sup>2</sup> and the Fair Debt Collection Practices Act.<sup>3</sup> The intent of the Fair Debt Collection Practices Act is to protect consumers from harmful debt collection practices and to protect ethical collectors from an unfair competitive disadvantage.

The Telemarketing and Consumer Fraud and Abuse Prevention Act requires the FTC to adopt regulations (1) defining and prohibiting deceptive telemarketing acts or practices; (2) restricting the hours when unsolicited telephone calls may be made to consumers; and (3) requiring disclosure of the nature of the call at the start of an unsolicited call made to sell goods or services.<sup>4</sup>

The Fair Debt Collection Practices Act has many provisions which are similar to the Florida Consumer Collection Practices Act.<sup>5</sup> However, there are some key consumer and regulatory provisions in the federal act that are not included under Florida's law: 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 Florida Deceptive and Unfair Trade Practices Act,<sup>6</sup> provides remedies and penalties for "unfair methods of competition, unconscionable acts or practices, and unfair or deceptive acts or practices in the conduct of any trade or commerce".<sup>7</sup> Violations include any violation of the act and rules adopted pursuant to the FTC Act, which would include the standards of unfairness and deception set forth and interpreted by the FTC or the federal courts. Willful violations of the act occur when the person knew or should have known that the conduct was unfair, deceptive, or prohibited by rule. Remedies for practices prohibited by the act may include an action to enjoin a person from committing such acts,<sup>8</sup> an

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<sup>1</sup> 15 U.S.C. ss. 41-58.

<sup>2</sup> 15 U.S.C. ss. 6101-6108.

<sup>3</sup> 15 U.S.C. s. 1692.

<sup>4</sup> 16 C.F.R. Part 310.

<sup>5</sup> Part VI of ch. 559, F.S.

<sup>6</sup> Part II of ch. 501, F.S.

<sup>7</sup> s. 501.204, F.S.

<sup>8</sup> s. 501.207(1)(b), F.S.

action to recover actual damages caused by the violation, as well as the imposition of a civil penalty of generally not more than \$10,000 for each willful violation. Actions can be brought by a state attorney, the Department of Legal Affairs,<sup>9</sup> or by a consumer.<sup>10</sup>

### **Current Situation:**

A violation of any provision of Part IV of ch. 817, F.S., is an unfair or deceptive trade practice under the Florida Deceptive and Unfair Trade Practices Act.<sup>11</sup> The Department of Legal Affairs and the Office of the Attorney General may enforce the act against companies engaging in unfair and deceptive trade practices.<sup>12</sup> A client harmed by a violation of this act may bring an action for recovery of damages, costs and attorney's fees.<sup>13</sup> A person who violates any provision of the act commits a third degree felony,<sup>14</sup> punishable by not more than 5 years in prison,<sup>15</sup> and a fine of up to \$5,000.<sup>16</sup>

Part VI of ch. 559, F.S., regulates consumer collection agencies and protects consumers from certain debt collection practices that involve fraud, harassment, threats, and other unscrupulous activities. Section 559.725, F.S., designates the Department of Financial Services (DFS) as the registry for consumer complaints. Once the DFS receives a sworn complaint against an entity, the DFS refers the complaints to the appropriate regulatory authority or the Florida Bar, if appropriate. In January 2008, the DFS and the OFR mutually agreed to delegate responsibility for the registry to the OFR.

The OFR is responsible for the registration of consumer collection agencies.<sup>17</sup> Currently, there are approximately 1,250 consumer collection agencies registered with the OFR. The annual registration fee is \$200. Any out-of-state debt collector who collects or attempts to collect consumer debt, prior to registration, is subject to an administrative fine, not to exceed \$1,000.<sup>18</sup> Section 559.72, F.S., outlines prohibited practices as they relate to the collection of consumer debts. Such practices range from prohibitions against persons impersonating a law enforcement officer or government agent to using threats of force or violence. Section 559.725, F.S., authorizes the OFR to investigate by means of written communication. However, the OFR has no authority to examine the books and records of a consumer collection agency in determining the factual basis of a complaint, nor does it have the authority to issue subpoenas. Before the OFR takes action, there must be at least five, unresolved, sworn complaints filed by five different consumers within a 12-month period against a consumer collection agency.<sup>19</sup> Since January 2008, the OFR has not levied any fines, nor has it suspended or revoked any registrations because it has not documented five unresolved complaints by five different consumers against one specific consumer collection agency.

The OFR's authority to discipline registrants is limited. The OFR may not revoke or suspend a registration if the debt collection agency can show by a preponderance of the evidence that the violations were not intentional and resulted from a bona fide error.<sup>20</sup> The OFR must also consider the registrant's volume of business when deciding whether to suspend or revoke a registration. The law allows the OFR to fine a registrant, not to exceed \$1,000, for a violation of the prohibited practices provisions. Any action by the OFR to revoke, suspend, or issue an administrative fine must be taken within two years of the date of the last violation upon which the action is founded. The OFR does not have the authority to impose significant administrative sanctions against a consumer collection agency that fails to register. Rather, the act provides it is a first-degree misdemeanor to operate a consumer collection agency without first registering with the office, unless the entity is exempt.<sup>21</sup> The OFR does not have the authority to issue cease and desist orders.

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<sup>9</sup> s. 501.203(2), F.S.

<sup>10</sup> s. 501.211(1), F.S.

<sup>11</sup> ch. 501 part II, F.S.

<sup>12</sup> s. 817.806(1), F.S.

<sup>13</sup> Id.

<sup>14</sup> s. 817.806(2), F.S.

<sup>15</sup> s. 775.082(3)(d), F.S.

<sup>16</sup> s. 775.083(1)(c), F.S.

<sup>17</sup> s. 559.555, F.S.

<sup>18</sup> s. 559.565, F.S.

<sup>19</sup> s. 559.725, F.S.

<sup>20</sup> s. 559.730, F.S.

<sup>21</sup> s. 559.785, F.S.

The OFR is required to notify the appropriate state attorney, or the Attorney General for cases pertaining to out-of-state consumer debt collectors, of any determination by the office regarding a violation of the Florida Consumer Collection Practices Act (Act).<sup>22</sup> State attorneys may apply to a court of competent jurisdiction upon the sworn affidavit of any person alleging a violation of any of the provisions of the Act.<sup>23</sup> The Attorney General is only currently authorized to take action against out-of-state debt collectors in federal court for violations of the Act.

**Effect of Proposed Change:**

The proposed council bill:

- Transfers responsibility for receiving and maintaining records of consumer correspondence and complaints regarding debt collection from the Division of Consumer Services of the Department of Financial Services to the Office of Financial Regulation (OFR).
- Increases the maximum administrative fine from \$1,000 to \$10,000 for an out-of-state consumer debt collector that collects or attempts to collect debt in Florida prior to registering with the OFR.
- Authorizes the Attorney General to initiate action on behalf of the state against an out-of-state consumer debt collector in any state court of competent jurisdiction.
- Authorizes the Attorney General to take action against in-state debt collectors for any violations of the Florida Consumer Collection Practices Act.
- Requires that a written notice be provided to the debtor prior to an assignee taking any action to collect the debt.
- Revises the requirement which must be met regarding complaints against a consumer collection agency prior to the OFR initiating action to investigate a complaint. The requirement for at least five, unresolved, sworn complaints filed by five different consumers within a 12-month period against a consumer collection agency is eliminated. The complainant must certify, in writing, under oath and subject to penalty of perjury a summary of the nature of the alleged violation.
- Specifies that a complainant must certify, subject to penalty of perjury, a summary of the nature of an alleged violation and the facts that allegedly support the complaint, using a prescribed form.
- Requires that registrants maintain books and records for three (3) years and provides that OFR will have access to those records.
- Authorizes the OFR to issue subpoenas, and cease and desist orders.
- Requires that a registered consumer collection agency respond, in writing, to the OFR within 45 days after receipt of a written request from the OFR concerning a consumer complaint. Failure to respond timely can result in an administrative fine of up to \$250 per request per day.
- Authorizes administrative fines of up to \$10,000 for a violation of a prohibited practice.

**B. SECTION DIRECTORY:**

- Section 1. Creates s. 559.5556, F.S., providing for maintenance of records.
- Section 2. Amends s. 559.565, F.S., providing for enhanced enforcement actions against out-of-state consumer debt collectors.
- Section 3. Amends s. 559.715, F.S., providing for a written notice to the debtor.
- Section 4. Amends s. 559.72, F.S., clarifying prohibited practices.
- Section 5. Amends s. 559.725, F.S., providing for transfer and modification of administrative duties.
- Section 6. Creates s. 559.726, F.S., providing for subpoenas.
- Section 7. Creates s. 559.727, F.S., providing for cease and desist orders.
- Section 8. Amends s. 559.730(5), F.S., providing for enhanced administrative remedies.

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<sup>22</sup> Id.

<sup>23</sup> s. 559.78, F.S.

Section 9. Amends s. 559.77, F.S., clarifying civil remedies.

Section 10. Provides for an effective date.

## II. FISCAL ANALYSIS & ECONOMIC IMPACT STATEMENT

### A. FISCAL IMPACT ON STATE GOVERNMENT:<sup>24</sup>

	(FY 10-11)	(FY 11-12)	(FY 12-13)
1. Revenues:			
<u>Recurring</u>			
Registration fees (\$200 x 1,477)	\$ 295,400	\$ 295,400	\$ 295,400
<u>Non-Recurring</u>	\$ 0	\$ 0	\$ 0
<u>Total Revenues</u>	\$ 295,400	\$ 295,400	\$ 295,400
2. Expenditures:			
<u>New Recurring – 2 FTE<sup>25</sup></u>			
Salary and Benefits	\$ 130,725	\$ 130,725	\$ 130,725
Expense	\$ 20,770	\$ 20,770	\$ 20,770
Transfer to DMS	\$ 798	\$ 798	\$ 798
Service Charge to General Revenue (8%)	\$ 20,632	\$ 20,632	\$ 20,632
<u>Existing Recurring<sup>26, 27</sup></u>	\$ 205,118	\$ 205,118	\$ 205,118
<u>Total Recurring</u>	\$ 377,593	\$ 377,593	\$ 377,593
<u>Non-Recurring</u>			
Expense	\$ 7,754		
OCO	\$ 2,000		
<u>Total Non-Recurring</u>	\$ 9,754		
<u>Total Expenditures</u>	\$ 387,347	\$ 377,593	\$ 387,593
<u>Net Fiscal Impact on State Government</u>	<u>(\$ 91,947)</u>	<u>(\$ 82,193)</u>	<u>(\$ 82,193)</u>

### B. FISCAL IMPACT ON LOCAL GOVERNMENTS:

1. Revenues:

None.

2. Expenditures:

None.

<sup>24</sup> Office of Financial Regulation Estimated Fiscal Impact for PCB dated April 7, 2010 on file with the Insurance, Business & Financial Affairs Policy Committee.

<sup>25</sup> See FISCAL COMMENTS.

<sup>26</sup> There are currently 3 positions dedicated to licensing and complaint functions with current expenditures of \$205,118.

<sup>27</sup> Office of Financial Regulation Estimated Fiscal Impact for PCB dated April 7, 2010 on file with the Insurance, Business & Financial Affairs Policy Committee.

### C. DIRECT ECONOMIC IMPACT ON PRIVATE SECTOR:

The broadening of circumstances under which a consumer collection agency might face investigation, and the increase in the upper limit for administrative fines, could negatively impact those agencies violating the Florida Consumer Collection Practices Act.

### D. FISCAL COMMENTS:

The removal of barriers to filing complaints is expected to increase the volume of complaints. To handle the additional workload associated with complaints, the OFR anticipates that at least one additional financial examiner/analyst will be needed. The OFR also estimates that at least one attorney will be required for investigative and enforcement issues.<sup>28</sup>

The OFR has noted that, should the current consumer collection agency registration fee of \$200<sup>29</sup> be increased to \$275, the enhanced revenue would offset the new recurring expenditure.

## III. COMMENTS

### A. CONSTITUTIONAL ISSUES:

#### 1. Applicability of Municipality/County Mandates Provision:

Not applicable. The bill does not appear to: require counties or municipalities to spend funds or take an action requiring the expenditure of funds; reduce the authority that counties or municipalities have to raise revenues in the aggregate; or reduce the percentage of a state tax shared with counties or municipalities.

#### 2. Other:

None.

### B. RULE-MAKING AUTHORITY:

Rule-making authority is granted to the Financial Services Commission for establishing guidelines related to imposing administrative penalties.

### C. DRAFTING ISSUES OR OTHER COMMENTS:

## IV. AMENDMENTS/COUNCIL OR COMMITTEE SUBSTITUTE CHANGES

At the April 14, 2010 meeting of the General Government Policy Council, a strike-all amendment was proposed and adopted.

The amendment:

- Added a requirement that registrants maintain books and records for three (3) years and provided that OFR will have access to those records.
- Added authorization for OFR to issue subpoenas, and cease and desist orders.
- Added the requirement that a written notice must be provided to the debtor prior to an assignee taking any action to collect the debt.
- Specified that a complainant must certify, subject to penalty of perjury, a summary of the nature of an alleged violation and the facts that allegedly support the complaint, using a prescribed form.
- Increased from 20 to 45 the number of days allowed for a collection agency to respond to OFR's written request for information concerning a consumer complaint.
- Decreased the administrative fine for failure to comply with the timely response requirement from \$2,500 per request per day to \$250 per request per day.

<sup>28</sup> Id.

<sup>29</sup> s. 559.555, F.S.

- Provided for an increase in the maximum permissible administrative fine from \$1,000 to \$10,000.
- Changed the effective date from July 1, 2010 to October 1, 2010.

The analysis is drafted to PCB GGPC 10-03, as amended.