

Date of Hearing: June 12, 2023

ASSEMBLY COMMITTEE ON BANKING AND FINANCE

Timothy Grayson, Chair

SB 666 (Min) – As Amended June 5, 2023

SENATE VOTE: 39-0

SUBJECT: Small business: commercial financing transactions

SUMMARY: Restricts or prohibits certain fees charged by commercial financing providers and brokers in connection with commercial financing transactions. Specifically, **this bill:**

1) Makes the following definitions:

- a) “Small business” means an independently owned and operated business that is not dominant in its field of operation, the principal office of which is located in California, the officers of which are domiciled in California, and that, together with affiliates, has 100 or fewer employees and average annual gross receipts of fifteen million dollars (\$15,000,000) or less over the previous three years.
- b) “Commercial financing” to have the same meaning as Section 22800 of the Financial Code, related to commercial financing disclosures, which provides that “commercial financing” means an accounts receivable purchase transaction, including factoring, asset-based lending transaction, commercial loan, commercial open-end credit plan, or lease financing transaction intended by the recipient for use primarily for other than personal, family, or household purposes.
- c) “Recipient” means a person who is presented with a specific commercial financing offer by a provider that is equal to or less than five hundred thousand dollars (\$500,000).

2) Prohibits the following fees from being charged to a small business in connection with a commercial financing transaction:

- a) A fee for accepting or processing a payment required by the terms of the financing contract as an automated clearinghouse transfer debit.
- b) A fee for providing a small business with documentation prepared by the financing provider that contains a statement of the amount due to satisfy the remaining amount owed, including, but not limited to, interest accrued to the date the statement is prepared and a means of calculating per diem interest accruing thereafter.
- c) A fee in addition to an origination fee that does not have a clear corresponding service provided for the fee, including, but not limited to, a risk assessment, due diligence, or platform fee.
- d) A fee for monitoring the small business’s collateral, unless the underlying financing transaction is delinquent for more than 90 days.

- e) A fee for filing or terminating a lien filed in accordance with the provisions of the Uniform Commercial Code against the business's assets that exceeds 150 percent of the cost of the filing or termination.
- 3) Exempts the following from the provisions of the bill:
- a) A provider that is a depository institution.
 - b) A provider that is a lender regulated under the federal Farm Credit Act.
 - c) A commercial financing transaction secured by real property.
 - d) A commercial financing transaction in which the recipient is a dealer or a vehicle rental company, as specified, pursuant to a specific commercial financing offer or commercial open-end credit plan of at least fifty thousand dollars (\$50,000), including any commercial loan made pursuant to such a commercial financing transaction.
 - e) Any person who makes no more than one commercial financing transaction in California in a 12-month period or any person who makes five or fewer commercial financing transactions in California in a 12-month period that are incidental to the business of the person relying upon the exemption
 - f) A commercial financing transaction in which the recipient is a dealer, as defined by Section 285 of the Vehicle Code, or an affiliate of the dealer, pursuant to a specific commercial financing offer or commercial open-end credit plan of at least fifty thousand dollars (\$50,000), including, but not limited to, a commercial loan made pursuant to that commercial financing transaction.
 - g) A commercial financing transaction in which the recipient is a vehicle rental company, or an affiliate of the vehicle rental company, pursuant to a specific commercial financing offer or commercial open-end credit plan of at least fifty thousand dollars (\$50,000), including, but not limited to, a commercial loan made pursuant to that commercial financing transaction.
- 4) Entitles a recipient to the following relief if a provider or broker violates the fee restrictions:
- a) Actual damages sustained as a result of the violation, including, but not limited to, the amount of fees paid by the recipient that are prohibited.
 - b) Statutory damages of at least five hundred dollars (\$500) but not greater than two thousand five hundred dollars (\$2,500).
 - c) Injunctive relief.
 - d) Attorney's fees and costs.
 - e) Any other relief that the court deems proper.
- 5) Provides that a court may award a provider or broker that is the prevailing party in an action brought pursuant to this section reasonable attorney's fees upon a finding that the recipient brought the action in bad faith.

EXISTING LAW:

- 1) Provides the California Financing Law that requires, among other things, licensure of persons engaged in the business of making commercial loans and persons engaged in the brokering of commercial loans. (Financial Code Section 22000 et seq.)
- 2) Requires the disclosure of specified information related to commercial financing transactions. (Financial Code Section 22800 et seq.)

FISCAL EFFECT: Unknown. This bill is keyed nonfiscal by Legislative Counsel.

COMMENTS:

- 1) Purpose.

According to the author:

California's small businesses were hit hard by the impacts COVID-19 had on our economy. With 40,000 small businesses in the state forced to close, many others were required to seek loans to keep their businesses afloat. Some of these commercial lenders or finance companies charge hidden or exorbitant fees to small businesses, making the lending process even more burdensome for small businesses.

This bill would allow the financing process to be more equitable and transparent for small businesses here in California. SB 666 identifies fees charged by lenders or MCA providers that are either exorbitant, hidden, or provide no service to the customer, and then looks to prohibit or cap these fees.

- 2) A new policy focus on "junk fees."

In 2022, the Biden Administration announced a new initiative to reduce or eliminate hidden fees, charges, and add-ons for banking services as well as non-financial services such as cable, airline tickets, and concert tickets. Collectively termed "junk fees," these fees are believed to "weaken market competition, raise costs for consumers and businesses, and hit the most vulnerable Americans the hardest."¹

The Biden Administration points to four broad, and sometimes overlapping, categories of junk fees:

- Mandatory fees that often hide or confuse the full price that will be paid by a consumer, such as concert service fees.
- Surprise fees that consumers learn about after a transaction, such as surprise hospital bills or undisclosed voluntary fees such as airline "family seating fees."

¹ <https://www.whitehouse.gov/briefing-room/blog/2022/10/26/the-presidents-initiative-on-junk-fees-and-related-pricing-practices/>

- Exploitative or predatory fees, which is defined as fees that “far exceed the marginal cost of the service they purport to cover.” Such fees often target consumers who have limited options because those consumers are locked into a product or service.
- Fraudulent fees that involve fraud or misrepresentation. The White House cites the example of advertised “no fee” bank accounts that carry significant indirect charges.

The Biden Administration also notes that junk fees disproportionately impact lower income households and people of color. For example, consumers in low-income and majority-Black neighborhoods paid disproportionately more in credit card late fees, and the National Consumer Law Center found in a 2017 report that Hispanic car buyers paid more in extra add-ons such as service contracts.

3) A new policy focus on small business lending.

Small businesses must navigate a highly complex, fragmented, and quickly-evolving lending market. For even savvy borrowers, understanding available options can be time-consuming and confusing, made more difficult because commercial financing is not covered by long-established federal statutes such as the Truth in Lending Act (TILA). As the Consumer Financial Protection Bureau (CFPB) notes about the small business lending market:

The market is fragmented across numerous different product types, making small business lending very different from residential mortgage lending. Among other sources of financing, small businesses use credit cards and lines of credit; equipment, vehicle, and other closed-end loans, both secured and unsecured; and merchant cash advances. Some lenders offer a variety of products while others specialize.²

Historically, issues around transparency and equity in the small business lending market have been underexplored by California policymakers. This has changed in recent years amid studies and reports documenting the challenging lending environment for small businesses, especially businesses located in low-income or disadvantaged communities or owned by people of color. In response to the proliferation of complex and costly commercial lending products, the Legislature passed SB 1235 (Glazer), Chapter 1011, Statutes of 2018, to require DFPI to establish standardized commercial financing disclosures. SB 1235 aimed to create the first “small business truth in lending law” in the nation to help small business borrowers compare and evaluate the varied financing options available to them.

While SB 1235 became law in 2018, the bill’s provisions only recently took effect in December 2022 following a lengthy and extensive regulatory process. In its press release celebrating the final regulations, DFPI states the new disclosures “will assist small businesses in making more informed decisions about the potential costs of various commercial financing options.”³

² https://files.consumerfinance.gov/f/documents/cfpb_small-business-lending-rule-fact-sheet_2023-03.pdf

³ <https://dfpi.ca.gov/2022/06/14/dfpis-commercial-financing-disclosure-regulations-approved-to-become-effective-as-of-december-9-2022/>

4) A new policy focus on junk fees in small business lending

SB 666 embraces the Biden Administration's efforts to limit the proliferation of junk fees by prohibiting certain fees charged to small businesses for financing and loan products. In many ways, SB 666 complements SB 1235 by limiting the use of certain fees understood to be unnecessary, excessive, or perhaps misleading.

The bill prohibits the use of five specific types of fees found in commercial financing arrangements. These fees are also highlighted in a series of November 2017 Woodstock Institute reports analyzing lending trends and inequities in separate metropolitan regions.⁴ The Woodstock Institute reports note fees amounted to as much as 14% of the gross loan amount in the loans analyzed, sometimes totaling thousands of dollars. Those fees are:

- A fee for accepting or processing a payment required by the terms of the financing contract as an automated clearinghouse transfer debit. The Automated Clearing House (ACH) network is the network by which payments are made between banks without the physical exchange of money. While fees for processing ACH transfers are common and quite small, the Woodstock Institute Report points to the use of ACH set-up fees, often in excess of \$300, as part of the initial financing agreement.
- A fee in addition to an origination fee that does not have a clear corresponding service provided for the fee, including, but not limited to, a risk assessment, due diligence, or platform fee. While AB 666 permits an origination fee, the author's office proposes to prohibit companion fees such as a risk assessment. The author's office notes that to the extent providers charge a higher origination fee, this is the preferable outcome rather than a smaller origination fee mixed with other fees of unknown purpose.
- A fee for monitoring the small business's collateral, unless the underlying financing transaction is delinquent for more than 60 days. According to the author's office, some providers or lenders monitor a borrower's collateral and then assess a surprise fee to the borrower for this service, even when the borrower is in good standing. SB 666 eliminates that fee unless the transaction is delinquent.
- A fee for filing or terminating a lien filed in accordance with the provisions of the Uniform Commercial Code (UCC) against the business's assets that exceeds 150% of the cost of the filing or termination. As the Woodstock Institute reports notes, termination fees can be hundreds of dollars, which far exceed the actual cost of creating a public record. SB 666 proposes to limit such fees that are excessively expensive.
- A fee for providing a small business with documentation prepared by the financing provider that contains a statement of the amount due to satisfy the remaining amount owed, including, but not limited to, interest accrued to the date the statement is prepared and a means of calculating per diem interest accruing thereafter. Payoff letter fees or statement letter fees can occur when borrowers look to refinance into a more affordable product. SB 666's supporters argue this fee is anti-competitive.

⁴ <https://woodstockinst.org/news/press-clips/report-lending-disparities-cost-fresno-small-businesses-millions-dollars/>

5) How small businesses benefit from SB 666.

Advocates, experts, and federal policymakers and regulators acknowledge that eliminating certain fees may not lead to savings for the borrower or consumer. In many cases, the lost revenue for firms will be recouped somewhere else, either through other, more transparent charges, interest, or the retail price of a good or service.

However, the effort to curb the use of junk fees is not just about saving people money. As the White House argues:

Markets work when firms compete on an even playing field – displaying prices to consumers in a fair and transparent manner. Mandatory hidden fees risk obscuring the full price, making it harder for consumers to comparison shop – to choose their preferred product and the best deal. These fees can also create an uneven playing field for businesses, making firms that price in a fair and transparent manner seem more expensive than their rivals.

In the small business lending context, fully understanding the potential cost of a loan or financing arrangement means being able to compare those products with the confidence that there will not be surprise or vague charges later on in the process. Thus, while it is possible providers shift costs in other ways, hopefully they do so in a way that offers a clearer picture of the true costs and trade-offs of a particular small business financing arrangement.

6) Recent amendments.

The author amended SB 666 to include the following changes:

- An amendment to include "small business owners" not just "small businesses".
- A change to 1799.302 (d), reducing 90 days to 60 days to align this timeline with federal Small Business Administration regulations.
- An amendment to exclude floor plan lenders from the bill.
- An amendment clarifying that the ban on ACH fees does not include a fee imposed when an ACH payment fails because of insufficient funds in a borrower's account

7) Related legislation

SB 33 (Glazer, 2023) removes the sunset date that applies to the requirement that providers of commercial financing disclose the total cost of financing expressed as an annualized rate. The bill is pending in this committee.

SB 1235 (Glazer, Chapter 1011, Statutes of 2018) requires providers of commercial financing to disclose specified information about a commercial financing offer, including the total amount of financing, the dollar cost of financing, the method, frequency, and amount of payments, and until January 1, 2024, the total cost of financing expressed as an annualized rate.

8) Amendments

The committee recommends the following amendment to clarify SB 666's existing exemption for "depository institutions," a term undefined in the current version of the bill.

Add the following definition in Section 1799.300:

(f) “Depository institution” means any of the following:

(1) A bank, trust company, or industrial loan company doing business under the authority of, or in accordance with, a license, certificate, or charter issued by the United States, this state, or any other state, district, territory, or commonwealth of the United States that is authorized to transact business in this state.

(2) A federally chartered savings and loan association, federal savings bank, or federal credit union that is authorized to transact business in this state.

(3) A savings and loan association, savings bank, or credit union organized under the laws of this or any other state that is authorized to transact business in this state.

REGISTERED SUPPORT / OPPOSITION:**Support**

California Association of Micro Enterprise Opportunity (CAMEO)
Small Business Majority
The Greenlining Institute
Consumer Federation of California
Housing and Economic Rights Advocates

Opposition

None on file

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