

BILL ANALYSIS

C.S.H.B. 3827
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Pensions, Investments & Financial Services
Committee Report (Substituted)

BACKGROUND AND PURPOSE

In recent years, companies that provide earned wage access services have been on the rise. Earned wage access companies provide consumers with the ability to receive a certain portion of their earned but unpaid wages before their scheduled payday. These companies are not payday lenders, and they cannot be adequately categorized under the existing statutes found in the Finance Code. With the proliferation of this newly emerging business model, necessary guardrails must be put in place to protect the increasing number of earned wage access service consumers. C.S.H.B. 3827 seeks to create a new chapter in the Finance Code regulating earned wage access services and the providers of such services with respect to both business-to-business and business-to-consumer interactions.

CRIMINAL JUSTICE IMPACT

It is the committee's opinion that this bill does not expressly create a criminal offense, increase the punishment for an existing criminal offense or category of offenses, or change the eligibility of a person for community supervision, parole, or mandatory supervision.

RULEMAKING AUTHORITY

It is the committee's opinion that rulemaking authority is expressly granted to the Finance Commission of Texas in SECTIONS 1, 2, and 5 of this bill.

ANALYSIS

C.S.H.B. 3827 amends the Finance Code to provide for the licensing of an earned wage access services provider and the regulation of earned wage access services, defined by the bill as the business of providing the following:

- consumer-directed wage access services, which involves offering or providing services directly to a Texas consumer based on the consumer's earned but unpaid income;
- employer-integrated wage access services, which involves delivering to Texas consumers access to earned but unpaid income that is based on employment, income, and attendance data obtained directly or indirectly from an employer; or
- both consumer-directed wage access services and employer-integrated wage access services.

The bill defines "earned but unpaid income" as salary, wages, compensation, or income that a consumer represents, and a provider reasonably determines, has been earned or has accrued to the benefit of the consumer in exchange for the consumer's provision of services to an employer or on the employer's behalf and that has not been paid to the consumer by the employer at the time the provider pays the consumer proceeds of such earned but unpaid income. The bill defines "employer" as a person who employs a consumer or a person who is contractually obligated to pay a consumer earned but unpaid income on an hourly, project-based, piecework, or other basis, in exchange for the consumer's provision of services to the employer or on the employer's behalf, including to a consumer who is acting as an independent contractor with respect to the employer. The term does not include a customer of the employer or a person whose obligation to pay

salary, wages, compensation, or other income to a consumer is not based on the consumer's provision of services for or on behalf of that person. The bill specifies that "fee," for purposes of its provisions regarding earned wage access services, includes an amount charged by a provider for expedited delivery or other delivery of proceeds to a consumer and for a subscription or membership fee charged by a provider for a bona fide group of services that includes earned wage access services. The term does not include a voluntary tip, gratuity, or donation paid to the provider.

Application for and Issuance of Required Licenses

C.S.H.B. 3827 requires a person to hold a license to engage in the business of offering or providing earned wage access services in Texas and prohibits a person from using any device, subterfuge, or pretense to evade the application of that requirement. The bill expressly does not require the following entities to obtain a license:

- a bank, credit union, savings bank, or savings and loan association organized under the laws of the United States or under the laws of the financial institution's state of domicile; or
- an employer that offers a portion of salary, wages, or compensation directly to its employees or independent contractors before the normally scheduled pay date.

C.S.H.B. 3827 sets out provisions with respect to application requirements that do the following:

- requires the application to be under oath, give the approximate location from which the business is to be conducted or state that the business will be conducted entirely online, identify the business's principal parties in interest, and contain other relevant information that the consumer credit commissioner requires;
- requires an applicant, on the filing of one or more license applications, to pay to the commissioner an investigation fee of \$200 and a license fee in a certain amount determined by the Finance Commission of Texas and requires the commission to set the fee by rule in an amount necessary to recover the costs of administering the bill;
- if required by the commissioner, requires an applicant to file with the application a bond that is in the amount of \$10,000 regardless of the number of license applications filed by the applicant, satisfactory to the commissioner, and issued by a surety company qualified to do business as a surety in Texas;
- requires the bond to be in favor of the state for the use of the state and the use of a person who has a cause of action against the license holder;
- requires the bond to be conditioned on the license holder's faithful performance under the bill's provisions and rules adopted thereunder and on the payment of all amounts that become due to the state or another person during the period for which the bond is given; and
- caps the aggregate liability of a surety to all persons damaged by the license holder's violation of the bill at the bond amount.

C.S.H.B. 3827 requires the commissioner, on the submission of an application and the requisite bond and fees, as applicable, to conduct an investigation to determine whether to issue the license. In addition, the bill does the following:

- requires the commissioner to approve the application and issue to the applicant a license if the commissioner finds the applicant has net assets of at least \$25,000 available for the operation of the business and that the applicant's financial responsibility, experience, character, and general fitness are sufficient to command the confidence of the public and warrant the belief that the business will be operated lawfully and fairly within the bill's purpose;
- requires the commissioner to notify an applicant if the commissioner finds the applicant does not meet eligibility requirements;
- entitles an applicant who receives notice that the applicant did not meet the eligibility requirements to a hearing on the application not later than the 60th day after the date of

requesting the hearing, which must be made not later than the 30th day after the date of receiving that notification;

- requires the commissioner to approve or deny the application not later than the 60th day after the date a completed application with the required fees is filed or, if a hearing is held, after the date of the hearing's completion and authorizes the commissioner and applicant to agree to a later date in writing; and
- if the commissioner denies the application, requires the commissioner to retain the investigation fee and return the license fee submitted with the application.

C.S.H.B. 3827 sets out provisions with respect to an issued license that, as follows:

- establish that the license is valid for a period prescribed by finance commission rule, not to exceed two years, and requires the commission to prescribe that period by rule;
- require the license to state the name of the license holder and the address of the office from which the business is to be conducted or, if the business is to be conducted entirely online, the address of the license holder's headquarters;
- prohibit a license holder from conducting business under a name other than the name stated on the license or at a location other than the address stated on the license unless the business is to be conducted entirely online;
- require a license holder to display the license at the place of business provided on the license or, for a business conducted online, include its license number on the business's website;
- require a license holder to maintain for each office for which a license is held net assets of at least \$25,000 that are used or readily available for use in conducting that office's business;
- require a license holder that operates entirely online to maintain net assets of at least \$25,000;
- require a license holder, not later than the 30th day before the date the license expires, to pay to the commissioner for each license held a fee in an amount determined by commission rule; and
- establish that a license expires if the license fee is not paid before the 16th day after the date on which written notice of delinquency of payment has been given to the license holder.

C.S.H.B. 3827 authorizes the commissioner to refuse to renew the license of a person who fails to comply with an order issued by the commissioner to enforce the bill and authorizes the commissioner, after notice and opportunity for a hearing, to suspend or revoke a license if the commissioner finds the following:

- the license holder failed to pay the applicable license fee, an examination fee, an investigation fee, or another charge imposed by the commissioner;
- the license holder, knowingly or without the exercise of due care, violated the bill or a rule adopted or ordered thereunder; or
- a fact or condition exists that, if it had existed or had been known to exist at the time of the original license application, clearly would have justified the commissioner's denial of the application.

The bill subjects a license holder who violates the bill to revocation of the holder's license and, if the license holder is a corporation, forfeiture of the corporation's charter. The bill requires the attorney general, when notified of a violation and license revocation, to file suit in a district court in Travis County, if the license holder is a corporation, for forfeiture of the license holder's charter.

C.S.H.B. 3827 requires the commissioner's decision on the suspension or revocation of a license and the evidence considered by the commissioner in making the decision to be filed in the commissioner's public records. The bill provides for the commissioner's authority to reinstate a suspended license or issue a new license to a person whose license has been revoked under certain circumstances and for the method by which a license holder may surrender a license.

The bill establishes that the suspension, revocation, or surrender of a license does not affect the obligation of a contract between the license holder and a consumer entered into before the revocation, suspension, or surrender and that the surrender of a license does not affect the license holder's civil or criminal liability for an act committed before surrender.

C.S.H.B. 3827 requires a license holder to give written notice to the commissioner before the 30th day preceding the date the license holder moves an office from the location provided on the license and requires the commissioner to amend the license accordingly. The bill authorizes a license to be transferred or assigned only with the commissioner's approval.

Limiting Liability by Late Licensure

C.S.H.B. 3827 authorizes a person who obtains or renews a license after the date on which the person was required to do so to limit the person's liability by paying to the commissioner all prior license fees that the person should have paid and a late filing fee as prescribed by the bill. The bill does the following:

- establishes that a person who renews an expired license and pays the applicable license fees and, if required, a late filing fee is considered for all purposes to have held the required license as if it had not expired;
- exempts such a person from any liability, forfeiture, or penalty relating to the person's not holding a license during the period for which the license fees and late filing fee are paid; and
- applies a benefit provided by these limited liability provisions to a license holder's employees or other agents, employers, predecessors, successors, and assigns but does not apply to any other person required to be licensed under Finance Code provisions relating to consumer protection with respect to financial services.

Disclosure Statement

C.S.H.B. 3827 requires an earned wage access services provider, before executing a contract with a consumer for the provision of earned wage access services, to provide the consumer with a written or electronic disclosure that does the following:

- informs the consumer of the consumer's rights under the contract;
- fully and clearly discloses each fee associated with the earned wage access services;
- includes an explanation of the consumer's right to proceed against the surety bond; and
- provides the name and address of the surety company that issued the surety bond.

The disclosure may be included as part of the contract to provide earned wage access services. The bill requires a provider to notify a consumer of any material change to the information provided in such a disclosure statement to that consumer, using a font and language intended to be easily understood by a layperson, before implementing the particular change with respect to that consumer. The bill applies these disclosure provisions only to a contract for earned wage access services entered into on or after the bill's effective date.

C.S.H.B. 3827 requires a provider to keep in its files a copy of the disclosure statement, including any notifications of material changes to the statement, that includes the consumer's written or digital signature acknowledging receipt of the statement or notification until the second anniversary of the date on which the disclosure or notification was provided.

Contract for Services

C.S.H.B. 3827 authorizes each contract for the provision of earned wage access services to a consumer by an earned wage access services provider to be in writing or electronic form and requires a contract to be dated, include the written or digital signature of the consumer, and use a font and language intended to be easily understood by a layperson. Each contract must disclose the following:

- the provider is required to offer the consumer at least one reasonable option to obtain proceeds at no cost to the consumer and clearly explain how to elect that no-cost option;
- fee obligations are subject to the limitations on compelling or attempting to compel repayment established by the bill;
- proceeds will be provided to the consumer using a method agreed to by the consumer and the provider;
- the consumer may cancel participation in the provider's earned wage access services at any time without incurring a cancellation fee;
- the provider is required to develop and implement policies and procedures to respond to questions asked and concerns raised by consumers and to address complaints from consumers in an expedient manner;
- if a provider seeks repayment of outstanding proceeds, a fee, or another payment from a consumer, including a voluntary tip, gratuity, or other donation, from a consumer's account at a depository institution through an electronic funds transfer or other means, the provider must comply with applicable provisions of and regulations adopted under the federal Electronic Fund Transfer Act and, unless the payment sought was incurred by the consumer using fraudulent or unlawful means, reimburse the consumer for the full amount of any overdraft or non-sufficient funds fees imposed on the consumer by the consumer's depository institution if the provider attempts to seek any payment from the consumer on a date before, or in a different amount from, the date or amount disclosed to the consumer for that payment;
- the provider is required to comply with all local, state, and federal privacy and information security laws; and
- if the provider solicits, charges, or receives a tip, gratuity, or donation from the consumer, the provider must provide clear disclosure with respect to the voluntary nature of the tip, gratuity, or donation immediately before each transaction and in each contract and other service contracts with consumers and may not mislead or deceive the consumer regarding that voluntary nature or represent that the tip, gratuity, or donation will benefit a specific individual.

The bill applies these contract form and terms provisions only to a contract for earned wage access services entered into on or after the bill's effective date. The bill requires a provider to make available to the consumer a copy of the completed contract, when receipt of the document is acknowledged by the consumer.

Prohibitions

C.S.H.B. 3827 prohibits an earned wage access services provider from doing the following in connection with providing earned wage access services to consumers:

- sharing with an employer any fees, tips, gratuities, or other donations that were received from or charged to a consumer for earned wage access services;
- accepting payment of outstanding proceeds, a fee, or a tip, gratuity, or other donation from a consumer through use of a credit card or charge card;
- charging a late fee, deferral fee, interest, or other penalty or charge for failure to pay outstanding proceeds, a fee, or a tip, gratuity, or other donation;
- reporting any information regarding the provider's inability to receive repayment of outstanding proceeds, or receive a fee or a tip, gratuity, or other donation, from a consumer to a consumer credit reporting agency or a debt collector;
- requiring a consumer's credit report or credit score to determine the consumer's eligibility for earned wage access services; or
- compelling or attempting to compel payment by a consumer of outstanding proceeds, a fee, or a tip, gratuity, or other donation to the provider using the following methods:
 - repeatedly attempting to debit a consumer's depository institution account in violation of applicable payment system rules;
 - making outbound telephone calls to the consumer;
 - filing a suit against the consumer;

- using a third party to pursue collection of the payment from the consumer on the provider's behalf; or
- selling the outstanding amount to a third-party collector or debt buyer for purposes of collection from the consumer.

A provider is expressly not precluded from using any such method to compel or attempt to compel repayment of outstanding amounts incurred by a consumer through fraudulent or unlawful means or to pursue an employer for breach of the employer's contractual obligations to the provider.

C.S.H.B. 3827 additionally prohibits a provider from doing the following:

- making or using a false or misleading representation or statement to a consumer during the offer or provision of earned wage access services;
- directly or indirectly engaging in a fraudulent or deceptive act, practice, or course of business relating to the offer or provision of earned wage access services;
- advertising its services if the provider has not obtained a license to provide earned wage access services; and
- attempting to cause a consumer to waive a right under the bill.

Administration of Provisions

C.S.H.B. 3827 authorizes the commission to adopt rules to enforce the bill's earned wage access services provisions and requires the commissioner to recommend proposed rules to the commission. The bill requires the commission to establish reasonable and necessary fees for carrying out the commissioner's powers and duties under those provisions. The bill requires the commissioner or the commissioner's representative, at the times the commissioner considers necessary, to examine each place of business of each licensed provider and investigate the provider's transactions and records, including books, accounts, papers, and correspondence, to the extent the transactions and records pertain to the business subject to the license. The bill requires a licensed provider to pay to the commissioner an amount assessed by the commissioner to cover the direct and indirect cost of an examination and a proportionate share of general administrative expenses.

C.S.H.B. 3827 requires the licensed provider to give the commissioner or the commissioner's representative free access to the provider's office, place of business, files, safes, and vaults and to provide the commissioner electronic copies of books, accounts, papers, and correspondence as requested by the commissioner. A licensed provider's violation of this requirement is a ground for the suspension or revocation of the provider's license. The bill authorizes the commissioner or the commissioner's representative during an examination to administer oaths and examine any person under oath on any subject pertinent to a matter that the commissioner is authorized or required to consider, investigate, or secure information about under the bill. The bill establishes that information obtained under these provisions is confidential.

C.S.H.B. 3827 authorizes the commissioner, or the commissioner's representative, to discover violations or to obtain required information, to investigate the records, including books, accounts, papers, and correspondence, of a licensed provider or other person who the commissioner has reasonable cause to believe is violating the bill, regardless of whether the person claims to not be subject to the bill. The bill subjects its earned wage access services provisions to the investigative and enforcement authority granted to the commissioner under the Finance Code.

C.S.H.B. 3827 requires the commissioner, on application by any person and on payment of any associated cost, to furnish under the commissioner's seal and signed by the commissioner or an assistant of the commissioner a certificate of good standing or a certified copy of a license, rule, or order. The bill establishes that the transcript of a hearing held by the commissioner under the bill is a public record. The bill requires a licensed provider to maintain on file with the commissioner the name and address of the provider's registered agent for service of process.

C.S.H.B. 3827 requires a licensed provider to maintain a record of each transaction as is necessary to enable the commissioner to determine whether the provider is complying with the bill's provisions. The bill requires a licensed provider to keep the record and make it available electronically or physically in Texas until the later of the fourth anniversary of the date of the transaction or the second anniversary of the date on which the final entry is made in the record. The bill requires the commissioner to accept a licensed provider's system of records if the system discloses the requisite provider transaction information.

C.S.H.B. 3827 requires a licensed provider to annually file with the commissioner a report, not later than May 1 or a later date set by the commissioner, that contains relevant information required by the commissioner concerning the provider's business and operations in Texas during the preceding calendar year and specifies the information that must be included in the report. The bill makes the report confidential and requires the report to be under oath and in the form prescribed by the commissioner. The bill requires the commissioner to annually prepare and publish a consolidated analysis and recapitulation of provider reports.

C.S.H.B. 3827 authorizes the commissioner to assess an administrative penalty against a person who knowingly and wilfully violates or causes a violation of the bill's provisions or a rule adopted thereunder. The bill authorizes the commissioner to order an earned wage access services provider who violates those provisions or such a rule to pay restitution to an identifiable person.

Applicability Provisions

C.S.H.B. 3827 exempts a person licensed to provide earned wage access services from the Money Services Act or statutory provisions regarding the regulation of interest, loans, and financed transactions with respect to earned wage access services offered or provided by the person. The bill establishes that the bill controls if there is a conflict between its provisions and any other Finance Code provisions relating to consumer protection with respect to financial services. The bill voids a waiver of a bill provision by a consumer.

Criminal History Record Check

C.S.H.B. 3827 amends the Government Code to entitle the commissioner to obtain information from the Texas Department of Public Safety (DPS) criminal history record information that relates to an applicant for a license to provide earned wage access services.

Deadline to Obtain License

C.S.H.B. 3827 requires a person engaging in business as an earned wage access services provider on the bill's effective date to obtain a license to engage in that business not later than January 1, 2024.

EFFECTIVE DATE

September 1, 2023.

COMPARISON OF INTRODUCED AND SUBSTITUTE

While C.S.H.B. 3827 may differ from the introduced in minor or nonsubstantive ways, the following summarizes the substantial differences between the introduced and committee substitute versions of the bill.

While both the introduced and the substitute regulate the provision of earned wage access services, they differ in their approach. In doing so, the introduced provided for the filing of a

registration statement with the secretary of state of an earned wage access provider, whereas the substitute provides for the regulation of such a provider. Accordingly, the substitute does not include provisions that were in the introduced and relate to the following:

- a registration statement, an update of a registration statement, and an inspection of a registration statement;
- a fee for filing the registration;
- persons not covered by the bill;
- prohibited acts in connection with providing earned wage access services;
- a surety bond, a surety account, the amount of surety bond or account, the beneficiary of surety bond, a claim against surety bond or account, the term of surety bond or account, and the payment of money in surety account to a credit services organization;
- a criminal penalty, injunctive relief, damages, deceptive trade practices, and the statute of limitations;
- the definitions of "mandatory payment," "non-mandatory payment," "nonrecourse," and "obligor"; and
- a requirement for an applicable person to register with the secretary of state not later than January 1, 2024.

The substitute includes provisions that were not in the introduced and relate to the following:

- licensing requirements and the issuance of a license, application requirements and a fee, a bond, the investigation of an application, the approval or denial of an application, the disposition of fees on denial of an application, and the license term;
- the name and place on a license, displaying a license, minimum assets for a license, a license fee, the expiration of a license on the failure to pay the fee, the grounds for refusing license renewal, license suspension or revocation, corporate charter forfeiture, filing a license suspension or revocation with public records, the reinstatement of a suspended license or issuance of a new license after revocation, the surrender of a license, moving an office, transferring or assigning a license, and the effect of a license suspension, revocation, or surrender;
- limiting liability for late licensure based on the payment of fees, the schedule of such fees for obtaining or renewing a license, and the effect of compliance with certain Finance Code consumer protection provisions for a license holder and on a person other than the license holder;
- prohibited acts in connection with providing earned wage access services;
- the adoption of rules, the examination of providers and access to certain records, the general investigating authority of the commissioner or of the commissioner's representative, a certificate of good standing and a certified copy of certain documents, a transcript of a hearing, the appointment of an agent, the payment of examination costs and administrative expenses, a licensee's records, and annual reports;
- the duty of the commission to establish and set reasonable and necessary licensing fees by rule regarding earned wage access services;
- the duty of the commission to prescribe by rule the licensing period for an earned wage access services provider;
- the application of the commissioner's general investigative and enforcement authority to the bill's earned wage access services provisions;
- the authority of the commissioner to order the payment of restitution to an identifiable person by an earned wage access services provider who violates the bill or a rule adopted under the bill;
- the authority of the commissioner to obtain criminal history record check information for an applicant or license holder regarding earned wage access services from DPS;
- the inapplicability of the Money Services Act to a person licensed under the bill and the controlling nature of the bill's provisions over any conflict in law;
- the definitions of "consumer-directed wage access services," "employer," "employer-integrated wage access services," and "fee"; and
- a requirement for an applicable person to obtain a license not later than January 1, 2024.

The substitute includes but revises the definition provisions contained in the introduced in the following manner:

- specifies that "earned but unpaid income" includes salary and is in exchange for the consumer's provision of services to an employer or on the employer's behalf; and
- changes "earned wage access services" from the business of delivering proceeds to a consumer before the next date on which an obligor is obligated to pay salary, wages, compensation, or other income to the consumer, as in the introduced, to the business of providing consumer-directed, employer-integrated, or both consumer-directed and employer-integrated wage access services.

While both the introduced and the substitute provide for a disclosure statement that must be provided to a consumer before executing a contract for earned wage access services, they differ in their disclosure requirements in the following manner:

- the substitute does not include provisions from the introduced requiring the statement to contain the following:
 - the terms of the services offered by the provider, including a description of any non-mandatory payments that may be directly imposed by the provider in connection with the provision of services;
 - a statement that the commissioner has oversight authority over services performed by the provider and includes a telephone number and a website for submission of consumer complaints to the commissioner regarding the provider's services; and
 - as an alternative to the name and address of the surety company issuing the surety bond as provided in both bill versions, the name and address of the depository and the trustee and the account number of the surety account;
- the substitute includes a provision that was not in the introduced requiring the provider to notify a consumer of any material change to the information provided in the statement to that consumer, using a font and language intended to be easily understood by a layperson, before implementing the particular change with respect to that consumer; and
- the substitute includes a provision that was not in the introduced requiring the provider to keep in its files a copy of such a notification of a material change.

While both the introduced and the substitute provide for the required form and terms of a contract for the provision of earned wage access services, they differ in their contract requirements in the following manner:

- the substitute requires the contract to be in a font intended to be easily understood by a layperson, whereas the introduced did not;
- the substitute requires the contract to contain disclosures not required by the introduced regarding the requirement to offer the consumer at least one reasonable option to obtain proceeds at no cost, fee obligations being subject to certain limitations, a provider's policies and procedures to respond to questions and concerns, the provider's compliance with the federal Electronic Fund Transfer Act and reimbursement to a consumer seeking repayment for certain payments from the consumer's account at a depository institution, the duty of the provider to comply with applicable privacy and information security laws, and the voluntary nature of a tip, gratuity, or donation; and
- the substitute does not include provisions from the introduced requiring the contract to contain disclosures regarding proceeds being provided on a nonrecourse basis, non-mandatory payment obligations being treated as nonrecourse payment options, notification to the consumer when the provider will first attempt to seek repayment of proceeds, and the provider's compliance with any applicable rules for use of an automated clearinghouse transaction if attempting to seek repayment from a consumer's depository institution.