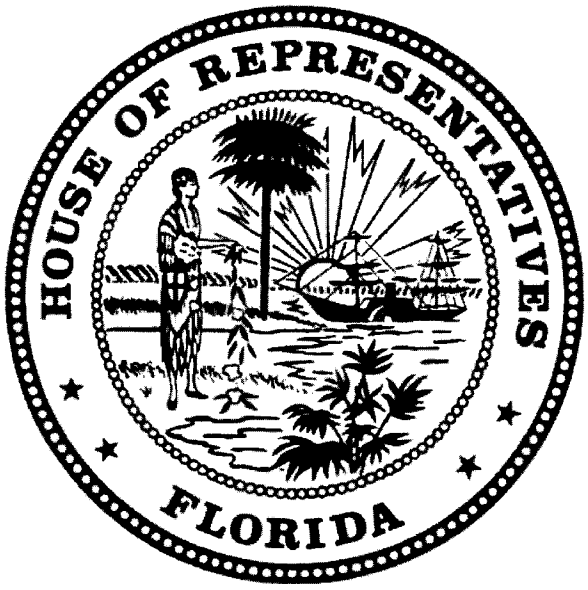

Insurance & Banking Subcommittee

Wednesday, January 13, 2016
1:00 PM
Sumner Hall (404 HOB)

MEETING PACKET

Steve Crisafulli
Speaker

John Wood
Chair

Committee Meeting Notice

HOUSE OF REPRESENTATIVES

Insurance & Banking Subcommittee

Start Date and Time:	Wednesday, January 13, 2016 01:00 pm
End Date and Time:	Wednesday, January 13, 2016 03:00 pm
Location:	Sumner Hall (404 HOB)
Duration:	2.00 hrs

Consideration of the following bill(s):

HB 337 Vision Care Plans by Peters
CS/HB 393 Estates by Civil Justice Subcommittee, Berman
HB 445 Viatical Settlements by Stevenson
HB 613 Workers' Compensation System Administration by Sullivan
HB 717 Consumer Credit by Burgess
HB 817 Mergers and Acquisitions Brokers by Raulerson

Pursuant to rule 7.12, the filing deadline for amendments to bills on the agenda by a member who is not a member of the committee or subcommittee considering the bill is 6:00 p.m., Tuesday, January 12, 2016.

By request of the Chair, all Insurance & Banking Subcommittee members are asked to have amendments to bills on the agenda submitted to staff by 6:00 p.m., Tuesday, January 12, 2016.

NOTICE FINALIZED on 01/11/2016 3:20PM by McCloskey.Michele

The Florida House of Representatives

Regulatory Affairs Committee

Insurance & Banking Subcommittee

Steve Crisafulli
Speaker

John Wood
Chair

AGENDA

January 13, 2016
404 House Office Building
1:00 PM – 3:00 PM

I. Prayer and Pledge of Allegiance

II. Call to Order & Roll Call

III. Consideration of the following bill(s):

A. HB 337 Vision Care Plans by Peters

B. CS/HB 393 Estates by Civil Justice Subcommittee, Berman

C. HB 445 Viatical Settlements by Stevenson

D. HB 613 Workers' Compensation System Administration by Sullivan

E. HB 717 Consumer Credit by Burgess

F. HB 817 Mergers and Acquisitions Brokers by Raulerson

IV. Adjournment

303 House Office Building, 402 South Monroe Street, Tallahassee, Florida 32399-1300
(850) 717-4871 Fax: (850) 413-0419

HOUSE OF REPRESENTATIVES STAFF ANALYSIS

BILL #: HB 337 Vision Care Plans
SPONSOR(S): Peters and others
TIED BILLS: **IDEN./SIM. BILLS:** SB 340

REFERENCE	ACTION	ANALYST	STAFF DIRECTOR or BUDGET/POLICY CHIEF
1) Health Innovation Subcommittee	11 Y, 0 N	Langston	Poche
2) Insurance & Banking Subcommittee		Peterson KP	Luczynski NJ
3) Health & Human Services Committee			

SUMMARY ANALYSIS

Ophthalmologists, optometrists, and opticians are health care practitioners, as defined in s. 456.001(4), F.S. They are regulated by their respective boards within the Division of Medical Quality Assurance and are overseen by the Department of Health (DOH).

The key difference between ophthalmologists, optometrists, and opticians is the scope of their practice. An optician designs, verifies, fits, and dispenses eyeglasses, contact lenses, and other optical devices upon the written prescription of a licensed ophthalmologist or optometrist; an optician does not diagnose or treat eye diseases. In addition to being able to dispense eyeglasses and contact lenses, an optometrist performs eye exams and vision tests to detect certain eye abnormalities, prescribes eyeglasses and contact lenses, and prescribes medications for eye diseases. An optometrist is not a medical doctor and is not authorized within the scope of practice to perform surgery or other invasive procedures. An ophthalmologist is a medical doctor or an osteopathic physician; therefore, in addition to being able to perform the duties of an optometrist, the ophthalmologist is licensed to perform eye surgeries.

Ophthalmologists, optometrists, and opticians routinely contract with health insurers, prepaid limited health services organizations (PLHSOs), and health maintenance organizations (HMOs) for the provision of vision care services. In a study commissioned by the American Optometric Association, optometrists reported in 2011 that two-thirds of revenue comes from third-party payers. A separate survey indicated that 48 percent of U.S. adults were enrolled in vision plans during 2012. Nationwide, vision care is approximately a $36 billion industry.

Credentialing is a process for the collection and verification of a provider's professional qualifications. An HMO is required by law to have a system for verification and examination of the credentials of each of its providers. Credentialing is also a required element for health plan accreditation by the National Commission for Quality Assurance. Some plans contract for credentialing services through a third-party vendor.

HB 337 prohibits health insurers, PLHSOs, and HMOs from requiring an ophthalmologist or optometrist to join a network solely for the purpose of credentialing the licensee for another insurer's, PLHSO's, or HMO's vision network. The bill also prohibits health insurers, PLHSOs, and HMOs from restricting an ophthalmologist, optometrist, or optician to specific suppliers of materials or optical laboratories. Additionally, the bill requires health insurers, PLHSOs, and HMOs to update their online vision care network provider directories on a monthly basis to reflect current participating providers.

The bill makes a violation of these prohibitions an unfair insurance trade practice.

The bill does not appear to have a fiscal impact on state or local government.

The bill provides for an effective date of July 1, 2016.

FULL ANALYSIS

I. SUBSTANTIVE ANALYSIS

A. EFFECT OF PROPOSED CHANGES:

Background

Regulation of Ophthalmologists, Optometrists, and Opticians

Ophthalmologists, optometrists, and opticians are health care practitioners, as defined in s. 456.001(4), F.S., and are regulated by their respective boards within the Division of Medical Quality Assurance[1] within the Department of Health (DOH).[2] Ophthalmologists are governed by the practice act in Chapter 458 or 459, F.S.; optometrists are governed by the practice act in Chapter 463, F.S.; opticians are governed by the practice act in Chapter 484, Part I, F.S.

Ophthalmologists

Ophthalmology is a branch of medicine specializing in the anatomy, function, and diseases of the eye. Ophthalmologists provide a full spectrum of eye care. They perform functions of optometrists, such as annual eye exams and prescribing glasses and contact lenses. In addition, they are authorized within their scope of practice to perform delicate eye surgery. Ophthalmologists are either Medical Doctors (MDs) or Doctors of Osteopathic Medicine (DOs). They are regulated by the Board of Medicine and the Board of Osteopathic Medicine, respectively.

Optometrists

Optometrists, licensed by the Board of Optometry, are the primary health providers for normal vision care, including yearly checkups. They are licensed to practice optometry, which involves performing eye exams and vision tests, prescribing and dispensing glasses and contact lenses, detecting certain eye abnormalities, and prescribing medications for certain eye diseases.[3] Optometrists, or Doctors of Optometry, are not medical doctors and are not authorized within their scope of practice to perform surgery or other invasive techniques.[4]

Opticians

Opticians, licensed by Board of Opticianry, are technicians trained to design, verify and fit eyeglass lenses and frames, contact lenses, and other devices to correct eyesight.[5] Opticians are not permitted to test vision, diagnose or treat eye diseases, or write prescriptions for visual correction. Opticians rely on prescriptions supplied by ophthalmologists or optometrists to provide services.

Third-Party Reimbursement for Vision Care Services

In a study commissioned by the American Optometric Association, optometrists reported in 2011 that two-thirds of revenue comes from third-party payers. Reimbursements from vision insurance plans accounted for 31 percent of revenues; reimbursements from private medical insurers accounted for 17 percent of revenue; and government reimbursements accounted for 17 percent of revenue. A separate survey indicated that 48 percent of U.S. adults were enrolled in vision plans during 2012.[6] Nationwide,

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[1] s. 456.001, F.S.
[2] s. 456.004, F.S.
[3] AMERICAN ASSOCIATION FOR PEDIATRIC OPHTHALMOLOGY AND STRABISMUS, *Differences between Ophthalmologist, Optometrist and Optician*, http://www.aapos.org/terms/conditions/132 (last visited Jan. 4, 2016).
[4] s. 463.0055(1)(a), F.S.
[5] *Supra* note 3.
[6] AMERICAN OPTOMETRIC ASSOCIATION, *AOA Excel and Jobson Medical Information present, An action-oriented analysis of The State of the Optometric Profession: 2013,* at 14, *available at* https://www.google.com/?gws_rd=ssl#q=the+state+of+the+optometric+profession.

vision care is approximately a $36 billion industry comprised of services ($15 billion) and sale of corrective eye glasses and lenses ($21 billion) with expected growth of approximately 1 percent to 2 percent.[7]

Health Insurer Contracts

Health insurer provider contracts are regulated by the Office of Insurance Regulation (OIR) under part VI of ch. 627, F.S.

There are certain limitations placed on health insurer contracts. Section 627.6474(1), F.S., provides that a health insurer may not require that a health care practitioner accept the terms of other health care practitioner contracts with any other insurer or health maintenance organization (HMO) that is under common management and control of the insurer. This includes contracts for Medicare and Medicaid services, and services provided by a preferred provider organization, an exclusive provider organization, or a prepaid limited health service organization (PLHSO). This type of provision is typically referred to as an "all products clause." A contract provision that violates this prohibition is void. The only exception is for a practitioner in a group practice who must accept the terms of a contract negotiated for the practitioner by the group, as a condition of continuation or renewal of the contract. Additionally, s. 627.6474(2), F.S., provides that a contract between a health insurer and a dentist for the provision of dental services may not require the dentist to provide services to the insured under such contract at a fee set by the health insurer unless such services are covered services under the applicable contract.

Current Florida law does not prohibit health insurer provider contracts from requiring a licensed ophthalmologist or optometrist to join a network or restricting an ophthalmologist, optometrist, or optician to specific suppliers of materials or optical laboratories. There are also no statutes that require health insurers to update network provider directories monthly or to make such directories available in an online version.

Prepaid Limited Health Service Organization Arrangements

PLHSOs provide limited health services to enrollees through an exclusive panel of providers in exchange for a prepayment, and are authorized in part I of ch. 636, F.S. Limited health services are ambulance services, dental care services, vision care services, mental health services, substance abuse services, chiropractic services, podiatric care services, and pharmaceutical services. Provider agreements for PLHSOs are authorized in s. 636.035, F.S., and must comply with the requirements in that section.

There are other limitations on PLHSO provider agreements. Like insurance contracts, PLHSO provider agreements may not, as a condition of continuation or renewal of a contract, require compliance with an "all products clause." Like insurance contracts, a PLHSO contract provision that violates this prohibition is void.[8] Again, there is an exception to this limitation for a practitioner in a group practice who must accept the terms of a contract negotiated for the practitioner by the group, as a condition of continuation or renewal of the contract. Additionally, s. 636.035(13), F.S., provides that a contract between a health insurer and a dentist for dental services may not contain a provision that requires the dentist to provide services to the subscriber of the PLHSO at a fee set by the PLHSO unless such services are covered services under the applicable contract.

Section 636.035, F.S., does not prohibit PLHSO provider agreements from requiring a licensed ophthalmologist or optometrist to join a network or restricting an ophthalmologist, optometrist, or

[7] HARRIS WILLIAMS & CO., *Vision Industry Overview,* Feb. 2015, at 1, *available at* http://www.google.com/url?sa=t&rct=j&q=&esrc=s&source=web&cd=1&ved=0ahUKEwjig4c08tPJAhXG4SYKHcYeDQUQFggcMAA&url=http%3A%2F%2Fwww.harriswilliams.com%2Fsites%2Fdefault%2Ffiles%2Fcontent%2Fhwco_hcls_vision_industry_updatev2.pdf&usg=AFQjCNFg6otUP4KjPv6GxudQ9ms4iotr-Q&sig2=cTEzESQqV0e0yflylhlJLQ&bvm=bv.109395566,d.cWE.

[8] s. 636.035(12), F.S.

optician to specific suppliers of materials or optical laboratories. There are also no statutes that require PLHSOs to update network provider directories monthly or to make such directories available in an online version.

Health Maintenance Organization (HMO) Contracts

The OIR regulates HMO contracts and rates under part I of ch. 641, F.S. The Agency for Health Care Administration regulates the quality of care provided by HMOs under part III of ch. 641, F.S. Section 641.315, F.S., authorizes provider contracts with HMOs, and specifies the requirements for HMO provider contracts with "health care practitioners" as defined in s. 465.001(4), F.S.

Part I of ch. 641, F.S., limits the provisions that may be in an HMO provider contract. Section 641.315(9), F.S., provides that a contract between an HMO and a contracted primary care or admitting physician may not contain any provision that prohibits the physician from providing inpatient services in a contracted hospital to a subscriber if such services are determined by the HMO to be medically necessary and covered services under the HMO's contract with the contracted physician. As with insurance contracts and PLHSO agreements, an HMO provider contract may not contain an "all products clause" that requires a contracted health care practitioner to accept the terms of another practitioner contract. A contract provision that violates the statute is void, except in cases where the practitioner is in a group practice and must accept the terms of a contract negotiated for the practitioner by the group, as a condition of continuation or renewal of the contract. Additionally, s. 641.315(11), F.S., provides that a contract for dental services may not contain a provision that requires the dentist to provide services to the subscriber of the HMO at a fee set by the HMO unless such services are covered services under the applicable contract.

Section 641.315, F.S., does not prohibit HMO provider contracts from requiring a licensed ophthalmologist or optometrist to join a network or restricting an ophthalmologist, optometrist, or optician to specific suppliers of materials or optical laboratories. There are also no statutes that require HMOs to update network provider directories monthly or to make such directories available in an online version.

Unfair Insurance Trade Practices

Part IX of ch. 626, F.S., regulates insurance by defining practices that constitute unfair methods of competition or unfair or deceptive acts or practices and prohibits those activities. Potential penalties under the Unfair Insurance Trade Practices Act (the Act) include an amount not greater than:

- $5,000 for each nonwillful violation.
- $40,000 for each willful violation.
- An aggregate amount of $20,000 for all nonwillful violations arising out of the same action.
- An aggregate amount of $200,000 for all willful violations arising out of the same action.[9]

Fines may be imposed in addition to any other applicable penalty.[10] Additionally, the OIR is authorized to conduct hearings,[11] issue cease and desist orders,[12] and assess a penalty of up to $50,000 and suspend or revoke an entity's certificate of authority for engaging in an unfair insurance trade practice.[13]

Current law expressly exempts PLHSOs and HMOs from the Insurance Code.[14] Thus, they are not subject to the Act. Instead, s. 641.3903, F.S., sets forth unfair methods of competition and unfair or

[9] s. 626.9521(2), F.S.
[10] *See* s. 626.9631, F.S., the penalties under the insurance code are in addition to any other civil or administrative penalties.
[11] s. 626.9571, F.S.
[12] s. 626.9581, F.S.
[13] s. 626.6901, F.S.
[14] *See* ss. 636.004, 636.029, 641.18(4)(b), 641.201, 641.30(2), F.S..

deceptive acts or practices applicable to HMOs. Section 636.059, F.S., makes those provisions applicable to PLHSOs, as well. The provisions in s. 641.3903, F.S., are not identical to those set forth in the Act.

Credentialing

Credentialing is a process for the collection and verification of a provider's professional qualifications, including academic background, relevant training and experience, licensure, and certification or registration to practice in a particular health care field.[15] Credentialing is a required element for health plan accreditation by the National Commission for Quality Assurance.[16]

Historically, practitioners who wished to be credentialed by an entity were required to submit original documentation to the entity which, in turn, would independently verify the documentation. This resulted in a significant administrative burden for practitioners who, because they participated with multiple insurance plans or had admitting privileges to multiple hospitals, were required to submit the same documentation over and over again. As a result, various organizations and companies have emerged to provide centralized credentialing services. In centralized credentialing, a practitioner submits the required documentation one time and entities that wish to credential the practitioner access the necessary information from the central database.[17]

Florida law only addresses credentialing for HMOs. Section 641.495(6), F.S., provides that each HMO must have a system for verification and examination of the credentials of each of its providers. If an HMO delegates the credentialing process to a contracted provider or entity, it must verify that the policies and procedures of the delegated provider or entity are consistent with the policies and procedures of the HMO and that there is evidence of oversight activities to determine that required standards are maintained.[18] Florida law does not expressly require credentialing for other types of health plans.

Effect of the Proposed Changes

HB 337 amends ss. 627.6474, 636.035, and 641.315, F.S., to prohibit health insurers, PLHSOs, and HMOs, respectively, from requiring a licensed ophthalmologist or optometrist to join a network solely for the purpose of credentialing the licensee for another insurer's or organization's network. However, the bill provides that this provision does not prevent a health insurer, PLHSO, or HMO from entering into a contract with another insurer's or organization's vision care plan to use their network.

The bill amends ss. 627.6474, 636.035, and 641.315, F.S., to prohibit health insurers, PLHSOs, and HMOs, respectively, from restricting a licensed ophthalmologist, optometrist, or optician to specific suppliers of material or optical laboratories. However, the bill provides that this provision does not restrict a health insurer, PLHSO, or HMO in determining specific amounts of coverage or reimbursement for the use of network or out-of-network suppliers or laboratories.

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[15] *See, e.g.,* AETNA, *Health care professionals: Joining the Network FAQs*, https://www.aetna.com/faqs-health-insurance/health-care-professionals-join-network.html (last visited Dec. 10, 2015); FLORIDA BLUE, *Manual for Physicians and Providers*, (2015), at 14, *available at* https://www.floridablue.com/docview/provider-manual-2015/ (last visited Jan. 5, 2016); UNITEDHEALTHCARE, *Physician Credentialing and Recredentialing Frequently Asked Questions*, *available at* https://www.unitedhealthcareonline.com/ccmcontent/ProviderII/UHC/en-US/Assets/ProviderStaticFiles/ProviderStaticFilesPdf/Tools%20and%20Resources/Protocols/Credentialing_FAQ.pdf (last visited Jan. 5, 2016).

[16] NCQA, *CR Standards & Guidelines,* http://www.ncqa.org/tabid/404/Default.aspx (last visited Jan. 5, 2016).

[17] *See, e.g.,* CAQH, *About CAQH ProView, A CAQH Solution, available at* http://www.caqh.org/about/press-kit (last visited Jan. 5, 2016); Subcomm. on Health Care Approps., The Florida House of Representatives, *CS/HB 817* (April 2, 2013), at 2–3, *available at* http://myfloridahouse.gov/Sections/Bills/bills.aspx.

[18] BUREAU OF MANAGED HEALTH CARE, AGENCY FOR HEALTH CARE ADMINISTRATION, *Interpretive Guidelines for Initial Health Care Provider Certificates: Health Maintenance Organizations and Prepaid Health Clinics*, (2010), at 48, *available at* https://ahca.myflorida.com/MCHQ/Health_Facility_Regulation/Commercial_Managed_Care/docs/CHMO/Initial-IGs-withProbesJune2010.pdf (last visited Jan. 5, 2016).

The bill specifies that any health insurer, PLHSO, or HMO who commits a knowing violation of either provision has committed an unfair insurance trade practice pursuant to s. 626.9541(1)(d), F.S.[19] The violator is then subject to civil and administrative penalties under the Unfair Insurance Trade Practices Act.

The bill also requires health insurers, PLHSOs, and HMOs to update their online vision care network provider directories on a monthly basis to accurately reflect the providers currently participating in their networks.

The bill provides an effective date of July 1, 2016.

B. SECTION DIRECTORY:

Section 1: Amends s. 627.6474, F.S., relating to provider contracts.
Section 2: Amends s. 636.035, F.S., relating to provider arrangements.
Section 3: Amends s. 641.315, F.S., relating to provider contracts.
Section 4: Provides an effective date of July 1, 2016.

II. FISCAL ANALYSIS & ECONOMIC IMPACT STATEMENT

A. FISCAL IMPACT ON STATE GOVERNMENT:

1. Revenues:

   None.

2. Expenditures:

   None.

B. FISCAL IMPACT ON LOCAL GOVERNMENTS:

1. Revenues:

   None.

2. Expenditures:

   None.

C. DIRECT ECONOMIC IMPACT ON PRIVATE SECTOR:

The bill provides that a licensed ophthalmologist, optometrist, or optician contracting with an insurer, PLHSO, or HMO is not required to purchase materials and services from specific suppliers or optical labs. This would give the provider the ability to be competitive and responsive to local market conditions regarding the cost and quality of such materials and services provided to consumers. This would also enable the provider to deliver these services in-house if the provider has the service capability. Currently, the approved lab lists of some vision plans can be limited and may require a provider to send all orders to a plan-owned lab in another city or state, which may result in delays for the consumer in receiving their eyeglasses. If such a lab is performing poorly, this can cause additional delays and frustrations for consumers.

Consumers will have online access to more timely and accurate network directories for vision care providers, which will assist them in evaluating plans or selecting network providers.

[19] s. 626.9541(1)(d), F.S., provides that entering into any agreement to commit, or by any concerted action committing, any act of boycott, coercion, or intimidation resulting in, or tending to result in, unreasonable restraint of, or monopoly in, the business of insurance are an unfair insurance trade practices.

A health insurer, PLHSO, or HMO found to have violated the provisions of the bill is subject to civil and administrative fines under the Unfair Insurance Trade Practices Act.

D. FISCAL COMMENTS:

None.

III. COMMENTS

A. CONSTITUTIONAL ISSUES:

1. Applicability of Municipality/County Mandates Provision:

Not applicable. This bill does not appear to affect county or municipal governments.

2. Other:

The general rule of law is that legislation applies prospectively only. The Florida Constitution prohibits laws that retroactively impair the obligation of contracts already in existence.[20] To clarify its application, the bill may specify that the provisions only apply to contracts entered into or renewed on or after July 1, 2016.

B. RULE-MAKING AUTHORITY:

None.

C. DRAFTING ISSUES OR OTHER COMMENTS:

According to records of the OIR, at least one provider offers vision care services in Florida under a discount medical plan organization (DMPO) license. DMPOs are licensed by the OIR under part II of ch. 636, F.S. In exchange for fees, dues, or other consideration, a DMPO offers its members access to providers who offer care at a discount.[21] The sponsor may wish to amend the bill to cover DMPOs.

The bill requires insurers, PLHSOs, and HMOs to update their online directory monthly. While industry practice may be to offer an online directory, current law does not require it. Thus, it is unclear whether the intent of the bill is to require monthly updating only if the insurer, PLHSO, or HMO maintains an online directory, or to impose both a requirement for an online directory and monthly updating.

IV. AMENDMENTS/ COMMITTEE SUBSTITUTE CHANGES

[20] FLA. CONST. art I, s. 10.
[21] *See* s. 636.202, F.S.

A bill to be entitled

An act relating to vision care plans; amending ss. 627.6474, 636.035, and 641.315, F.S.; providing that a health insurer, a prepaid limited health service organization, and a health maintenance organization, respectively, may not require a licensed ophthalmologist or optometrist to join a network solely for the purpose of credentialing the licensee for another vision network; providing that such insurers and organizations are not prevented by the act from entering into a contract with another vision care plan; providing that such insurers and organizations may not restrict a licensed ophthalmologist, optometrist, or optician to specific suppliers of materials or optical laboratories; providing that such insurers and organizations are not restricted by the act in determining certain amounts of coverage or reimbursement; requiring such insurers' and organizations' online vision care network provider directories to be updated monthly; providing that a violation of certain prohibitions in the act constitutes a specified unfair insurance trade practice; providing an effective date.

Be It Enacted by the Legislature of the State of Florida:

Section 1. Subsection (3) is added to section 627.6474, Florida Statutes, to read:

627.6474 Provider contracts.—

(3)(a) A health insurer may not require an ophthalmologist licensed pursuant to chapter 458 or chapter 459 or an optometrist licensed pursuant to chapter 463 to join a network solely for the purpose of credentialing the licensee for another insurer's vision network. This paragraph does not prevent a health insurer from entering into a contract with another insurer's vision care plan to use the vision network.

(b) A health insurer may not restrict an ophthalmologist licensed pursuant to chapter 458 or chapter 459, an optometrist licensed pursuant to chapter 463, or an optician licensed pursuant to part I of chapter 484 to specific suppliers of materials or optical laboratories. This paragraph does not restrict a health insurer in determining specific amounts of coverage or reimbursement for the use of network or out-of-network suppliers or laboratories.

(c) A health insurer's online vision care network provider directory must be updated monthly to reflect the vision care providers currently participating in the health insurer's network.

(d) A knowing violation of paragraph (a) or paragraph (b) constitutes an unfair insurance trade practice under s. 626.9541(1)(d).

Section 2. Subsection (14) is added to section 636.035,

Florida Statutes, to read:

636.035 Provider arrangements.—

(14)(a) A prepaid limited health service organization may not require an ophthalmologist licensed pursuant to chapter 458 or chapter 459 or an optometrist licensed pursuant to chapter 463 to join a network solely for the purpose of credentialing the licensee for another organization's vision network. This paragraph does not prevent such organization from entering into a contract with another organization's vision care plan to use the vision network.

(b) A prepaid limited health service organization may not restrict an ophthalmologist licensed pursuant to chapter 458 or chapter 459, an optometrist licensed pursuant to chapter 463, or an optician licensed pursuant to part I of chapter 484 to specific suppliers of materials or optical laboratories. This paragraph does not restrict such organization in determining specific amounts of coverage or reimbursement for the use of network or out-of-network suppliers or laboratories.

(c) A prepaid limited health service organization's online vision care network provider directory must be updated monthly to reflect the vision care providers currently participating in the organization's network.

(d) A knowing violation of paragraph (a) or paragraph (b) constitutes an unfair insurance trade practice under s. 626.9541(1)(d).

Section 3. Subsection (12) is added to section 641.315,

Florida Statutes, to read:

641.315 Provider contracts.—

(12)(a) A health maintenance organization may not require an ophthalmologist licensed pursuant to chapter 458 or chapter 459 or an optometrist licensed pursuant to chapter 463 to join a network solely for the purpose of credentialing the licensee for another organization's vision network. This paragraph does not prevent such organization from entering into a contract with another organization's vision care plan to use the vision network.

(b) A health maintenance organization may not restrict an ophthalmologist licensed pursuant to chapter 458 or chapter 459, an optometrist licensed pursuant to chapter 463, or an optician licensed pursuant to part I of chapter 484 to specific suppliers of materials or optical laboratories. This paragraph does not restrict such organization in determining specific amounts of coverage or reimbursement for the use of network or out-of-network suppliers or laboratories.

(c) A health maintenance organization's online vision care network provider directory must be updated monthly to reflect the vision care providers currently participating in the organization's network.

(d) A knowing violation of paragraph (a) or paragraph (b) constitutes an unfair insurance trade practice under s. 626.9541(1)(d).

Section 4. This act shall take effect July 1, 2016.

HOUSE OF REPRESENTATIVES STAFF ANALYSIS

BILL #: CS/HB 393 Estates
SPONSOR(S): Civil Justice Subcommittee; Berman
TIED BILLS: None **IDEN./SIM. BILLS:** CS/CS/SB 540

REFERENCE	ACTION	ANALYST	STAFF DIRECTOR or BUDGET/POLICY CHIEF
1) Civil Justice Subcommittee	13 Y, 0 N, As CS	Robinson	Bond
2) Insurance & Banking Subcommittee		Bauer	Luczynski
3) Judiciary Committee			

SUMMARY ANALYSIS

The Florida Probate Code and the Florida Trust Code govern the disposition and management of estates during a person's lifetime or after their death. This bill amends these codes to:

- Codify the common law situs rule which provides that the disposition of real property located in Florida is governed by Florida law regardless of any contrary directive in a will.
- Prohibit non-judicial modification of all irrevocable trusts created on or after July 1, 2016, unless non-judicial modification is expressly authorized by the terms of the trust.
- Provide additional guidance to lawyers and the courts regarding the circumstances under which a trustee may pay attorney's fees and costs from trust assets in breach of trust proceedings.

The bill does not appear to have a fiscal impact on state or local governments. The bill may have a positive impact on the private sector.

The bill has an effective date of July 1, 2016.

FULL ANALYSIS

I. SUBSTANTIVE ANALYSIS

A. EFFECT OF PROPOSED CHANGES:

Disposition of Real Property in Probate

"Lex loci rei sitae," or the situs rule, is the fundamental legal principle that real property is governed by the law of the jurisdiction in which it is situated. The situs rule is based upon the rationale that the situs jurisdiction has the greatest interest in controlling the administration of real property located within its borders.[1] As early as the nineteenth century, the Florida Supreme Court affirmed the application of the situs rule in this state:

> [I]t is the universal rule that the laws of the state where [the property] is situated furnish the rules for its descent, alienation, and transfer, the construction and validity of conveyances thereof, and the capacity of the parties to such contracts and conveyances, as well as their rights under the same.[2]

Under the Florida Probate Code, chs. 731-735, F.S., intestate[3] succession of real property located in Florida is explicitly governed by Florida law, regardless of whether the decedent owner was a resident or non-resident of the state, in accordance with the common law situs rule.[4] In regard to testamentary dispositions of Florida real property by non-residents, s. 731.106(2), F.S. provides in pertinent part:

> When a nonresident decedent, whether or not a citizen of the United States, provides by will that the testamentary disposition of tangible or intangible personal property having a situs within this state, or of real property in this state, shall be construed and regulated by the laws of this state, the validity and effect of the dispositions shall be determined by Florida law.

As it relates to the disposition of Florida real property by non-residents, s. 731.106(2), F.S., merely restates the long standing common law principle of "lex loci rei sitae," while acknowledging the realities of multijurisdictional estate planning. However, construing this provision of law as a matter of first impression, the First District Court of Appeal in *Saunders v. Saunders* concluded that the statute was a restraint, rather than codification, of "lex loci rei sitae."[5] The court held that Florida law applies to the disposition of a non-resident testator's Florida real property only when explicitly provided by such testator's will.[6] Where the will is silent, the court found that the law of the non-resident decedent's domicile governs.[7] The holding of the court is directly at odds with the consistent and longstanding approach of Florida courts endorsing the situs rule.[8] Rules of statutory construction presume that no change in the common law is intended unless the statute is explicit; and inference and implication cannot be substituted for clear expression.

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[1] The situs rule has been justified on several additional grounds: the situs state has a strong interest in regulating the manner in which real estate is used and developed; there is a compelling interest in insuring that title and ownership interests in situs land be regular and predictable; the situs state has a clear interest in land as a source of public revenue, since real property taxation is premised on the accurate identification and description of ownership interests in land; and the situs state is best situated to resolve disputes and enforce legal decisions pertaining to local property, and can best do so when it implements local legal policy. Michael S. Finch, *Choice-of-Law and Property* 26 STETSON L. REV. 257 (1996).
[2] *Walling v. Christian & Craft Grocery Co.*, 27 So. 46, 48 (Fla. 1899).
[3] Any part of the estate of a decedent not effectively disposed of by will. s. 732.101, F.S.
[4] s. 732.101, F.S.; *See also Estate of Salathe v. Schula*, 703 So. 2d 1167, 1168 (Fla. 2d DCA 1997).
[5] *Saunders v. Saunders*, 796 So. 2d 1253, 1254 (Fla. 1st DCA 2001).
[6] *Id.*
[7] *Id.*
[8] *See Connor v. Elliott*, 85 So. 164, 165 (Fla. 1920); *Kyle v. Kyle*, 128 So. 2d 427 (Fla. 2d DCA 1961); *Denison v. Denison*, 658 So. 2d 581 (Fla. 4th DCA 1995); *Beale v. Beale*, 807 So. 2d 797, 798 (Fla. 1st DCA 2002).

Effect of Proposed Changes

The bill creates s. 731.1055, F.S., to provide that the disposition of real property in this state, whether testate or intestate, is governed by laws of this state in accordance with the common law "situs" rule.

The bill also makes conforming changes to s. 731.106, F.S.

Trusts

The "Florida Trust Code", ch. 736, F.S., governs the creation and administration of trusts. A "trust" is generally defined as a fiduciary relationship[9] with respect to property, subjecting the person by whom the title to the property is held to equitable duties to deal with the property for the benefit of another person.[10] A trust involves three interest holders: the "settlor"[11] who establishes the trust; the "trustee"[12] who holds legal title to the property for the benefit of the beneficiary; and lastly, the "beneficiary"[13] who has an equitable interest in property held subject to the trust.

Trusts are created for many purposes including, but not limited to, the protection of property and beneficiaries, tax planning, and professional management of assets.

Modification of Irrevocable Trusts

Under the Trust Code, a trust may be created by *inter vivos* or testamentary transfer, by a settlor's self-declaration of trust, or by the exercise of a power of appointment.[14] Unless the power to modify, amend, or terminate is reserved at the time of creation, a trust becomes irrevocable upon its creation. The terms and provisions of an irrevocable trust cannot be changed, nor may the trust be terminated by the settlor.

The terms of the trust, however, do not prevail over default rules of the Trust Code authorizing the modification or termination of an irrevocable trust under certain circumstances.[15] Upon petition by an interested party at any time after its creation, an irrevocable trust may be judicially modified to reform mistakes to accomplish the settlor's intent,[16] to achieve the settlor's tax objectives,[17] to prevent the failure of a charitable gift,[18] to protect the best interests of the beneficiaries,[19] or if modification is not inconsistent with the settlor's purpose.[20] Judicial modification may be a lengthy and expensive process and there is no guarantee a court will grant a petition for modification.

Section 736.0412, F.S., authorizes a simpler non-judicial modification process for irrevocable trusts created after December 31, 2000, if the settlor is no longer alive and the trustee and all qualified beneficiaries unanimously agree to such modification. Such trusts may be non-judicially modified to:[21]

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[9] *Brundage v. Bank of America*, 996 So. 2d 877, 882 (Fla. 4th DCA 2008) (trustee owes a fiduciary duty to settlor/beneficiary).
[10] 55A FLA. JUR.2D *Trusts* § 1.
[11] "Settlor" means a person, including a testator, who creates or contributes property to a trust. s. 736.0103(18), F.S.
[12] "Trustee" means the original trustee and includes any additional trustee, any successor trustee, and any cotrustee. s. 736.0103(23), F.S.
[13] "Beneficiary" means a person who has a present or future beneficial interest in a trust, vested or contingent, or who holds a power of appointment over trust property in a capacity other than that of trustee. s. 736.0103(4), F.S.
[14] s. 736.0401, F.S.
[15] s. 736.0105(2)(j) and (k), F.S.
[16] s. 736.0415, F.S.
[17] s. 736.0416, F.S.
[18] s. 736.0413, F.S.
[19] s. 736.04115, F.S.
[20] s. 736.04113, F.S.
[21] s. 736.0412(1), F.S.

- Amend or change the terms of the trust, including terms governing distribution of the trust income or principal or terms governing administration of the trust.
- Terminate the trust in whole or in part.
- Direct or permit the trustee to do acts that are not authorized or that are prohibited by the terms of the trust.
- Prohibit the trustee from performing acts that are permitted or required by the terms of the trust.

Rule Against Perpetuities

Although an irrevocable trust is subject to judicial modification at any time, the availability of non-judicial modification under s. 736.0412, F.S., depends upon the time within which a property interest must vest or terminate under the trust pursuant to the Rule against Perpetuities.[22] The Rule against Perpetuities ensures that a trust has ascertainable beneficiaries as required by the Trust Code.[23] Florida's Uniform Statutory Rule against Perpetuities establishes three periods within which a property interest must vest or terminate:

- Within 21 years after the death of an individual then alive.[24]
- Within 90 years after the property interest is created.[25]
- As to any trust created after December 31, 2000, within 360 years after the property interest is created (unless the trust requires that all beneficial interests vest or terminate within a lesser period).[26]

The first two periods are collectively referred to as the "90-year period," and the third period is generally referred to as the "360-year period." Depending upon the unique needs of the beneficiaries and the intent of the settlor, a trust may be drafted to comply with either the "90-year period" or the "360-year period."

Section 736.0412(4), F.S., *prohibits* the use of non-judicial modification for an irrevocable trust subject to the "90-year period," *unless the terms of the trust expressly authorize nonjudicial modification.*[27] In the absence of such authorization, the trust may only be judicially modified during the first 90 years after it becomes irrevocable. However, an irrevocable trust subject to the "360-year period" *may be non-judicially modified* at any time after the settlor's death, *even if the terms of the trust do not authorize such modification.*

While flexibility and ease of non-judicial modification may be desirable for 360-year trusts in order to accommodate unforeseen changes in circumstances over hundreds of years, there is no readily apparent justification to treat irrevocable trusts subject to the "90-year period" differently than those subject to the "360-year period."[28] Moreover, permitting 360 year trusts to be non-judicially modified

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[22] The common law Rule against Perpetuities originated from an English court rule in 1682. The rule provides that a nonvested (also known as contingent) interest in property or power of appointment in a trust is invalid unless it can be said with absolute certainty, that it will either vest or terminate, no later than 21 years after the death of an individual alive at the creation of the trust interest. The primary objective of the rule is to prevent perpetual control and unreasonable restraints upon the alienation of property by invalidating, after a specific time, any future nonvested interest created either by a will, deed, or power of appointment.

[23] s. 736.0402, F.S.; It is the beneficiaries who have standing to enforce the trust, and beneficiaries, courts and trustees alike need to know who they are.

[24] s. 689.225(2)(a), F.S.

[25] *Id.*

[26] s. 689.225(2)(f), F.S.

[27] s. 736.0412(4)(b), F.S.

[28] The Real Property, Probate, and Trust Law Section of the Florida Bar, *White Paper: Proposed Amendments to §§736.0412(4) and 736.0105(2)(k), Florida Statutes, restricting nonjudicial modification of irrevocable trusts during the first 90 years unless the trust specifically permits it* (on file with the Civil Justice Subcommittee, Florida House of Representatives).

immediately after the settlor's death invites abuse. The settlor of such trusts clearly intended to control the disposition of trust assets for an extended period after their death.[29]

The discrepancy between the treatment of the two trusts appears to be an error in the codification of a compromise between stakeholders at the time of the extension of the rule against perpetuities to 360 years.[30]

Effect of Proposed Changes – Modification of Irrevocable Trusts

The bill amends s. 736.0412, F.S., to provide that an irrevocable trust created on or after July 1, 2016, regardless of whether the trust is drafted to comply with the "90-year period" or the "360 year period," is not subject to non-judicial modification during the first 90 years after creation, unless non-judicial modification is expressly authorized by the terms of the trust.

The bill also makes conforming changes to s. 736.0105, F.S.

Attorney's Fees and Costs in Breach of Trust Proceedings

A trustee may be involved in legal proceedings relating to the trust. When legal proceedings are instituted, a trustee may retain counsel and pay attorney fees and costs from the assets of the trust.[31] Payment of such costs and fees may be made without the approval of any person, including trust beneficiaries, and without prior court authorization.[32]

Breach of Trust

A trustee's broad authority to pay legal fees incurred in connection with the trust administration from trust assets is not without limitation, however, in proceedings involving a breach of trust.

The Trust Code requires a trustee to administer a trust "in good faith, in accordance with its terms and purposes and the interests of the beneficiaries, and in accordance with [the] code,"[33] and also imposes a duty of loyalty upon the trustee.[34] A trustee's violation of a duty owed to a beneficiary is a breach of trust.[35] Breaches of trust can include: undervaluing trust assets,[36] failure to obtain a surety bond,[37] failure to render accountings to the beneficiaries,[38] failure to disperse monies pursuant to the settlor's wishes,[39] improperly favoring one beneficiary over another,[40] and failure to prosecute claims of the trust or defend claims against the trust.[41] Beneficiaries of the trust have standing to initiate causes of action in equity for breaches of trust unless the beneficiary has consented to or ratified the action, released the trustee of liability for such action,[42] or the claim is otherwise barred by statute.[43]

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[29] *Id.*
[30] *Id.*
[31] s. 736.0816(20), F.S.
[32] s. 736.0802(10), F.S.
[33] s. 736.0801, F.S.
[34] s. 736.0802(1), F.S.
[35] s. 736.1001(1), F.S.
[36] *McCormick v. Cox*, 118 So. 3d 980, 986 (Fla. 3d DCA 2013).
[37] *Id.*
[38] *Id.*; *Corya v. Sanders,* 155 So. 3d 1279, 1283-84 (Fla. 4th DCA 2015).
[39] *Kritchman v. Wolk*, 152 So. 3d 628, 632 (Fla. 3d DCA 2014).
[40] s. 736.0803, F.S.
[41] s. 736.0811, F.S.
[42] John Grimsley, 18 FLA. PRAC., Law of Trusts § 8:4 (2012), John Bourheau et al, *Breach of Trust Action Against Trustee*, 55A FLA. JUR 2D Trusts § 235 (2015), George Gleason Bogert et al, *Action be Beneficiary Against Express Trustee*, THE LAW OF TRUSTS AND TRUSTEES § 951 (2015); s. 736.1012, F.S.; *See also Anderson v. Northrop*, 12 So. 318, 324 (Fla. 1892).
[43] s. 736.1008, F.S.

Attorney's Fees and Costs in Breach of Trust Proceedings

If a claim or defense based upon a breach of trust is made against a trustee in a proceeding, the trustee must provide prior written notice of any intention to pay its attorney's fees and costs from the trust assets to qualified beneficiaries.[44] The notice must inform the beneficiary of the right to obtain an order prohibiting the payment of fees and costs.[45] The notice must be delivered by any commercial delivery service requiring a signed receipt, by any form of mail requiring a signed receipt, or as provided in the Florida Rules of Civil Procedure for service of process.[46]

Upon the motion of a qualified beneficiary whose share of the trust may be affected by such payment, the court may preclude a trustee from paying its attorney fees and costs from the trust assets.[47] The beneficiary must make a reasonable showing by evidence in the record, or by proffering evidence, that a reasonable basis exists for a court to conclude that there has been a breach of trust. If the court finds that there is a reasonable basis to conclude that there has been a breach of trust, unless the court finds good cause, the court must enter an order prohibiting the payment of attorney's fees and costs from the assets of the trust. The order must also provide for the refund of attorney's fees or costs paid before an order was entered on the motion.[48] If a refund is not made as directed by the court, the court may, among other sanctions, strike defenses or pleadings filed by the trustee.[49]

If a claim or defense based upon a breach of trust is later withdrawn, dismissed, or resolved in favor of the trustee, the trustee may pay costs or attorney's fees incurred in the proceeding from the assets of the trust without further court authorization or notice to the beneficiaries.[50]

Leading practitioners have identified several areas in which the provisions governing the payment of attorney's fees and costs in breach of trust proceedings fail to provide direction to lawyers and the court, including:[51]

- The circumstances under which the limitations on the payment of attorney's fees and costs are triggered.
- The categories of attorney's fees and costs subject to limitation.
- The circumstances under which the trustee must serve notice of an intention to pay attorney's fees and costs from trust assets and the consequences, if any, of paying such fees and costs prior to serving notice.
- Whether a trustee may use trust assets to pay its attorney's fees and costs upon a final determination in its favor by the trial court or must wait until the conclusion of any appellate proceeding.
- The type of showing required to preclude a trustee from using trust assets to pay its attorney's fees and cost, and the type of evidence that may be used to make or rebut such a showing.

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[44] "Qualified beneficiary" means a living beneficiary who, on the date of the beneficiary's qualification is determined, is a distributee or permissible distributee of trust income or principal; would be a distributee or permissible distributee of trust income or principal if the interests of other actual or permissible distributees terminated on that date without causing the trust to terminate; or would be a distributee or permissible distributee of trust income or principal if the trust terminated in accordance with its terms on that date. s. 736.0103(16), F.S.

[45] s. 736.0802(10), F.S.

[46] *Id.*

[47] *Id.*

[48] *Id.*

[49] *Id.*

[50] *Id.*

[51] The Real Property, Probate, and Trust Law Section of the Florida Bar, *White Paper Regarding a Trustee's Use of Trust Assets to Pay Attorney's Fees and Costs in Connection with Claim or Defense of Breach of Trust* (on file with the Civil Justice Subcommittee, Florida House of Representatives).

Effect of Proposed Changes – Attorney Fees and Costs in Trust Proceedings

The bill substantially amends s. 736.0802(10), F.S., to provide additional guidance to lawyers and the courts regarding the payment of attorney's fees and costs from trust assets in breach of trust proceedings. Specifically, the bill:

- Provides that the limitation on the general authority of a trustee to pay attorney's fees and costs from trust assets applies only to the payment of attorney's fees and costs incurred in connection with a claim or defense of breach of trust that is set forth in a filed pleading. The bill defines "pleading" as a pleading recognized by the Florida Rules of Civil Procedure.[52]

- Requires that the notice of intent to pay attorney's fees and costs also identify the judicial proceeding in which the claim or defense of breach of trust has been made.

- Authorizes a trustee to serve the notice of intent to pay attorney's fees and costs in the manner provided for service of pleadings and other documents under the Florida Rules of Civil Procedure[53] if the court has already acquired jurisdiction over the party in the proceeding. Additionally, the bill waives service of the notice of intent upon a qualified beneficiary whose identity or location is unknown to, and not reasonably ascertainable by, the trustee.

- Provides that if a trustee pays attorney's fees and costs from trust assets prior to serving the notice of intent, any affected qualified beneficiary is entitled to an order compelling the return of the payment with interest at the statutory rate.[54] The court must award attorney's fees and costs in connection with a motion to compel under such circumstances.

- Identifies the categories of evidence through which a movant may show, or through which a trustee may rebut, that a reasonable basis exists to conclude there has been a breach of trust. Permissible evidence consists of affidavits, answers to interrogatories, admissions, depositions, and any evidence otherwise admissible under the Florida Evidence Code.[55]

- Requires that payments made after service of the notice of intent be returned to the trust with interest at the statutory rate if ordered by the court.

- Provides that if the claim or defense of breach of trust is withdrawn, dismissed, or resolved by the trial court without a determination that the trustee committed a breach of trust, the trustee may pay attorney's fees and costs from trust assets without court authorization or serving a notice of intent. Further, the attorney's fees and costs that the trustee may pay under such circumstances include those payments that the trustee may have been previously compelled to return.

The bill also makes conforming changes to ss. 736.0816 and 736.1007, F.S.

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[52] Fla. R. Civ. Procedure 1.100(a) provides: "There shall be a complaint or, when so designated by a statute or rule, a petition, and an answer to it; an answer to a counterclaim denominated as such; an answer to a crossclaim if the answer contains a crossclaim; a third-party complaint if a person who was not an original party is summoned as a third-party defendant; and a third-party answer if a third-party complaint is served. If an answer or third-party answer contains an affirmative defense and the opposing party seeks to avoid it, the opposing party shall file a reply containing the avoidance. No other pleadings shall be allowed."

[53] Such service may be made by e-mail, mail, hand delivery, fax, or by deposit with the clerk of court if no address is known. *See* Fla. R. Civ. Pro. 1.080(a) and Fla. R. Jud. Admin. 2.516.

[54] The Chief Financial Officer is required to set the rate of interest payable on judgments and decrees on December 1, March 1, June 1, and September 1 of each year for the following applicable quarter. The current rate is 4.75%. FLORIDA DEPARTMENT OF FINANCIAL SERVICES, http://www.myfloridacfo.com/Division/AA/Vendors/ (last visited Nov. 11, 2015).

[55] ch. 90, F.S.

B. SECTION DIRECTORY:

Section 1 creates s. 731.1055, F.S., relating to disposition of real property.

Section 2 amends s. 731.106, F.S., relating to assets of nondomiciliaries.

Section 3 amends s. 736.0105, F.S., relating to default and mandatory rules.

Section 4 amends s. 736.0412, F.S., relating to nonjudicial modification of irrevocable trust.

Section 5 amends s. 736.0802, F.S., relating to duty of loyalty.

Section 6 amends s. 736.0816, F.S., relating to specific powers of trustee.

Section 7 amends s. 736.1007, F.S., relating to trustee's attorney's fees.

Section 8 provides an effective date of July 1, 2016.

II. FISCAL ANALYSIS & ECONOMIC IMPACT STATEMENT

A. FISCAL IMPACT ON STATE GOVERNMENT:

1. Revenues:

   The bill does not appear to have any impact on state revenues.

2. Expenditures:

   The bill does not appear to have any impact on state expenditures.

B. FISCAL IMPACT ON LOCAL GOVERNMENTS:

1. Revenues:

   The bill does not appear to have any impact on local government revenues.

2. Expenditures:

   The bill does not appear to have any impact on local government expenditures.

C. DIRECT ECONOMIC IMPACT ON PRIVATE SECTOR:

The bill's clarification of attorney fees incurred in connection with breach of trust cases may have a positive impact on the private sector

D. FISCAL COMMENTS:

None.

III. COMMENTS

A. CONSTITUTIONAL ISSUES:

1. Applicability of Municipality/County Mandates Provision:

   Not applicable. The bill does not appear to affect county or municipal governments.

2. Other:

None.

B. RULE-MAKING AUTHORITY:

The bill does not appear to create a need for rulemaking or rulemaking authority.

C. DRAFTING ISSUES OR OTHER COMMENTS:

An amendment is anticipated to remove sections 3 and 4 of the bill, relating to non-judicial modification of irrevocable trusts.

IV. AMENDMENTS/ COMMITTEE SUBSTITUTE CHANGES

On November 18, 2015, the Civil Justice Subcommittee adopted two amendments and reported the bill favorably as a committee substitute. The amendments made technical revisions to the bill. This analysis is drafted to the committee substitute as passed by the Civil Justice Subcommittee.

A bill to be entitled

An act relating to estates; creating s. 731.1055, F.S.; providing that the validity and the effect of a specified disposition of real property be determined by Florida law; amending ss. 731.106 and 736.0105, F.S.; conforming provisions to changes made by the act; amending s. 736.0412, F.S.; providing applicability for nonjudicial modification of an irrevocable trust; amending s. 736.0802, F.S.; defining the term "pleading"; authorizing a trustee to pay attorney fees and costs from the assets of the trust without specified approval or court authorization in certain circumstances; requiring the trustee to serve a written notice of intent upon each qualified beneficiary of the trust before the payment is made; requiring the notice to contain specified information and to be served in a specified manner; providing that specified qualified beneficiaries are entitled to an order compelling the refund of a specified payment to the trust; requiring the court to award specified attorney fees and costs; authorizing the court to prohibit a trustee from using trust assets to make a specified payment; authorizing the court to enter an order compelling the return of specified attorney fees and costs to the trust with interest at the statutory rate; requiring the court to

deny a specified motion unless the court finds a reasonable basis to conclude that there has been a breach of trust; authorizing a court to deny the motion for good cause; authorizing the movant to show that a reasonable basis exists, and a trustee to rebut the showing, through specified means; authorizing the court to impose remedies or sanctions; authorizing a trustee to use trust assets in a specified manner if a claim or defense of breach of trust is withdrawn, dismissed, or judicially resolved in a trial court without a determination that the trustee has committed a breach of trust; providing construction; amending ss. 736.0816 and 736.1007, F.S.; conforming provisions to changes made by the act; providing an effective date.

Be It Enacted by the Legislature of the State of Florida:

Section 1. Section 731.1055, Florida Statutes, is created to read:

731.1055 Disposition of real property.—The validity and effect of a disposition, whether intestate or testate, of real property in this state shall be determined by Florida law.

Section 2. Subsection (2) of section 731.106, Florida Statutes, is amended to read:

731.106 Assets of nondomiciliaries.—

(2) When a nonresident decedent, whether or not a citizen of the United States, provides by will that the testamentary disposition of tangible or intangible personal property having a situs within this state~~, or of real property in this state,~~ shall be construed and regulated by the laws of this state, the validity and effect of the dispositions shall be determined by Florida law. The court may, and in the case of a decedent who was at the time of death a resident of a foreign country the court shall, direct the personal representative appointed in this state to make distribution directly to those designated by the decedent's will as beneficiaries of the tangible or intangible property or to the persons entitled to receive the decedent's personal estate under the laws of the decedent's domicile.

Section 3. Paragraph (k) of subsection (2) of section 736.0105, Florida Statutes, is amended to read:

736.0105 Default and mandatory rules.—

(2) The terms of a trust prevail over any provision of this code except:

(k) The ability to modify a trust under s. 736.0412, except as provided in s. 736.0412(4)(b) or (c).

Section 4. Section 736.0412, Florida Statutes, is amended to read:

736.0412 Nonjudicial modification of irrevocable trust.—

(1) After the settlor's death, a trust may be modified at any time as provided in s. 736.04113(2) upon the unanimous

agreement of the trustee and all qualified beneficiaries.

(2) Modification of a trust as authorized in this section is not prohibited by a spendthrift clause or by a provision in the trust instrument that prohibits amendment or revocation of the trust.

(3) An agreement to modify a trust under this section is binding on a beneficiary whose interest is represented by another person under part III of this code.

(4) This section does ~~shall~~ not apply to any trust:

(a) ~~Any trust~~ Created before ~~prior to~~ January 1, 2001.

(b) ~~Any trust~~ Created after December 31, 2000, and before July 1, 2016, if, under the terms of the trust, all beneficial interests in the trust must vest or terminate within the period prescribed by the rule against perpetuities in s. 689.225(2), notwithstanding s. 689.225(2)(f), unless the terms of the trust expressly authorize nonjudicial modification.

(c) Created on or after July 1, 2016, during the first 90 years after it is created, unless the terms of the trust expressly authorize nonjudicial modification.

(d) ~~(c) Any trust~~ For which a charitable deduction is allowed or allowable under the Internal Revenue Code until the termination of all charitable interests in the trust.

(5) For purposes of subsection (4), a revocable trust shall be treated as created when the right of revocation terminates.

(6) The provisions of this section are in addition to, and

not in derogation of, rights under the common law to modify, amend, terminate, or revoke trusts.

Section 5. Subsection (10) of section 736.0802, Florida Statutes, is amended to read:

736.0802 Duty of loyalty.—

(10) Unless otherwise provided in this subsection, payment of costs or attorney ~~attorney's~~ fees incurred in any proceeding ~~from the assets of the trust~~ may be made by a ~~the~~ trustee from assets of the trust without the approval of any person and without court authorization, ~~unless the court orders otherwise~~ as provided in ss. 736.0816(20) and 736.1007(1) ~~paragraph (b)~~.

(a) As used in this subsection, the term "pleading" means a pleading as defined in Rule 1.100 of the Florida Rules of Civil Procedure.

(b) If a trustee incurs attorney fees or costs in connection with a claim or defense of breach of trust which is made in a filed pleading, the trustee may pay such attorney fees or costs from trust assets without the approval of any person and without any court authorization. However, the trustee must serve a written notice of intent upon each qualified beneficiary of the trust whose share of the trust may be affected by the payment before such payment is made. The notice of intent need not be served upon a qualified beneficiary whose identity or location is unknown to, and not reasonably ascertainable by, the trustee.

(c) The notice of intent must identify the judicial

proceeding in which the claim or defense of breach of trust has been made in a filed pleading and must inform the person served of his or her right under paragraph (e) to apply to the court for an order prohibiting the trustee from using trust assets to pay attorney fees or costs as provided in paragraph (b) or compelling the return of such attorney fees and costs to the trust. The notice of intent must be served by any commercial delivery service or form of mail requiring a signed receipt; the manner provided in the Florida Rules of Civil Procedure for service of process; or, as to any party over whom the court has already acquired jurisdiction in that judicial proceeding, in the manner provided for service of pleadings and other documents by the Florida Rules of Civil Procedure.

(d) If a trustee has used trust assets to pay attorney fees or costs described in paragraph (b) before service of a notice of intent, any qualified beneficiary who is not barred under s. 736.1008 and whose share of the trust may have been affected by such payment is entitled, upon the filing of a motion to compel the return of such payment to the trust, to an order compelling the return of such payment, with interest at the statutory rate. The court shall award attorney fees and costs incurred in connection with the motion to compel as provided in s. 736.1004.

(e) Upon the motion of any qualified beneficiary who is not barred under s. 736.1008 and whose share of the trust may be affected by the use of trust assets to pay attorney fees or

costs as provided in paragraph (b), the court may prohibit the trustee from using trust assets to make such payment and, if such payment has been made from trust assets after service of a notice of intent, the court may enter an order compelling the return of the attorney fees and costs to the trust, with interest at the statutory rate. In connection with any hearing on a motion brought under this paragraph:

1. The court shall deny the motion unless it finds a reasonable basis to conclude that there has been a breach of trust. If the court finds there is a reasonable basis to conclude there has been a breach of trust, the court may still deny the motion if it finds good cause to do so.

2. The movant may show that such reasonable basis exists, and the trustee may rebut any such showing, by presenting affidavits, answers to interrogatories, admissions, depositions, and any evidence otherwise admissible under the Florida Evidence Code.

(f) If a trustee fails to comply with an order of the court prohibiting the use of trust assets to pay attorney fees or costs described in paragraph (b) or fails to comply with an order compelling that such payment be refunded to the trust, the court may impose such remedies or sanctions as the court deems appropriate, including, without limitation, striking the defenses or pleadings filed by the trustee.

(g) Notwithstanding the entry of an order prohibiting the use of trust assets to pay attorney fees and costs as provided

in paragraph (b), or compelling the return of such attorney fees or costs, if a claim or defense of breach of trust is withdrawn, dismissed, or judicially resolved in the trial court without a determination that the trustee has committed a breach of trust, the trustee may use trust assets to pay attorney fees and costs as provided in paragraph (b) and may do so without service of a notice of intent or order of the court. The attorney fees and costs may include fees and costs that were refunded to the trust pursuant to an order of the court.

(h) This subsection does not limit proceedings under s. 736.0206 or remedies for breach of trust under s. 736.1001 or the right of any interested person to challenge or object to the payment of compensation or costs from the trust.

~~(a) If a claim or defense based upon a breach of trust is made against a trustee in a proceeding, the trustee shall provide written notice to each qualified beneficiary of the trust whose share of the trust may be affected by the payment of attorney's fees and costs of the intention to pay costs or attorney's fees incurred in the proceeding from the trust prior to making payment. The written notice shall be delivered by sending a copy by any commercial delivery service requiring a signed receipt, by any form of mail requiring a signed receipt, or as provided in the Florida Rules of Civil Procedure for service of process. The written notice shall inform each qualified beneficiary of the trust whose share of the trust may be affected by the payment of attorney's fees and costs of the~~

~~right to apply to the court for an order prohibiting the trustee from paying attorney's fees or costs from trust assets. If a trustee is served with a motion for an order prohibiting the trustee from paying attorney's fees or costs in the proceeding and the trustee pays attorney's fees or costs before an order is entered on the motion, the trustee and the trustee's attorneys who have been paid attorney's fees or costs from trust assets to defend against the claim or defense are subject to the remedies in paragraphs (b) and (c).~~

~~(b) If a claim or defense based upon breach of trust is made against a trustee in a proceeding, a party must obtain a court order to prohibit the trustee from paying costs or attorney's fees from trust assets. To obtain an order prohibiting payment of costs or attorney's fees from trust assets, a party must make a reasonable showing by evidence in the record or by proffering evidence that provides a reasonable basis for a court to conclude that there has been a breach of trust. The trustee may proffer evidence to rebut the evidence submitted by a party. The court in its discretion may defer ruling on the motion, pending discovery to be taken by the parties. If the court finds that there is a reasonable basis to conclude that there has been a breach of trust, unless the court finds good cause, the court shall enter an order prohibiting the payment of further attorney's fees and costs from the assets of the trust and shall order attorney's fees or costs previously paid from assets of the trust to be refunded. An order entered~~

~~under this paragraph shall not limit a trustee's right to seek an order permitting the payment of some or all of the attorney's fees or costs incurred in the proceeding from trust assets, including any fees required to be refunded, after the claim or defense is finally determined by the court. If a claim or defense based upon a breach of trust is withdrawn, dismissed, or resolved without a determination by the court that the trustee committed a breach of trust after the entry of an order prohibiting payment of attorney's fees and costs pursuant to this paragraph, the trustee may pay costs or attorney's fees incurred in the proceeding from the assets of the trust without further court authorization.~~

~~(c) If the court orders a refund under paragraph (b), the court may enter such sanctions as are appropriate if a refund is not made as directed by the court, including, but not limited to, striking defenses or pleadings filed by the trustee. Nothing in this subsection limits other remedies and sanctions the court may employ for the failure to refund timely.~~

~~(d) Nothing in this subsection limits the power of the court to review fees and costs or the right of any interested persons to challenge fees and costs after payment, after an accounting, or after conclusion of the litigation.~~

~~(e) Notice under paragraph (a) is not required if the action or defense is later withdrawn or dismissed by the party that is alleging a breach of trust or resolved without a determination by the court that the trustee has committed a~~

~~breach of trust.~~

Section 6. Subsection (20) of section 736.0816, Florida Statutes, is amended to read:

736.0816 Specific powers of trustee.—Except as limited or restricted by this code, a trustee may:

(20) Employ persons, including, but not limited to, attorneys, accountants, investment advisers, or agents, even if they are the trustee, an affiliate of the trustee, or otherwise associated with the trustee, to advise or assist the trustee in the exercise of any of the trustee's powers and pay reasonable compensation and costs incurred in connection with such employment from the assets of the trust, subject to s. 736.0802(10) with respect to attorney fees and costs, and act without independent investigation on the recommendations of such persons.

Section 7. Subsection (1) of section 736.1007, Florida Statutes, is amended to read:

736.1007 Trustee's attorney ~~attorney's~~ fees.—

(1) If the trustee of a revocable trust retains an attorney to render legal services in connection with the initial administration of the trust, the attorney is entitled to reasonable compensation for those legal services, payable from the assets of the trust, subject to s. 736.0802(10), without court order. The trustee and the attorney may agree to compensation that is determined in a manner or amount other than the manner or amount provided in this section. The agreement is

not binding on a person who bears the impact of the compensation unless that person is a party to or otherwise consents to be bound by the agreement. The agreement may provide that the trustee is not individually liable for the attorney ~~attorney's~~ fees and costs.

Section 8. This act shall take effect July 1, 2016.

INSURANCE & BANKING SUBCOMMITTEE

CS/HB 393 by Rep. Berman
Estates

AMENDMENT SUMMARY
January 13, 2016

Amendment 1 by Rep. Berman (Lines 69-106): Removes sections 3 and 4 of the bill, relating to non-judicial modification, to restore current law in ss. 736.0105 and 736.0412, F.S.

COMMITTEE/SUBCOMMITTEE AMENDMENT

Bill No. CS/HB 393 (2016)

Amendment No. 1

COMMITTEE/SUBCOMMITTEE ACTION

ADOPTED	__ (Y/N)
ADOPTED AS AMENDED	__ (Y/N)
ADOPTED W/O OBJECTION	__ (Y/N)
FAILED TO ADOPT	__ (Y/N)
WITHDRAWN	__ (Y/N)
OTHER	_____

Committee/Subcommittee hearing bill: Insurance & Banking Subcommittee

Representative Berman offered the following:

Amendment (with directory and title amendments)

Remove lines 69-73 and lines 76-106

D I R E C T O R Y A M E N D M E N T

Remove lines 67-68 and lines 74-75

T I T L E A M E N D M E N T

Remove lines 5-9 and insert:

by Florida law; amending s. 731.106, F.S.; conforming provisions to changes made by the act; amending s. 736.0802, F.S.;

HOUSE OF REPRESENTATIVES STAFF ANALYSIS

BILL #: HB 445 Viatical Settlements
SPONSOR(S): Stevenson
TIED BILLS: **IDEN./SIM. BILLS:** SB 650

REFERENCE	ACTION	ANALYST	STAFF DIRECTOR or BUDGET/POLICY CHIEF
1) Insurance & Banking Subcommittee		Bauer	Luczynski
2) Appropriations Committee			
3) Regulatory Affairs Committee			

SUMMARY ANALYSIS

An *insurable interest* exists for purposes of life insurance when a policyholder has a reasonable expectation that he or she will benefit from the continued life and health of the insured person. In Florida, it is recognized that an individual has an insurable interest as to his or her own life, body, and health, and that other persons with a "love and affection" or pecuniary relationship to the insured (such as family members or a corporate employer) also have valid insurable interests. It has long been recognized in American jurisprudence that life insurance policies purchased without an insurable interest (i.e., on strangers) violate public policy, because they constitute a mere wager on human lives that creates a perverse desire for the early death of the insured. In some instances, life insurance policyholders may wish to sell their policies to third parties as a way to obtain cash for medical expenses or other needs. In these transactions, known as *viatical settlements*, companies called *viatical settlement providers* (VSPs) purchase the policy from the insured (*the viator*) for more than its cash surrender value, but less than the face value of the policy. In 1996, Florida established a regulatory framework of the viatical settlement industry in the Viatical Settlement Act in part X, ch. 626, F.S. ("the Act"), which is administered by the Office of Insurance Regulation (OIR). The Act requires VSPs to comply with licensure, annual reporting, anti-fraud, transactional, and disclosure provisions, and sets forth administrative, criminal, and civil penalties for violations of the Act.

In the early 2000s, a related product known as "stranger-originated life insurance" (also known as STOLI) emerged. While STOLI initially appears similar to legitimate viatical settlements, STOLI is a scheme designed to procure life insurance on individuals, often using fraudulent means, such as misrepresentation, falsification, or omission of material facts in the life insurance application, so that an assignment or sale of a policy functions as a subterfuge that circumvents the insurable interest requirement. While various provisions in the Act and the Insurance Code currently prohibit practices that may involve STOLI, they do not specifically address STOLI.

The bill amends the Act to specifically define STOLI as a "fraudulent viatical settlement act," to prohibit STOLI as a practice that lacks an insurable interest in the insured at the time of policy origination, and to make STOLI void and unenforceable. Additionally, the bill:

- Increases maximum administrative fines that the OIR may impose for certain violations, and creates new felony offenses for certain viatical settlement practices;
- Establishes new disclosure requirements for VSPs and prohibits conflicts of interest between brokers and VSPs;
- Requires VSPs to file their advertising and marketing materials with the OIR prior to entering into viatical contracts, and to maintain documentation of compliance with their anti-fraud plans;
- Increases the non-contestability period from two years to five years, subject to certain exceptions; and
- Requires certain documentation to be provided to insurers for verification of coverage, prior to entering into a viatical settlement contract.

The bill has an indeterminate impact on state government, in that it increases administrative fines for violations of the Act, and requires the OIR to review VSPs' advertising materials. The Criminal Justice Impact Conference has not yet met to determine the prison bed impact of the bill. The bill has no impact on local governments. While the bill increases regulatory requirements and administrative fines on VSPs, the bill may have a positive effect on consumers and life insurers by strengthening consumer protections and reducing fraudulent life insurance claims and litigation.

The bill has an effective date of July 1, 2016.

FULL ANALYSIS

I. SUBSTANTIVE ANALYSIS

A. EFFECT OF PROPOSED CHANGES:

Life Insurance and the Insurable Interest Requirement

Life insurance allows an individual to set aside money in the present (through the payment of premiums) to provide some measure of financial security for his or her surviving beneficiaries upon his or her premature death. The proceeds allow survivors to pay off debts and other expenses and provide a source of income to replace that lost by the death of the insured.[1] Life insurance dates to ancient Rome where burial clubs covered the cost of members' funeral expenses and provided monetary benefits to survivors. Modern life insurance became commercially important in the 15th century Mediterranean mercantile economies and through its introduction to England in the 16th century. Although it served a legitimate purpose of risk avoidance and mitigation, life insurance drew a strong appeal to the gambling instincts of middle-class individuals with no financial interest in the lives of popes, princes, and other prominent people and who took out insurance policies on these strangers' lives as mere wagers. To put an end to the use of life insurance contracts as wagering devices, the British Parliament enacted the Life Assurance Act of 1774, holding that any life insurance contract without an *insurable interest* in the life of the insured would be null and void.[2]

In the late 19th century, the U.S. Supreme Court defined "insurable interest" as "a reasonable expectation of advantage or benefit from the continuance of [the insured's] life"; in other words, an insurable interest is found when an individual has a greater interest in the survival of the insured than in the insured's death.[3] Subsequently, most American courts recognized the insurable interest requirement for life insurance policies, finding that life insurance policies purchased without an insurable interest violate public policy because they constitute a mere wager that creates a sinister desire for the early death of the insured.[4] Today, it is recognized that an individual has an insurable interest as to his or her own life, body, and health. In addition, an insurable interest is founded on a "love and affection" interest for persons related by blood or law; as to other persons, a lawful and substantial economic interest in the continued life, health, or bodily safety of the insured person,[5] such as corporate-owned insurance on the life of an officer or director. These recognized interests are intended to ensure life insurance's purpose as a financial protection tool, rather than a wagering device.

Florida's insurable interest requirement is codified at s. 627.404, F.S., which lists nine exclusive categories in which an insurable interest as to life, health, or disability insurance are recognized, including the "own life, body and health," "love and affection," and "substantial pecuniary advantage" grounds mentioned above.[6] The statute requires that an insurable interest exist at the time the insurance contract is made, but need not exist after the inception date of coverage under the contract. Thereafter, life insurance is an asset that may be freely sold, transferred, or devised, which is consistent with the parties' freedom to contract for the assignment or non-assignment of policies in s. 627.422, F.S.

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[1] OFFICE OF INSURANCE REGULATION, *Life Insurance*, http://www.floir.com/Sections/LandH/Life/default.aspx (last viewed Dec. 7, 2015).

[2] Susan Lorde Martin, *Betting on the Lives of Strangers: Life Settlements, STOLI, and Securitization*, 13 U. PA. J. BUS. L. 173, 174 (2010); OFFICE OF INSURANCE REGULATION, *Report of Commissioner Kevin M. McCarty: Stranger-Originated Life Insurance and the Use of Fraudulent Activity to Circumvent the Intent of Florida's Insurable Interest Law* (Jan. 2009), ("2009 OIR Report"), p. 6.

[3] *Warnock v. Davis*, 104 U.S. 775, 779 (1881); *Connecticut Mut. Life Ins. Co. v. Schaefer*, 94 U.S. 457, 460 (1876).

[4] *Id.*; *Aetna Life Ins. Co. v. France*, 94 U.S. 561 (1876) and *Grigsby v. Russell*, 222 U.S. 149 (1911).

[5] OFFICE OF INSURANCE REGULATION, *Report of Commissioner Kevin M. McCarty: Stranger-Originated Life Insurance and the Use of Fraudulent Activity to Circumvent the Intent of Florida's Insurable Interest Law* (Jan. 2009), ("2009 OIR Report"), p. 7.

[6] These grounds were added to s. 627.404, F.S., by the Florida Legislature in 2008. Ch. 2008-36, Laws of Fla.

Viatical Settlements: The Secondary Market of Life Insurance

In some instances, life insurance policyholders seek to sell their policies to third parties (usually private, individual investors) as a way to obtain cash for medical expenses or other needs. In these transactions, known as "viatical settlements," companies called *viatical settlement providers* would usually purchase the policy from the insured (*the viator*) for more than its cash surrender value, but less than the face value of the policy. The settlement is usually based upon the projected life expectancy of the insured, the amount of built-up cash in the policy, and other criteria, and is often negotiated by a *viatical settlement broker* on the viator's behalf. The purchaser of the policy then pays the premiums to sustain the policy until the insured's death; as a result, the sooner the viator was the expected to die, the higher the settlement offer is likely to be.

Viatical settlements emerged during the HIV/AIDS epidemic in the 1980s, enabling terminally ill patients with short life expectancies who could no longer work and afford the policy premiums to sell their life insurance policies at a cash discount to pay for high medical care expenses. In the early days of the epidemic, AIDS patients generally died within months of their diagnoses, resulting in fairly quick, significant returns to investors,[7] who in those days were typically senior individuals who risked their savings in what was represented as a safe investment and marketed as a compassionate way to help dying patients. However, innovations in AIDS treatment in the early 1990s significantly improved life expectancies of AIDS patients, sometimes even outliving their investors, which disrupted mortality assumptions and diminished investor returns. As a result, some viatical settlement providers stopped brokering new viatical settlements, while others engaged in fraudulent practices, such as pyramid schemes.[8]

Because investors' expectations of returns can trigger the application of state and federal securities law, viatical settlements are widely treated as a hybrid transaction implicating both insurance law and securities law. *Insurance* law applies to protect the policy owner or viator in the "front-end" transaction with the viatical settlement provider through licensing, disclosure reporting, and other requirements. On the other hand, *securities* law applies to the "back-end" transaction to protect investors in viatical settlement investments by state securities regulators, and in some circumstances, the U.S. Securities and Exchange Commission.[9]

In response to increasing concerns over consumer protection in the viatical settlement market, several state insurance regulators (through the National Association of Insurance Commissioners (NAIC)) and the National Association of Insurance Legislators (NCOIL)[10] developed model state legislation regulating the "front-end" transaction of viatical settlements in 1993 and 2007, respectively.

Regulation of Viatical Settlements in Florida

In 1996, Florida enacted the Viatical Settlement Act (codified as part X, ch. 626, F.S.; "the Act")[11] as a regulatory framework for viatical settlement providers (VSPs) and viatical settlement brokers by the Department of Insurance, the predecessor agency to the current Office of Insurance Regulation

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[7] Kelly J. Bozanic, *An Investment to Die For: From Life Insurance to Death Bonds, the Evolution and Legality of the Life Settlement Industry*, 113 PENN. ST. L. REV. 229, 233-234 (2008).

[8] OFFICE OF INSURANCE REGULATION, *Secondary Life Insurance Market Report to the Florida Legislature* (Dec. 2013) ("2013 OIR Report"), p. 9.

[9] GOVERNMENT ACCOUNTABILITY OFFICE, Report to the Special Committee on Aging, U.S. Senate: Life Insurance Settlements, GAO-10-775 (Jul. 2010), p. 9, at http://www.gao.gov/assets/310/306966.pdf .

[10] The NAIC is the standard-setting and regulatory support organization created and governed by the chief insurance departments that regulate the conduct and solvency of insurers in their respective states or territories. NAIC, *About the NAIC*, http://www.naic.org/index_about.htm (last visited Dec. 29, 2015).

[11] Ch. 96-336, Laws of Fla.

(OIR).[12] The Act sets forth requirements for licensure, annual reporting, certain minimum disclosures to viators, transactional procedures, adoption of anti-fraud plans, and administrative, civil, and criminal penalties. The Act also provides the OIR with examination and enforcement authority over VSPs and brokers; review and approval authority over the viatical settlement contracts and forms; rulemaking authority; and provided that a violation of the Act is an unfair trade practice under the Insurance Code. The Act does not authorize the OIR to regulate the rate or amount paid as consideration for a viatical settlement contract.[13]

Since its inception, the Act has been substantively amended seven times to enhance consumer protections and to address changes in the viatical settlement industry.[14] For example, prior to July 1, 2005, viaticals in Florida were regulated exclusively as insurance. In 2005, following numerous consumer complaints and findings of investor harm in the "back-end transaction," the Legislature amended the Act to provide that *viatical settlement investments* are securities under the Florida Securities and Investor Protection Act (ch. 517, F.S.), which is enforced by the Office of Financial Regulation (OFR) and triggers requirements of full and fair disclosure to investors and a securities dealer license from the OFR.[15] The 2005 legislation also provides that a person or firm who offers or attempts to negotiate a viatical settlement between an insured (viator) and a VSP for compensation is a *viatical settlement broker* who must be licensed with the Department of Financial Services (DFS) as a life insurance agent with a proper appointment from a VSP. Viatical settlement brokers owe a fiduciary duty to the viator.[16]

Since the inception of the Act, the viatical settlement market has evolved both in terms of the types of policies transacted by viatical settlement providers and the type of investors.

- "Life settlements" are offered to non-terminally ill insureds that no longer want, need, or can afford their policies and as an alternative to exercising a redemption or accelerated death benefit clause in their policies. However, the Act treats life settlements the same as viatical settlements for purposes of regulation.[17]
- Additionally, instead of the private individuals who invested in viaticals during the HIV/AIDS epidemic, institutional investors (such as investment banks and hedge or pension funds) now often invest in large blocks of policies sold as a portfolio in the secondary market.[18] In 2013, the Legislature directed the OIR to review Florida law and regulations to determine whether there were adequate protections for purchasers of life insurance policies in the secondary life insurance market.[19] Following a public hearing conducted by the OIR, in which both life insurers and institutional investors participated, the OIR published a report, concluding that adequate protections for institutional purchasers in the secondary life insurance market existed and that their recommendations did not warrant legislative action at the time.[20]

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[12] Following the 2003 governmental reorganization, authority over the Act was transferred to the OIR. Ch. 2003-261, Laws of Fla. Additionally, the Act requires *life expectancy providers* to register with the OIR. Life expectancy providers determine life expectancies or mortality ratings for viatical settlements. ss. 626.9911(4) and 626.99175, F.S.

[13] s. 626.9926, F.S.

[14] Excluding reviser's bills and the 2003 governmental reorganization bill. *See* chs. 98-164; 99-212; 2000-344; 2001-207; 2001-247; 2005-237; and 2007-148, Laws of Fla.

[15] Ch. 2005-237, Laws of Fla.

[16] ss. 626.9911(9) and 626.9916, F.S.

[17] The 2000 legislation amended the definition of "viator," who is the owner of a life insurance policy seeking to enter into a viatical settlement contract, to remove language restricting such policy to one "insuring the life of an individual with a catastrophic or life-threatening illness." *See* ch. 2000-344, Laws of Fla.

[18] 2013 OIR REPORT, p. 13. One participant in the 2013 OIR hearing observed that institutional investors primarily participate in the securitization of life settlements, or the nominal "tertiary" market, which feeds liquidity into the secondary life insurance market (i.e., the subsequent trading after the policy is first sold). *Id.* at Appendix A, Transcript of Public Hearing, pp. 125-126.

[19] Ch. 2013-40, §6, Laws of Fla. (2013 General Appropriations Act, p. 316).

[20] 2013 OIR REPORT, pp. 50-51.

Stranger-Originated Life Insurance (STOLI)

Another evolution of the viatical settlement market is a practice known as "stranger-originated (or stranger-owned) life insurance" (STOLI), which emerged in the 2000s. In a STOLI transaction, an individual (typically a senior) is encouraged to take out insurance on his or her own life, sometimes in the millions of dollars, and then assigns the policy to an investor or group of investors (the "stranger") who pay the individual a large cash settlement in exchange for the ownership rights to the policy, including the right to receive the proceeds upon the insured's death.

On the surface, STOLI may appear similar to legitimate viatical or life settlements in that a third party buys a policy from an insured in which they have no insurable interest. However, the critical difference is that in legitimate settlements, an insured initially buys life insurance in a good-faith intent to protect valid insurable interests (i.e., to protect family members or a business from the risk of a premature death), but subsequently decides to sell the policy to a third party due to a change in circumstances that may not warrant the policy (such as divorce, death of an intended beneficiary, or the need for immediate cash due to illness or other loss).

Unlike legitimate viaticals, STOLI lacks an insurable interest at the time of the contract, thereby violating public policy against wagering on the lives of others. The life insurance policy is not acquired in good faith in that the parties intend at the outset that the *investors* (who lack an insurable interest in the insured) receive the proceeds, directly or indirectly.[21] STOLI is a scheme designed to procure life insurance on individuals, often using fraudulent means, such as misrepresentation, falsification, or omission of material facts in the life insurance application, so that an assignment or sale of a policy functions as a subterfuge that circumvents the insurable interest requirement. As the Uniform Law Commission noted:

> Those who benefit from STOLI transactions (typically investors in the secondary markets) claim that it is an appropriate use of life insurance consistent with applicable legal principles, including the free transferability of assets. Others, including life insurers, oppose the use of STOLI on the ground that is a perversion of the life insurance asset and leads to the moral hazard concerns that insurable interest doctrines were intended to mitigate.[22]

STOLI also differs from legitimate viatical settlements with the following common characteristics:

- Typically targets senior citizens who are induced with gifts, promises of free insurance, or monetary gain;
- Commonly financed through non-recourse "premium finance loans";
- Commonly structured through the use of an irrevocable trust, making it difficult for the life insurance company to know that the policy has been sold;
- Premiums are paid for two years (i.e., the contestable period); and
- Often involves misrepresentation, falsification, or omission of material facts (also known as "cleansheeting") in the life insurance application and inflated underwriting practices, such as the applicant's net worth, in order to obtain a policy with a high face value.

According to the OIR, STOLI impacts consumers (both individual investors and insureds) and insurers in a number of ways:[23]

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[21] AALU, NAIFA, and ACLI, *STOLI: The Problem and the Appropriate State Response*, p. 4, on file with the Insurance & Banking Subcommittee staff.

[22] UNIFORM LAW COMMISSION, *Insurable Interest Amendment to the Uniform Trust Code Summary*, at http://www.uniformlaws.org/ActSummary.aspx?title=Insurable%20Interests%20Amendment%20to%20the%20Uniform%20Trust%20Code (last visited Dec. 28, 2015).

[23] Office of Insurance Regulation, Agency Analysis of 2016 House Bill 445 ("OIR Agency Analysis"), p. 6 (Nov. 15, 2015); Additionally, s. 626.9923, F.S., requires VSPs to disclose certain risks to viators, such as tax and Medicaid eligibility consequences.

- Seniors may exhaust their life insurance purchasing capability and not be able to protect their own family or business.
- The incentives, especially cash payments, used to lure seniors to participate in STOLI schemes are taxable as ordinary income.
- Seniors may subject themselves or their estates to potential liability in the event the life insurance policy is rescinded by an insurer who discovers fraud.
- Seniors may encounter unexpected tax liability from the sale of the life insurance policy.[24]
- The "free" insurance is not free and may be subject to tax based on the economic value of the coverage.
- Seniors have to give the purchaser, and subsequent purchasers, access to their medical records when they sell their life insurance policy in the secondary market so that investors know the health status of the insured. The investors want to know the "status" of their investment and how close they are to getting paid.
- STOLI may lead to an increase in life insurance rates for the over-65 population.
- If STOLI practices continue to proliferate, the U.S. Congress may remove the tax-free status of life insurance proceeds, or may provide for federal regulatory oversight of the viatical settlement industry.

Legislative, Regulatory, and Litigation Approaches to STOLI

Over 30 states currently prohibit STOLI, generally through some combination of the NAIC and NCOIL model acts, in addition to common law or statutory insurable interest laws. STOLI has resulted in significant litigation, criminal and regulatory enforcement actions, both nationally and in Florida.[25]

Below are several legal grounds currently available to the OIR and life insurers in STOLI transactions:

- *Grounds for disciplinary action under the Act*: Currently, the Act authorizes the OIR to impose fines between $2,500 to $10,000, or to suspend, revoke, deny, or refuse to renew the license of any VSP found to be engaging in certain acts, such as fraudulent or dishonest practices, dealing in bad faith with viators, or violating any provision of the Act or the Insurance Code. The OIR may also impose cease and desist orders and immediate final orders for violations of the Act.[26]
- *Misrepresentation on an application*: Currently, s. 627.409, F.S., provides that misrepresentation, omission, concealment of fact, or incorrect statements on an application for an insurance contract "may prevent recovery" in certain cases. However, this remedy is viewed as inadequate, because there are no criminal penalties and the only civil penalty available is an action for rescission by the life insurer.
- *Agent regulation*: Various provisions of the Insurance Code authorize the DFS to suspend or revoke the license or appointment of licensees, agencies, or appointees on various grounds, such as using fraudulent or dishonest practices in the conduct of business under the license.[27]
- *Unfair Insurance Trade Practices Act*: Section 626.9541, F.S., lists several unfair methods of competition and unfair or deceptive acts or practices. Each violation of this statute can result in fines ranging from $5,000 to $75,000, depending on the willfulness and particular violation. In addition, "twisting" and "churning" are first-degree misdemeanors, while willfully submitting false signatures on an application is a third-degree felony.[28] While VSPs are subject to this statute by way of s. 626.9927, F.S., and STOLI transactions do share some components of these practices, the statute was written for the initial sale of an insurance policy to an insured and not

[24] *See* IRS Rev. Ruls. 09-13 and 09-14, regarding taxation of proceeds from settlements as capital gains ordinary income and taxation on a post-settlement basis.
[25] For a listing of OIR enforcement actions, see OIR, *Viatical Criminal, Civil and Regulatory Actions*, http://www.floir.com/sections/landh/viaticals/ccr_actions.aspx (last visited Dec. 29, 2015) and 2013 OIR Report, *Appendix C: Florida Regulatory and Enforcement Actions Pertaining to Viatical Settlement Providers.*
[26] ss. 626.9914 and 626.99272 , F.S.
[27] ss. 626.611, 626.6115, 626.6215, and 626.621, F.S.
[28] s. 626.9541, F.S.

specifically for STOLI, making it difficult and unwieldy for the OIR to apply the provisions to secondary sales of life insurance policies.[29]

- *Insurable Interest Litigation by Life Insurers*: Insurers and investors have relied on two dueling statutes which are not in the Act.
    - As noted above, Florida expanded its insurable interest statute, s. 627.404, F.S., in 2008 to clarify when an insurable interest may be validly recognized for life insurance purposes. Life insurers have relied on this statute in filing suit to rescind the policies subsequently transferred in a STOLI transaction for a lack of insurable interest at the time of the policy.
    - However, another statute, s. 627.455, F.S., requires insurers to include an incontestability clause in their policies that bars a challenge to the policy after it has been in force for two years. Securities intermediaries (acting for the institutional investors) have relied on this statute as a kind of statute of limitations to seek dismissal of insurers' rescission cases, arguing that a tardy challenge is barred regardless whether the policy was made with an insurable interest at inception.
    - In separate cases, the U.S. District Court for the Southern District of Florida reached different interpretations on the interplay of these statutes.[30] These appeals were consolidated to the U.S. Court of Appeals for the Eleventh Circuit, which noted that there are no cases decided by Florida courts that specifically address whether a party can challenge an insurance policy as being void ab initio for lack of an insurable interest if the challenge is made after the two-year contestability period, and if so, whether the individual with the required insurable interest must procure the policy in good faith. As a result, the Eleventh Circuit certified questions to the Florida Supreme Court last year for a determination of Florida law on the conflict between these two statutes.[31]

However, current law does not specifically define STOLI, nor does it have a specific *regulatory* prohibition on STOLI or policies lacking an insurable interest at inception.

Effect of the Bill

The bill increases the OIR's regulatory authority over the Act in areas that the OIR believes are necessary to protect Florida consumers by clarifying fraudulent acts, prohibited practices, explicitly prohibiting STOLI transactions, requiring increased disclosures to viators, and increasing transparency of viatical settlement providers' operations. These provisions are largely based on a combination of model viatical settlement legislation from the NAIC and the NCOIL. The bill focuses on the "front-end" transaction by viatical settlement providers, not the "back-end" (securities regulation).

Definitions; Prohibition of STOLI Practices and Fraudulent Viatical Settlement Acts

As stated by the OIR, many activities described in this bill are already prohibited by current laws addressing fraud and illegal activities,[32] although, as noted above, many of these current laws may be ineffective or difficult to enforce. The bill addresses the historical prohibition on wagering on the lives of strangers by creating a regulatory prohibition on "STOLI practices," which the bill defines as a "fraudulent viatical act," which are new definitions created in s. 626.9911, F.S. The bill creates s. 626.99289, F.S., to make any contract, agreement, arrangement, or transaction that is entered into for the furtherance of a STOLI act void and unenforceable.

[29] OIR Agency Analysis, p. 2.
[30] *Pruco Life Ins. V. Brasner*, 2011 WL 134056 (S.D. Fla. Jan. 7, 2011), and *Pruco Life Ins. Co. v. U.S. Bank*, 2013 WL 4496506 (S.D. Fla. Aug. 20, 2013).
[31] *Pruco Life Ins. Co. v. Wells Fargo Bank, N.A.*, 780 F.3d 1327 at 1336 (11th Cir. C.A. 2015). The appeal, currently pending at the Florida Supreme Court (Case No. SC15-382), is scheduled for oral argument on March 10, 2016, and will go back to the Eleventh Circuit for final disposition.
[32] OIR Agency Analysis, p. 2.

Section 1 of the bill also includes a comprehensive list defining a "fraudulent viatical settlement act," including preparing false or fraudulent material information or the concealment of material information related to a viatical settlement contract or life insurance policy; perpetuating or preventing the detection of a fraud; prohibitions on the use of trusts in STOLI transactions; and the failure to disclose to the insurer when requested by the insurer that the prospective insured has undergone a life expectancy evaluation by any person other than the insurer or its authorized representatives in connection with the issuance of a policy.

The bill also amends the definition of "viatical settlement contract" to include the sale of an interest in a trust or other entity if such entity was formed or used for the purpose of acquiring life insurance contracts that insure the life of a person residing in Florida. It also clarifies that a "viatical settlement contract" does not include accelerated death provisions in a life insurance policy or loan or advance from the issuer of the policy to the policyowner. This is consistent with the current definition of "viatical settlement provider" in s. 626.9911(12), F.S., which excludes life and health insurers that have lawfully issued a life insurance policy that provides accelerated benefits to terminally ill policyholders or certificateholders.

The section also deletes the exclusion of, "other licensed lending institution," from the definition of a "viatical settlement provider," as it could be interpreted to be a premium finance company or some other entity with little or no regulatory oversight.

Annual Statement Filings

Section 2 of the bill amends s. 626.9913, F.S., to require a VSP to include additional information in their annual statement filings to the OIR. The bill codifies the language that is currently collected by the OIR to ensure VSPs consistently provide this information,[33] and adds a requirement for providers to submit total commissions or compensation, including across jurisdictions and on a yearly basis. Previously, the OIR sought to collect this information from VSPs through a proposed rule; however, the proposed rule was successfully challenged as an invalid exercise of legislative authority.[34]

The bill also deletes obsolete language pertaining to surety bond requirements and deposits.

Grounds for Administrative Action against VSPs

Section 3 of the bill amends s. 626.9914, F.S., to add "fraudulent viatical settlement act" to the list of grounds for suspension, revocation, denial or non-renewal of a VSP license. The bill also increases maximum administrative fines for non-willful violations of this section from $2,500 to $10,000 and willful violations from $10,000 to $25,000. These new caps match the maximum fines that OIR can assess against a VSP pursuant to s. 626.99272(2), F.S., for any violations of the entire Act, not just the enumerated grounds in s. 626.9914, F.S.

Disclosures to Viators

Section 5 of the bill creates s. 626.99185, F.S., to establish new requirements for a VSP to disclose certain amounts paid to any broker along with a reconciliation of the difference between the gross offer and the net proceeds.[35] A viatical settlement provider, prior to executing a viatical contract, is required to obtain a signed and dated copy of this disclosure statement and any amended disclosure statement from the broker or viator. This new section also requires the VSP to maintain the statement for copying and inspection by the OIR pursuant to its examination authority in s. 626.9922(2), F.S.

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[33] *Id.* at p. 2.

[34] *LISA v. Fin. Serv. Comm'n*, Case No. 09-0386RP (Fla. DOAH May 7, 2009); *partly affirmed* in *Office of Ins. Reg. v. LISA*, 31 So. 3d 953 (Fla. 1st DCA 2010).

[35] Currently, s. 626.99181, F.S., requires viatical settlement *brokers* to disclose their compensation to the viator.

Prohibited Practices and Conflicts of Interest

Section 8 of the bill creates s. 626.99273, F.S., titled "prohibited practices and conflicts of interest," which is based on the NAIC Model Act. This section prohibits a broker from sharing common control with or receiving funds from the VSP. It also requires VSPs to file their advertising and marketing materials to the OIR prior to entering into any viatical contracts. The advertising and marketing materials along with insurance producers, insurers, brokers and VSPs are prohibited from stating or implying that the life insurance is free for any period of time, which is currently an unfair insurance trade practice in s. 626.9541(1)(n), F.S.

Incontestability Period, Notice to Insurers, & Verification of Coverage

Currently, the Act contains a contestability statute (s. 626.99287, F.S.), which provides that viatical settlements entered into within two years after the issuance of the insurance policy are generally void and unenforceable by either party, except in certain circumstances warranting a hardship exception, such as a viator's certification of a life-threatening illness or death of a viator's spouse. In these cases, the VSP submits the request to the insurer, who must "timely" respond. This provision does not preclude an insurer from contesting the validity of any policy on the grounds of fraud.

Section 12 of the bill repeals this contestability statute. In its place, Section 9 of the bill amends s. 626.99275, F.S., to require certain conditions be met within a 5-year period before applying for or entering into a life insurance policy that is the subject of a viatical settlement contract These conditions include: evidence that a viator or insured is terminally or chronically ill; the viator's spouse dies; the viator retires or becomes disabled; or bankruptcy of the viator. Some of these conditions are identical or substantially similar to the hardship exceptions in the current contestability statute. A viator may also meet the conditions if, after more than 2 years from entering into a viatical settlement contract, at all times during the policy's issuance, the viator certifies that: (a) policy premiums have been funded exclusively with unencumbered assets; (b) no agreement with another party has been entered into to purchase the policy; and (c) the insured and the policy have not been evaluated for settlement.

Section 9 of the bill also adds a prohibition on anyone from knowingly issuing, soliciting, marketing or promoting the purchase of a life insurance policy for the purposes of or emphasis on selling the policy, or from engaging in any fraudulent viatical settlement act. In addition to violating the incontestability period, these violations constitute a felony of varying degrees, depending on the value of the insurance policy.

Section 10 of the bill creates a notification to insurer statute (new s. 626.99276, F.S.), which clarifies the responsibilities of all parties involved in a viatical settlement and outlines the documents that must be submitted to the insurer as well as responsibilities of the insurer when dealing with the viatication of a policy. This section requires a viatical settlement provider to give notice to an insurer, including a copy of a sworn affidavit and documentation certifying that certain conditions have been met (as required by new paragraph s. 626.99275(1)(e), F.S., of the bill), if either the viator submits a request to the insurer for verification of coverage, or if the viatical settlement provider submits a request to transfer the policy or certificate to the provider. In response to a request for verification of coverage or transfer of policy, the section prohibits an insurer from requiring that the viator, insured, provider, or broker sign any disclosures or forms not specifically approved by the OIR for viatical settlement contracts. The section also requires that upon receipt of a request of a change of ownership or beneficiary, the insurer respond in writing within 30 days.

Anti-Fraud Plan Recordkeeping

Section 11 of the bill amends the anti-fraud statute (s. 626.99278, F.S.), to require licensed VSPs to maintain documentation of their compliance with their anti-fraud plan, documentation pertaining to material inconsistencies between medical records and insurance applications, and documentation of their reporting to the Division of Insurance Fraud. The documentation must be maintained in

accordance with s. 626.9922, F.S., which requires licensees to maintain books and records for at least 3 years after the death of the insured and must be made available to the OIR or DFS for inspection during reasonable business hours.
Cross-References

Sections 4, 6, and 7 of the bill amend ss. 626.99175, 626.9924, and 626.99245, F.S., respectively, to delete obsolete provisions and to correct cross-references.

B. SECTION DIRECTORY:

Section 1. Amends s. 626.9911, F.S., relating to definitions.
Section 2. Amends s. 626.9913, F.S., relating to viatical settlement provider license continuance; annual report; fees; deposit.
Section 3. Amends s. 626.9914, F.S., relating to suspension, revocation, denial, or nonrenewal of viatical settlement provider license; grounds; administrative fine.
Section 4. Amends s. 626.99175, F.S., relating to life expectancy providers; registration required; denial, suspension, revocation.
Section 5. Creates s. 626.99185, F.S., relating to disclosures to viator of disbursement.
Section 6. Amends s. 626.9924, F.S., relating to viatical settlement contracts; procedures; rescission.
Section 7. Amends s. 626.99245, F.S., relating to conflict of regulation of viaticals.
Section 8. Creates s. 626.99273, F.S., relating to prohibited practices and conflicts of interest.
Section 9. Amends s. 626.99275, F.S., relating to prohibited practices; penalties.
Section 10. Creates s. 626.99276, F.S., relating to notification to insurer required.
Section 11. Amends s. 626.99278, F.S., relating to viatical provider anti-fraud plan.
Section 12. Repeals s. 626.99287, F.S., relating to contestability of viaticated policies.
Section 13. Creates s. 626.99289, F.S., relating to void and unenforceable contracts, agreements, arrangements, and transactions.
Section 14. Provides an effective date of July 1, 2016.

II. FISCAL ANALYSIS & ECONOMIC IMPACT STATEMENT

A. FISCAL IMPACT ON STATE GOVERNMENT:

1. Revenues:

   Positive but indeterminate. The bill increases maximum administrative fines for non-willful violations of s. 626.9914, F.S., from $2,500 to $10,000, and willful violations of the same statute from $10,000 to $25,000.

2. Expenditures:

   Indeterminate. The bill requires the OIR to review additional forms and advertising materials. As there are currently no rules concerning viatical advertising, the OIR states that it is not possible to anticipate the volume of advertising materials the OIR may receive or the time OIR will have to expend reviewing such advertising.[36]

   In addition, the DFS noted that its investigations in viatical settlements primarily result from STOLI transactions, and that the bill's prohibition on STOLI transactions may significantly reduce their viatical-related investigative caseload. In addition, the DFS noted that the bill may be effective in reducing multiple loopholes and devices used to commit fraud in the viatical industry.[37]

   The bill has an insignificant, yet indeterminate fiscal impact on state government expenditures due to the creation of a new felony offenses in s. 626.99275, F.S., for persons who knowingly enter into a viatical settlement contract in violation of the incontestability period and who do not meet the

[36] OIR Agency Analysis, p. 4.
[37] Department of Financial Services, Agency Analysis of 2016 House Bill 445, p. 3 (Jan. 6, 2016).

exceptions, for knowingly issuing or promoting the purchase of a life insurance policy for the purpose of or with an emphasis on selling the policy, or engaging in a fraudulent settlement act. The Criminal Justice Impact Conference has not yet met to determine the prison bed impact of the bill. However, the bill may have a negative prison bed impact on the Department of Corrections because the bill creates these new felony offenses.

B. FISCAL IMPACT ON LOCAL GOVERNMENTS:

1. Revenues:

None.

2. Expenditures:

None.

C. DIRECT ECONOMIC IMPACT ON PRIVATE SECTOR:

Indeterminate. The bill increases regulatory requirements and administrative fines on viatical settlement providers. However, the bill may benefit consumers and life insurers by reducing the volume of lawsuits and fraudulent or speculative claims paid out by insurers, which could reduce overall premium costs.[38]

D. FISCAL COMMENTS:

None.

III. COMMENTS

A. CONSTITUTIONAL ISSUES:

1. Applicability of Municipality/County Mandates Provision:

Not applicable. The bill does not appear to affect county or municipal governments.

2. Other:

The bill is silent as to if or how it applies to policies issued or viaticated before the effective date of July 1, 2016. However, s. 624.21, F.S., provides that each amendment to the Insurance Code[39] (which includes the Act) shall be construed to operate prospectively, unless a contrary legislative intent is specified. This is consistent with the constitutional principle that unless the Legislature states otherwise, legislation is presumed only to operate prospectively, especially when retroactive application would impair existing rights. Even where the Legislature expressly states an intent for a statute to apply retroactively, courts will reject such an application if the statute impairs a vested right, creates a new obligation, or imposes a new penalty.[40]

State and federal appellate courts in California have held that the California 2009 anti-STOLI law (which, like this bill, established a statutory definition of STOLI and classified such transactions as fraudulent acts) does not apply retroactively to policies written or to beneficial interests transferred before the law took effect.[41] Similarly, the New York Court of Appeals held that New York law existing prior to anti-STOLI legislation enacted in 2009 applied in a 2010 STOLI challenge.[42]

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[38] *Id.*

[39] Section 624.01, F.S., provides that chs. 624-632, 634-636, 641-642, 648, and 651 constitute the Florida Insurance Code.

[40] *Menendez v. Progressive Exp. Ins. Co., Inc.*, 35 So.3d 873 (Fla. 2010).

[41] *Lincoln Life & Annuity Co. of N.Y. v. Berck,* 2011 WL 1878855 (Cal. Ct. App. 2011), *review denied* Aug. 31, 2011; *Wells Fargo Bank, N.A. v. American Nat. Ins. Co.*, 493 Fed.Appx. 838 (9th Cir. 2012).

[42] *Kramer v. Phoenix Life Ins. Co.*, 15 N.Y. 3d. 539 at 549, n. 5 (2010).

Under these principles (and regardless of how the Florida Supreme Court interprets the insurable interest and contestability statutes or how the Eleventh Circuit Court of Appeals adjudicates the parties' rights and obligations in *Pruco)*, it is unlikely a court would uphold retroactive application of subsequently enacted anti-STOLI legislation such as this bill.

B. RULE-MAKING AUTHORITY:

The bill prohibits a viatical settlement provider from entering into a viatical settlement contract unless the promotional, advertising, and marketing materials, "as prescribed by rule," have been filed with the OIR. The OIR has indicated that a more direct, specific delegation of rulemaking authority to the commission would be helpful.[43]

C. DRAFTING ISSUES OR OTHER COMMENTS:

- Line 544 prohibits life insurance "producers" and other entities from representing to applicants or policyholders that insurance is free or without cost for any period of time. The Insurance Code does not define the term "life insurance producers," but does include producers in the definition of "agent" (s. 626.015(2), F.S.).
- DFS noted that section 5 of the bill could be clarified as to the viatical settlement broker's responsibility in securing disclosure statements and providing any mandated copies to the viator.[44]
- The bill places the new 5-year incontestability period and exceptions in s. 626.99275, F.S. (prohibited practices; penalties); in order to qualify for an exception to the incontestability period, the bill requires a sworn affidavit and documentation from the viator. The bill cross-references this affidavit and documentation requirement in the new notification of insurer statute, s. 626.99276, F.S. It may be clearer to restore the incontestability rule as a stand-alone statute and to incorporate the new exceptions to incontestability, rather than to embed these into a prohibited practices/criminal penalties statute.
- The examination authority statute, s. 626.9922, F.S., which is not amended by the bill, refers to certain books and records that must be maintained and made available to the OIR. Specifically, subsection (2) of the statute requires VSP licensees to maintain books, records, and so forth, "relating to all transactions of viatical settlement contracts, life expectancies, or viatical settlement purchase agreements made before July 1, 2005" for three years after the insured's death. This provision could be clarified so as not to limit interpretation and application of this statute to only pre-2005 agreements and contracts.

In addition to the suggestion that the rulemaking authority for OIR's viatical advertising review be more specific, the OIR provided the following comments:[45]

- At line 248 [s. 626.9911(11)(b), F.S.], it may be appropriate to add "or other entity" after the word "trust."
- At line 345 [s. 626.9913(2)(b)2., F.S.], to ensure that data is reported for each year of the most recent 5 years, and not one aggregate filing for that 5 year period, the language should be clarified to denote that the data should be reported for each year of the past five years.
- At line 350 [s. 626.9913(2)(b)3., F.S.], the language should be clarified to state that the requested data is for the most recent calendar year.
- At line 386 [s. 626.9913(3)], F.S], the $100,000 deposit has remained the same since the Act was adopted. It may be appropriate to consider raising the amount of this deposit and/or tying it to a value that will rise with inflation. The NAIC Model Act requires a $250,000 deposit.
- At line 420 [s. 626.9914(1)(i), F.S.], it may be appropriate to expand this language to apply to those that the viatical settlement provider employs "or contracts with."

[43] OIR Agency Analysis, p. 6.
[44] DFS Agency Analysis, p. 3.
[45] OIR Agency Analysis, p. 6.

IV. AMENDMENTS/ COMMITTEE SUBSTITUTE CHANGES

A bill to be entitled

An act relating to viatical settlements; amending s. 626.9911, F.S.; revising definitions; defining the terms "business of viatical settlements," "fraudulent viatical settlement act," and "stranger-originated life insurance practice"; amending s. 626.9913, F.S.; requiring additional information in an annual statement filed by viatical settlement provider licensees; deleting an obsolete provision regarding a deposit requirement; amending s. 626.9914, F.S.; adding an act that warrants the imposition of administrative penalties against viatical settlement provider licensees; increasing the amount of administrative fines that may be imposed by the Office of Insurance Regulation against licensees for certain violations; amending s. 626.99175, F.S.; deleting an obsolete provision; deleting an exception from registration requirements for life expectancy providers; creating s. 626.99185, F.S.; requiring viatical settlement providers to provide viators with a disclosure statement before or concurrently with a viator's execution of a viatical settlement contract; providing requirements and procedures for such disclosure statements; amending s. 626.9924, F.S.; deleting a requirement to provide specified documents with a notice that a policy has or will become a

viaticated policy; amending s. 626.99245, F.S.; conforming a cross-reference; creating s. 626.99273, F.S.; prohibiting certain practices and conflicts of interest relating to viatical settlement contracts or insurance policies; requiring a viatical settlement provider to file certain promotional, advertising, and marketing materials with the office before entering into viatical settlement contracts; prohibiting certain references relating to the cost of life insurance policies in such materials and other specified statements and representations; amending s. 626.99275, F.S.; prohibiting a person from entering into a viatical settlement contract before a specified date except under specified circumstances, from issuing, soliciting, marketing, or otherwise promoting the purchase of a policy under certain circumstances, and from engaging in a fraudulent viatical settlement act; providing criminal penalties for a violation of such prohibitions; creating s. 626.99276, F.S.; requiring specified affidavits and other documentation to be provided to an insurer for requests to verify coverage and to transfer a policy or certificate to a viatical settlement provider; prohibiting insurers from requiring certain forms that have not been approved by the office to be signed as a condition of responding to such requests; requiring insurers to

respond in writing within a specified period to properly completed requests to change the ownership or beneficiary of a policy; amending s. 626.99278, F.S.; providing requirements for licensed viatical settlement providers to maintain specified documentation relating to anti-fraud plans and procedures, material inconsistencies between medical records and insurance applications, and reporting of specified fraudulent acts and prohibited practices; repealing s. 626.99287, F.S., relating to the contestability of viaticated policies; creating s. 626.99289, F.S.; providing that certain contracts, agreements, arrangements, and transactions relating to stranger-originated life insurance practices are void and unenforceable; providing an effective date.

Be It Enacted by the Legislature of the State of Florida:

Section 1. Section 626.9911, Florida Statutes, is amended to read:

626.9911 Definitions.—As used in this act, the term:

(1) "Business of viatical settlements" means an activity involved in the offering, soliciting, negotiating, procuring, effectuating, purchasing, investing, monitoring, tracking, underwriting, selling, transferring, assigning, pledging, or hypothecating of, or acquiring in other manner, an interest in a

life insurance policy by means of a viatical settlement contract.

(2) "Financing entity" means an underwriter, placement agent, lender, purchaser of securities, or purchaser of a policy or certificate from a viatical settlement provider, credit enhancer, or any entity that has direct ownership in a policy or certificate that is the subject of a viatical settlement contract, but whose principal activity related to the transaction is providing funds or credit enhancement to effect the viatical settlement or the purchase of one or more viaticated policies and who has an agreement in writing with one or more licensed viatical settlement providers to finance the acquisition of viatical settlement contracts. The term does not include a nonaccredited investor or other natural person. A financing entity may not enter into a viatical settlement contract.

(3) "Fraudulent viatical settlement act" means an act or omission committed by a person who, knowingly or with the intent to defraud for the purpose of depriving another of property or for pecuniary gain, commits or allows an employee or agent to commit an act specified in this subsection.

(a) Presenting, causing to be presented, or preparing with the knowledge or belief that it will be presented to or by another person false or concealed material information as part of, in support of, or concerning a fact material to:

1. An application for the issuance of a viatical

settlement contract or an insurance policy;

2. The underwriting of a viatical settlement contract or an insurance policy;

3. A claim for payment or benefit pursuant to a viatical settlement contract or an insurance policy;

4. Premiums paid on an insurance policy;

5. Payments and changes in ownership or beneficiary made in accordance with the terms of a viatical settlement contract or an insurance policy;

6. The reinstatement or conversion of an insurance policy;

7. The solicitation, offer, effectuation, or sale of a viatical settlement contract or an insurance policy;

8. The issuance of written evidence of a viatical settlement contract or an insurance policy; or

9. A financing transaction.

(b) Employing a plan, financial structure, device, scheme, or artifice to defraud related to viaticated policies.

(c) Engaging in a stranger-originated life insurance practice.

(d) Failing to disclose upon request by an insurer that the prospective insured has undergone a life expectancy evaluation by a person other than the insurer or its authorized representatives in connection with the issuance of the policy.

(e) Perpetuating a fraud or preventing the detection of a fraud by:

1. Removing, concealing, altering, destroying, or

sequestering from the office the assets or records of a licensee or other person engaged in the business of viatical settlements;

2. Misrepresenting or concealing the financial condition of a licensee, financing entity, insurer, or other person;

3. Transacting in the business of viatical settlements in violation of laws requiring a license, certificate of authority, or other legal authority to transact such business; or

4. Filing with the office or the equivalent chief insurance regulatory official of another jurisdiction a document that contains false information or conceals information about a material fact from the office or other regulatory official.

(f) Embezzlement, theft, misappropriation, or conversion of moneys, funds, premiums, credits, or other property of a viatical settlement provider, insurer, insured, viator, insurance policyowner, or other person engaged in the business of viatical settlements or insurance.

(g) Recklessly entering into, negotiating, brokering, or otherwise dealing in a viatical settlement contract, the subject of which is a life insurance policy that was obtained based on information that was falsified or concealed for the purpose of defrauding the policy's issuer, viatical settlement provider, or viator. As used in this paragraph, the term "recklessly" means acting or failing to act in conscious disregard for the relevant facts or risks, and which disregard involves a gross deviation from acceptable standards of conduct.

(h) Facilitating the viator's change of residency state to

avoid the provisions of this act.

(i) Facilitating or causing the creation of a trust with a non-Florida situs or other nonresident entity for the purpose of owning a life insurance policy covering a Florida resident to avoid the provisions of this act.

(j) Facilitating or causing the transfer of the ownership of an insurance policy covering a Florida resident to a trust with a non-Florida situs or other nonresident entity to avoid the provisions of this act.

(k) Applying for or obtaining a loan that is secured directly or indirectly by an interest in a life insurance policy.

(l) Violating s. 626.99273(1) or (2).

(m) Attempting to commit, assisting, aiding, or abetting in the commission of or conspiring to commit an act or omission specified in this subsection.

(4) ~~(2)~~ "Independent third-party trustee or escrow agent" means an attorney, certified public accountant, financial institution, or other person providing escrow services under the authority of a regulatory body. The term does not include any person associated, affiliated, or under common control with a viatical settlement provider or viatical settlement broker.

(5) ~~(3)~~ "Life expectancy" means an opinion or evaluation as to how long a particular person is to live, or relating to such person's expected demise.

(6) ~~(4)~~ "Life expectancy provider" means a person who

determines, or holds himself or herself out as determining, life expectancies or mortality ratings used to determine life expectancies under any of the following circumstances:

(a) On behalf of a viatical settlement provider, viatical settlement broker, life agent, or person engaged in the business of viatical settlements.~~;~~

(b) In connection with a viatical settlement investment, pursuant to s. 517.021(24).~~; or~~

(c) On residents of this state in connection with a viatical settlement contract or viatical settlement investment.

(7)~~(5)~~ "Person" has the meaning specified in s. 1.01.

(8)~~(6)~~ "Related form" means any form, created by or on behalf of a licensee, which a viator or insured is required to sign or initial. The forms include, but are not limited to, a power of attorney, a release of medical information form, a suitability questionnaire, a disclosure document, or any addendum, schedule, or amendment to a viatical settlement contract considered necessary by a provider to effectuate a viatical settlement transaction.

(9)~~(7)~~ "Related provider trust" means a titling trust or other trust established by a licensed viatical settlement provider or financing entity for the sole purpose of holding the ownership or beneficial interest in purchased policies in connection with a financing transaction. The trust must have a written agreement with a licensed viatical settlement provider or financing entity under which the licensed viatical settlement

provider or financing entity is responsible for insuring compliance with all statutory and regulatory requirements and under which the trust agrees to make all records and files relating to viatical settlement transactions available to the office as if those records and files were maintained directly by the licensed viatical settlement provider. This term does not include an independent third-party trustee or escrow agent or a trust that does not enter into agreements with a viator. A related provider trust is ~~shall be~~ subject to all provisions of this act that apply to the viatical settlement provider who established the related provider trust, except s. 626.9912, which does ~~shall~~ not apply ~~be applicable~~. A viatical settlement provider may establish up to ~~no more than~~ one related provider trust, and the sole trustee of such related provider trust shall be the viatical settlement provider licensed under s. 626.9912. The name of the licensed viatical settlement provider shall be included within the name of the related provider trust.

(10)~~(8)~~ "Special purpose entity" means an entity established by a licensed viatical settlement provider or by a financing entity, which may be a corporation, partnership, trust, limited liability company, or other similar entity formed solely to provide, either directly or indirectly, access to institutional capital markets to a viatical settlement provider or financing entity. A special purpose entity may not obtain capital from any natural person or entity with less than $50 million in assets and may not enter into a viatical settlement

contract.

(11) "Stranger-originated life insurance practice" means an act, practice, arrangement, or agreement to initiate a life insurance policy for the benefit of a third-party investor who, at the time of policy origination, has no insurable interest in the insured. Stranger-originated life insurance practices include, but are not limited to:

(a) The purchase of a life insurance policy with resources or guarantees from or through a person who, at the time of such policy's inception, could not lawfully initiate the policy and the execution of a verbal or written arrangement or agreement to directly or indirectly transfer the ownership of such policy or policy benefits to a third party.

(b) The creation of a trust that has the appearance of an insurable interest to initiate policies for investors, which violates insurable interest laws and the prohibition against wagering on life.

(12)~~(9)~~ "Viatical settlement broker" means a person who, on behalf of a viator and for a fee, commission, or other valuable consideration, offers or attempts to negotiate viatical settlement contracts between a viator resident in this state and one or more viatical settlement providers. Notwithstanding the manner in which the viatical settlement broker is compensated, a viatical settlement broker is deemed to represent only the viator and owes a fiduciary duty to the viator to act according to the viator's instructions and in the best interest of the

viator. The term does not include an attorney, licensed Certified Public Accountant, or investment adviser lawfully registered under chapter 517, who is retained to represent the viator and whose compensation is paid directly by or at the direction and on behalf of the viator.

(13) ~~(10)~~ "Viatical settlement contract" means a written agreement entered into between a viatical settlement provider, or its related provider trust, and a viator. The viatical settlement contract includes an agreement to transfer ownership or change the beneficiary designation of a life insurance policy at a later date, regardless of the date that compensation is paid to the viator. The agreement must establish the terms under which the viatical settlement provider will pay compensation or anything of value, which compensation or value is less than the expected death benefit of the insurance policy or certificate, in return for the viator's assignment, transfer, sale, devise, or bequest of the death benefit or ownership of all or a portion of the insurance policy or certificate of insurance to the viatical settlement provider. The term also includes the transfer for compensation or value of an ownership or a beneficial interest in a trust or other entity that owns such policy if the trust or other entity was formed or used for the principal purpose of acquiring one or more life insurance contracts that insure the life of a person residing in this state, and ~~A viatical settlement contract also includes~~ a contract for a loan or other financial transaction secured

primarily by an individual or group life insurance policy. The term does not include~~, other than~~ a policy loan by a life insurance company pursuant to the terms of the life insurance contract or accelerated death provisions contained in a life insurance policy, whether issued with the original policy or as a rider, ~~or~~ a loan secured by the cash surrender value of a policy as determined by the policy issuer and the life insurance policy terms, or a loan or advance from the issuer of the policy to the policyowner.

(14)~~(11)~~ "Viatical settlement investment" has the same meaning as specified in s. 517.021.

(15)~~(12)~~ "Viatical settlement provider" means a person who, in this state, from this state, or with a resident of this state, effectuates a viatical settlement contract. The term does not include:

(a) A ~~Any~~ bank, savings bank, savings and loan association, or credit union~~, or other licensed lending institution~~ that takes an assignment of a life insurance policy as collateral for a loan.

(b) A life and health insurer that has lawfully issued a life insurance policy that provides accelerated benefits to terminally ill policyholders or certificateholders.

(c) A ~~Any~~ natural person who enters into no more than one viatical settlement contract with a viator in 1 calendar year, unless such natural person has previously been licensed under this act or is currently licensed under this act.

(d) A trust that meets the definition of a "related provider trust."

(e) A viator in this state.

(f) A financing entity.

(16) ~~(13)~~ "Viaticated policy" means a life insurance policy, or a certificate under a group policy, which is the subject of a viatical settlement contract.

(17) ~~(14)~~ "Viator" means the owner of a life insurance policy or a certificateholder under a group policy, which policy is not a previously viaticated policy, who enters or seeks to enter into a viatical settlement contract. This term does not include a viatical settlement provider, ~~or~~ a ~~any~~ person acquiring a policy or interest in a policy from a viatical settlement provider, or ~~nor does it include~~ an independent third-party trustee or escrow agent.

Section 2. Subsections (2) and (3) of section 626.9913, Florida Statutes, are amended to read:

626.9913 Viatical settlement provider license continuance; annual report; fees; deposit.—

(2)(a) Annually, on or before March 1, the viatical settlement provider licensee shall file a statement containing information the commission requires and shall pay to the office a license fee in the amount of $500.

(b) In addition to any other requirements, the annual statement must specify:

1. The total number of unsettled viatical settlement

contracts and corresponding total amount due to viators under viatical settlement contracts that have been signed by the viator but have not been settled as of December 31 of the preceding calendar year, categorized by the number of days since the viator signed the contract for transactions regulated by this state.

2. For the most recent 5 years, the total number of policies purchased, total gross amount paid for policies purchased, total commissions or compensation paid for policies purchased, and total face value of policies purchased, allocated by state, territory, and jurisdiction.

3. The total amount of proceeds or compensation paid to policyowners, allocated by state, territory, and jurisdiction.

(c) ~~After December 31, 2007,~~ The annual statement shall include an annual audited financial statement of the viatical settlement provider prepared in accordance with generally accepted accounting principles by an independent certified public accountant covering a 12-month period ending on a day occurring within ~~falling during~~ the last 6 months of the preceding calendar year. If the audited financial statement has not been completed, however, the licensee shall include in its annual statement an unaudited financial statement for the preceding calendar year and an affidavit from an officer of the licensee stating that the audit has not been completed. In this event, the licensee shall submit the audited statement on or before June 1. The annual statement, due on or before March 1

each year, shall also provide the office with a report of all life expectancy providers who have provided life expectancies directly or indirectly to the viatical settlement provider for use in connection with a viatical settlement contract or a viatical settlement investment. A viatical settlement provider shall include in all statements filed with the office all information requested by the office regarding a related provider trust established by the viatical settlement provider. The office may require more frequent reporting. Failure to timely file the annual statement or the audited financial statement or to timely pay the license fee is grounds for immediate suspension of the license. The commission may by rule require all or part of the statements or filings required under this section to be submitted by electronic means in a computer-readable form compatible with the electronic data format specified by the commission.

(3) To ensure the faithful performance of its obligations to its viators in the event of insolvency or the loss of its license, a viatical settlement provider licensee must deposit and maintain deposited in trust with the department securities eligible for deposit under s. 625.52, having at all times a value of not less than $100,000~~; however, a viatical settlement provider licensed in this state prior to June 1, 2004, which has deposited and maintains continuously deposited in trust with the department securities in the amount of $25,000 and which posted and maintains continuously posted a security bond acceptable to~~

~~the department in the amount of $75,000, has until June 1, 2005, to comply with the requirements of this subsection~~.

Section 3. Subsections (1) and (2) of section 626.9914, Florida Statutes, are amended to read:

626.9914 Suspension, revocation, denial, or nonrenewal of viatical settlement provider license; grounds; administrative fine.—

(1) The office shall suspend, revoke, deny, or refuse to renew the license of any viatical settlement provider if the office finds that the licensee has committed any of the following acts:

(a) Has made a misrepresentation in the application for the license.~~;~~

(b) Has engaged in fraudulent or dishonest practices, or otherwise has been shown to be untrustworthy or incompetent to act as a viatical settlement provider.~~;~~

(c) Demonstrates a pattern of unreasonable payments to viators.~~;~~

(d) Has been found guilty of, or has pleaded guilty or nolo contendere to, any felony, or a misdemeanor involving fraud or moral turpitude, regardless of whether a judgment of conviction has been entered by the court.~~;~~

(e) Has issued viatical settlement contracts that have not been approved pursuant to this act.~~;~~

(f) Has failed to honor contractual obligations related to the business of viatical settlement contracts.~~;~~

(g) Deals in bad faith with viators.~~;~~

(h) Has violated any provision of the insurance code or of this act.~~;~~

(i) Employs a ~~any~~ person who materially influences the licensee's conduct and who fails to meet the requirements of this act.~~;~~

(j) No longer meets the requirements for initial licensure.~~; or~~

(k) Obtains or utilizes life expectancies from life expectancy providers who are not registered with the office pursuant to this act.

(l) Has engaged in a fraudulent viatical settlement act.

(2) The office may, in lieu of or in addition to any suspension or revocation, assess an administrative fine not to exceed $10,000 ~~$2,500~~ for each nonwillful violation or $25,000 ~~$10,000~~ for each willful violation by a viatical settlement provider licensee. The office may also place a viatical settlement provider licensee on probation for a period not to exceed 2 years.

Section 4. Subsection (1) of section 626.99175, Florida Statutes, is amended to read:

626.99175 Life expectancy providers; registration required; denial, suspension, revocation.—

(1) ~~After July 1, 2006,~~ A person may not perform the functions of a life expectancy provider without first having registered as a life expectancy provider~~, except as provided in~~

~~subsection (6)~~.

Section 5. Section 626.99185, Florida Statutes, is created to read:

626.99185 Disclosures to viator of disbursement.—

(1) Before or concurrently with a viator's execution of a viatical settlement contract, the viatical settlement provider shall provide to the viator, in duplicate, a disclosure statement in legible written form disclosing:

(a) The name of each viatical settlement broker who receives or will receive compensation and the amount of each broker's compensation related to that transaction. For the purpose of this section, compensation includes anything of value paid or given by or at the direction of a viatical settlement provider or person acquiring an interest in one or more life insurance policies to a viatical settlement broker in connection with the viatical settlement contract.

(b) A complete reconciliation of the gross offer or bid by the viatical settlement provider to the net amount of proceeds or value to be received by the viator related to that transaction. As used in this section, the term "gross offer" or "bid" means the total amount or value offered by the viatical settlement provider for the purchase of an interest in one or more life insurance policies, including commissions, compensation, or other proceeds or value being deducted from the gross offer or bid.

(2) The viator shall sign and date the disclosure

statement before or concurrently with the viator's execution of a viatical settlement contract, with the viator retaining the duplicate copy of the disclosure statement.

(3) If a viatical settlement contract is entered into and the contract is subsequently amended or if there is a change in the viatical settlement provider's gross offer or bid amount, a change in the net amount of proceeds or value to be received by the viator, or a change in the information provided in the disclosure statement to the viator, the viatical settlement provider shall provide, in duplicate, an amended disclosure statement to the viator containing the information in subsection (1). The viator shall sign and date the amended disclosure statement, with the viator retaining the duplicate copy of the amended disclosure statement.

(4) Before a viatical settlement provider's execution of a viatical settlement contract or an amendment to such contract, the viatical settlement provider must obtain the signed and dated disclosure statement and any amended disclosure statement required by this section. In transactions for which a broker is not used, the viatical settlement provider must obtain the signed and dated disclosure statement from the viator.

(5) The viatical settlement provider shall maintain the documentation required by this section pursuant to s. 626.9922(2) and shall make such documentation available to the office at any time for copying and inspection upon reasonable notice by the office to the viatical settlement provider.

Section 6. Subsection (7) of section 626.9924, Florida Statutes, is amended to read:

626.9924 Viatical settlement contracts; procedures; rescission.—

(7) At any time during the contestable period, within 20 days after a viator executes documents necessary to transfer rights under an insurance policy or within 20 days of any agreement, option, promise, or any other form of understanding, express or implied, to viaticate the policy, the provider must give notice to the insurer of the policy that the policy has or will become a viaticated policy. ~~The notice must be accompanied by the documents required by s. 626.99287(5)(a) in their entirety.~~

Section 7. Subsection (2) of section 626.99245, Florida Statutes, is amended to read:

626.99245 Conflict of regulation of viaticals.—

(2) This section does not affect the requirement of ss. 626.9911(15)~~(12)~~ and 626.9912(1) that a viatical settlement provider doing business from this state must obtain a viatical settlement license from the office. As used in this subsection, the term "doing business from this state" includes effectuating viatical settlement contracts from offices in this state, regardless of the state of residence of the viator.

Section 8. Section 626.99273, Florida Statutes, is created to read:

626.99273 Prohibited practices and conflicts of interest.—

(1) With respect to a viatical settlement contract or an insurance policy, a viatical settlement broker may not knowingly solicit an offer from, effectuate a viatical settlement with, or make a sale to any viatical settlement provider, financing entity, or related provider trust that is controlling, controlled by, or under common control with such viatical settlement broker.

(2) With respect to a viatical settlement contract or an insurance policy, a viatical settlement provider may not knowingly enter into a viatical settlement contract with a viator if, in connection with such viatical settlement contract, anything of value will be paid to a viatical settlement broker that is controlling, controlled by, or under common control with such viatical settlement provider, financing entity, or related provider trust that is involved in such viatical settlement contract.

(3) A viatical settlement provider may not enter into a viatical settlement contract unless the viatical settlement promotional, advertising, and marketing materials, as may be prescribed by rule, have been filed with the office. Such materials may not expressly indicate, or include any reference that would cause a viator to reasonably believe, that the life insurance is free for any period of time.

(4) A life insurance producer, insurer, viatical settlement broker, or viatical settlement provider may not make a statement or representation to an applicant or policyholder in

connection with the sale of a life insurance policy to the effect that the insurance is free or without cost to the policyholder for any period of time.

Section 9. Section 626.99275, Florida Statutes, is amended to read:

626.99275 Prohibited practices; penalties.—

(1) It is unlawful for a ~~any~~ person to:

(a) ~~To~~ Knowingly enter into, broker, or otherwise deal in a viatical settlement contract the subject of which is a life insurance policy, knowing that the policy was obtained by presenting materially false information concerning any fact material to the policy or by concealing, for the purpose of misleading another, information concerning any fact material to the policy, where the viator or the viator's agent intended to defraud the policy's issuer.

(b) ~~To~~ Knowingly or with the intent to defraud, for the purpose of depriving another of property or for pecuniary gain, issue or use a pattern of false, misleading, or deceptive life expectancies.

(c) ~~To~~ Knowingly engage in any transaction, practice, or course of business intending thereby to avoid the notice requirements of s. 626.9924(7).

(d) ~~To~~ Knowingly or intentionally facilitate the change of state of residency of a viator to avoid the provisions of this chapter.

(e) Knowingly enter into a viatical settlement contract

before the application for or issuance of a life insurance policy that is the subject of a viatical settlement contract or within a 5-year period commencing with the date of issuance of the policy or certificate, unless the viator provides a sworn affidavit and accompanying documentation that certifies to the viatical settlement provider that one or more of the following conditions have been met within the 5-year period:

1. The policy or certificate was issued upon the viator's exercise of conversion rights arising out of a group or individual policy, provided the total of the time covered under the conversion policy plus the time covered under the prior policy is at least 60 months. The time covered under a group policy shall be calculated without regard to any change in insurance carriers, provided the coverage has been continuous and under the same group sponsorship.

2. The viator submits independent evidence to the viatical settlement provider that one or more of the following conditions have been met within the 5-year period:

a. The viator or insured is terminally or chronically ill;

b. The viator's spouse dies;

c. The viator divorces his or her spouse;

d. The viator retires from full-time employment;

e. The viator becomes physically or mentally disabled and a physician determines that the disability prevents the viator from maintaining full-time employment; or

f. A final order, judgment, or decree is entered by a

court of competent jurisdiction, upon the application by a viator's creditor, which adjudicates the viator bankrupt or insolvent or approves a petition seeking reorganization of the viator or appointing a receiver, trustee, or liquidator to all or a substantial part of the viator's assets.

3. The viator enters into a viatical settlement contract more than 2 years after a policy's issuance date and, with respect to the policy, at all times before such date each of the following conditions is met:

a. Policy premiums have been funded exclusively with unencumbered assets, including an interest in the life insurance policy being financed only to the extent of its net cash surrender value provided by, or full recourse liability incurred by, the insured;

b. An agreement or understanding with another person has not been entered to guarantee any such liability or to purchase, or be ready to purchase, the policy, including through an assumption or forgiveness of the loan; and

c. The insured and the policy have not been evaluated for settlement.

(f) Knowingly issue, solicit, market, or otherwise promote the purchase of a life insurance policy for the purpose of or with an emphasis on selling the policy.

(g) Engage in a fraudulent viatical settlement act.

(2) A person who violates any provision of this section commits:

(a) A felony of the third degree, punishable as provided in s. 775.082, s. 775.083, or s. 775.084, if the insurance policy involved is valued at any amount less than $20,000.

(b) A felony of the second degree, punishable as provided in s. 775.082, s. 775.083, or s. 775.084, if the insurance policy involved is valued at $20,000 or more, but less than $100,000.

(c) A felony of the first degree, punishable as provided in s. 775.082, s. 775.083, or s. 775.084, if the insurance policy involved is valued at $100,000 or more.

Section 10. Section 626.99276, Florida Statutes, is created to read:

626.99276 Notification to insurer required.—

(1) A copy of the sworn affidavit and the documentation required in s. 626.99275(1)(e) must be submitted to the insurer if the viatical settlement provider or other party entering into a viatical settlement contract with a viator submits a request to the insurer for verification of coverage or if the viatical settlement provider submits a request to transfer the policy or certificate to the provider. If the request is made by a viatical settlement provider, the copy shall be accompanied by a sworn affidavit from the viatical settlement provider affirming that the copy is a true and correct copy of the documentation received by the provider.

(2) An insurer may not require, as a condition of responding to a request for verification of coverage or

effecting the transfer of a policy pursuant to a viatical settlement contract, that the viator, insured, viatical settlement provider, or viatical settlement broker sign any disclosures, consent form, waiver form, or other form that has not been approved by the office for use in connection with viatical settlement contracts in this state.

(3) Upon receipt of a properly completed request for change of ownership or beneficiary of a policy, the insurer shall respond in writing within 30 calendar days confirming that the change has been effectuated or specifying the reasons why the requested change cannot be processed. The insurer may not unreasonably delay effectuating a change of ownership or beneficiary and may not otherwise seek to interfere with any viatical settlement contract lawfully entered into in this state.

Section 11. Section 626.99278, Florida Statutes, is amended to read:

626.99278 Viatical provider anti-fraud plan.—

(1) Each ~~Every~~ licensed viatical settlement provider and registered life expectancy provider must adopt an anti-fraud plan and file it with the Division of Insurance Fraud of the department. Each anti-fraud plan shall include:

(a) ~~(1)~~ A description of the procedures for detecting and investigating possible fraudulent acts and procedures for resolving material inconsistencies between medical records and insurance applications.

(b) ~~(2)~~ A description of the procedures for the mandatory reporting of possible fraudulent insurance acts and prohibited practices specified ~~set forth~~ in s. 626.99275 to the Division of Insurance Fraud ~~of the department~~.

(c) ~~(3)~~ A description of the plan for anti-fraud education and training of its underwriters or other personnel.

(d) ~~(4)~~ A written description or chart outlining the organizational arrangement of the anti-fraud personnel who are responsible for the investigation and reporting of possible fraudulent insurance acts and for the investigation of unresolved material inconsistencies between medical records and insurance applications.

(e) ~~(5)~~ For viatical settlement providers, a description of the procedures used to perform initial and continuing review of the accuracy of life expectancies used in connection with a viatical settlement contract or viatical settlement investment.

(2) Each licensed viatical settlement provider shall maintain in accordance with s. 626.9922:

(a) Documentation of compliance with its anti-fraud plan and procedures filed in accordance with this section.

(b) Documentation pertaining to resolved and unresolved material inconsistencies between medical records and insurance applications.

(c) Documentation of its mandatory reporting of the possible fraudulent acts and prohibited practices specified in s. 626.99275 to the Division of Insurance Fraud.

Section 12. Section 626.99287, Florida Statutes, is repealed.

Section 13. Section 626.99289, Florida Statutes, is created to read:

626.99289 Void and unenforceable contracts, agreements, arrangements, and transactions.—A contract, agreement, arrangement, or transaction, including, but not limited to, a financing agreement or any other arrangement or understanding entered into, whether written or verbal, for the furtherance or aid of a stranger-originated life insurance practice is void and unenforceable.

Section 14. This act shall take effect July 1, 2016.

INSURANCE & BANKING SUBCOMMITTEE

HB 445 by Rep. Stevenson
Viatical Settlements

AMENDMENT SUMMARY
January 13, 2016

Amendment 1 (A1) by Rep. Stevenson (Lines 248-704): Retains the provisions of the bill (HB) and makes the following changes:

- Incorporates the following changes recommended by the Office of Insurance Regulation (OIR):
  - Adds "or other entity" after the word "trust (HB line 248/A1 line 7);
  - Clarifies that viatical settlement providers include certain data to the OIR on an annual basis, not in an aggregate five-year filing, and must annually report proceeds paid to policyowners for the most recent calendar year (HB lines 345 and 350/A1 lines 104 and 109);
  - Increases the deposit requirement for viatical settlement providers from $100,000 to $250,000 (HB line 386/A1 line 146)
  - Clarifies current law to prohibit viatical settlement providers from employing *or contracting* certain persons (HB line 420/A1 line 182);
  - Provides rulemaking authority to the OIR regarding annual reporting, advertising, and conflicts of interest requirements (HB sections 2 and 8/A1 lines 154-155 and 312-313).
- *Technical*: Replaces the undefined term "life insurance producer" with the term "agent," which is defined in the Insurance Code as including producers (HB line 544/A1 line 306).
- *Structural*: Deletes incontestability exceptions that the bill placed in the criminal prohibited practices statute (HB lines 576-618), and relocates them into the current contestability statute, s. 626.99287, F.S., which the amendment restores (A1 lines 425-492).
  - Clarifies an existing exception in the contestability statute (A1 lines 453-457), and deletes language regarding notification to insurers (A1 lines 493-502), which is addressed in a new statute created by section 10 of the bill and amendment.
  - Corrects cross-references due to the amendment restoring the contestability statute.

Amendment No. 1

COMMITTEE/SUBCOMMITTEE ACTION

ADOPTED	____	(Y/N)
ADOPTED AS AMENDED	____	(Y/N)
ADOPTED W/O OBJECTION	____	(Y/N)
FAILED TO ADOPT	____	(Y/N)
WITHDRAWN	____	(Y/N)
OTHER		

Committee/Subcommittee hearing bill: Insurance & Banking Subcommittee

Representative Stevenson offered the following:

Amendment (with title amendment)

Remove lines 248-704 and insert:

(b) The creation of a trust or other entity that has the appearance of an insurable interest to initiate policies for investors, which violates insurable interest laws and the prohibition against wagering on life.

(12) ~~(9)~~ "Viatical settlement broker" means a person who, on behalf of a viator and for a fee, commission, or other valuable consideration, offers or attempts to negotiate viatical settlement contracts between a viator resident in this state and one or more viatical settlement providers. Notwithstanding the manner in which the viatical settlement broker is compensated, a viatical settlement broker is deemed to represent only the

viator and owes a fiduciary duty to the viator to act according to the viator's instructions and in the best interest of the viator. The term does not include an attorney, licensed Certified Public Accountant, or investment adviser lawfully registered under chapter 517, who is retained to represent the viator and whose compensation is paid directly by or at the direction and on behalf of the viator.

(13) ~~(10)~~ "Viatical settlement contract" means a written agreement entered into between a viatical settlement provider, or its related provider trust, and a viator. The viatical settlement contract includes an agreement to transfer ownership or change the beneficiary designation of a life insurance policy at a later date, regardless of the date that compensation is paid to the viator. The agreement must establish the terms under which the viatical settlement provider will pay compensation or anything of value, which compensation or value is less than the expected death benefit of the insurance policy or certificate, in return for the viator's assignment, transfer, sale, devise, or bequest of the death benefit or ownership of all or a portion of the insurance policy or certificate of insurance to the viatical settlement provider. The term also includes the transfer for compensation or value of an ownership or a beneficial interest in a trust or other entity that owns such policy if the trust or other entity was formed or used for the principal purpose of acquiring one or more life insurance contracts that insure the life of a person residing in this

state, and ~~A viatical settlement contract also includes~~ a contract for a loan or other financial transaction secured primarily by an individual or group life insurance policy. The term does not include~~, other than~~ a policy loan by a life insurance company pursuant to the terms of the life insurance contract or accelerated death provisions contained in a life insurance policy, whether issued with the original policy or as a rider, ~~or~~ a loan secured by the cash surrender value of a policy as determined by the policy issuer and the life insurance policy terms, or a loan or advance from the issuer of the policy to the policyowner.

(14)~~(11)~~ "Viatical settlement investment" has the same meaning as specified in s. 517.021.

(15)~~(12)~~ "Viatical settlement provider" means a person who, in this state, from this state, or with a resident of this state, effectuates a viatical settlement contract. The term does not include:

(a) A ~~Any~~ bank, savings bank, savings and loan association, or credit union~~, or other licensed lending institution~~ that takes an assignment of a life insurance policy as collateral for a loan. (b) A life and health insurer that has lawfully issued a life insurance policy that provides accelerated benefits to terminally ill policyholders or certificateholders.

(c) A ~~Any~~ natural person who enters into no more than one viatical settlement contract with a viator in 1 calendar year,

unless such natural person has previously been licensed under this act or is currently licensed under this act.

(d) A trust that meets the definition of a "related provider trust."

(e) A viator in this state.

(f) A financing entity.

(16) ~~(13)~~ "Viaticated policy" means a life insurance policy, or a certificate under a group policy, which is the subject of a viatical settlement contract.

(17) ~~(14)~~ "Viator" means the owner of a life insurance policy or a certificateholder under a group policy, which policy is not a previously viaticated policy, who enters or seeks to enter into a viatical settlement contract. This term does not include a viatical settlement provider, ~~or~~ a ~~any~~ person acquiring a policy or interest in a policy from a viatical settlement provider, or ~~nor does it include~~ an independent third-party trustee or escrow agent.Enter Amending Text Here

Section 2. Section 626.9913, Florida Statutes, is amended to read:

626.9913 Viatical settlement provider license continuance; annual report; fees; deposit.-

(2)(a) Annually, on or before March 1, the viatical settlement provider licensee shall file a statement containing information the commission requires and shall pay to the office a license fee in the amount of $500.

(b) In addition to any other requirements, the annual statement must specify:

1. The total number of unsettled viatical settlement contracts and corresponding total amount due to viators under viatical settlement contracts that have been signed by the viator but have not been settled as of December 31 of the preceding calendar year, categorized by the number of days since the viator signed the contract for transactions regulated by this state.

2. For each of the most recent 5 years, the total number of policies purchased, total gross amount paid for policies purchased, total commissions or compensation paid for policies purchased, and total face value of policies purchased, allocated by state, territory, and jurisdiction.

3. For the most recent calendar year, the total amount of proceeds or compensation paid to policyowners, allocated by state, territory, and jurisdiction.

(c) ~~After December 31, 2007,~~ The annual statement shall include an annual audited financial statement of the viatical settlement provider prepared in accordance with generally accepted accounting principles by an independent certified public accountant covering a 12-month period ending on a day occurring within ~~falling during~~ the last 6 months of the preceding calendar year. If the audited financial statement has not been completed, however, the licensee shall include in its annual statement an unaudited financial statement for the preceding

calendar year and an affidavit from an officer of the licensee stating that the audit has not been completed. In this event, the licensee shall submit the audited statement on or before June 1. The annual statement, due on or before March 1 each year, shall also provide the office with a report of all life expectancy providers who have provided life expectancies directly or indirectly to the viatical settlement provider for use in connection with a viatical settlement contract or a viatical settlement investment. A viatical settlement provider shall include in all statements filed with the office all information requested by the office regarding a related provider trust established by the viatical settlement provider. The office may require more frequent reporting. Failure to timely file the annual statement or the audited financial statement or to timely pay the license fee is grounds for immediate suspension of the license. The commission may by rule require all or part of the statements or filings required under this section to be submitted by electronic means in a computer-readable form compatible with the electronic data format specified by the commission.

(3) To ensure the faithful performance of its obligations to its viators in the event of insolvency or the loss of its license, a viatical settlement provider licensee must deposit and maintain deposited in trust with the department securities eligible for deposit under s. 625.52, having at all times a value of not less than $250,000.~~$100,000; however, a viatical~~

~~settlement provider licensed in this state prior to June 1, 2004, which has deposited and maintains continuously deposited in trust with the department securities in the amount of $25,000 and which posted and maintains continuously posted a security bond acceptable to the department in the amount of $75,000, has until June 1, 2005, to comply with the requirements of this subsection~~.

(6) The commission may adopt rules implementing the provisions of this section.

Section 3. Subsections (1) and (2) of section 626.9914, Florida Statutes, are amended to read:

626.9914 Suspension, revocation, denial, or nonrenewal of viatical settlement provider license; grounds; administrative fine.—

(1) The office shall suspend, revoke, deny, or refuse to renew the license of any viatical settlement provider if the office finds that the licensee has committed any of the following acts:

(a) Has made a misrepresentation in the application for the license.~~;~~

(b) Has engaged in fraudulent or dishonest practices, or otherwise has been shown to be untrustworthy or incompetent to act as a viatical settlement provider.~~;~~

(c) Demonstrates a pattern of unreasonable payments to viators.~~;~~ (d) Has been found guilty of, or has pleaded guilty or nolo contendere to, any felony, or a misdemeanor involving

fraud or moral turpitude, regardless of whether a judgment of conviction has been entered by the court.~~,~~

(e) Has issued viatical settlement contracts that have not been approved pursuant to this act.~~,~~

(f) Has failed to honor contractual obligations related to the business of viatical settlement contracts.~~,~~

(g) Deals in bad faith with viators.~~,~~

(h) Has violated any provision of the insurance code or of this act.~~,~~

(i) Employs or contracts with a ~~any~~ person who materially influences the licensee's conduct and who fails to meet the requirements of this act.~~,~~

(j) No longer meets the requirements for initial licensure.~~; or~~

(k) Obtains or utilizes life expectancies from life expectancy providers who are not registered with the office pursuant to this act.

(l) Has engaged in a fraudulent viatical settlement act.

(2) The office may, in lieu of or in addition to any suspension or revocation, assess an administrative fine not to exceed $10,000 ~~$2,500~~ for each nonwillful violation or $25,000 ~~$10,000~~ for each willful violation by a viatical settlement provider licensee. The office may also place a viatical settlement provider licensee on probation for a period not to exceed 2 years.

Section 4. Subsection (1) of section 626.99175, Florida Statutes, is amended to read:

626.99175 Life expectancy providers; registration required; denial, suspension, revocation.—

(1) ~~After July 1, 2006,~~ A person may not perform the functions of a life expectancy provider without first having registered as a life expectancy provider~~, except as provided in subsection (6)~~.

Section 5. Section 626.99185, Florida Statutes, is created to read:

626.99185 Disclosures to viator of disbursement.—

(1) Before or concurrently with a viator's execution of a viatical settlement contract, the viatical settlement provider shall provide to the viator, in duplicate, a disclosure statement in legible written form disclosing:

(a) The name of each viatical settlement broker who receives or will receive compensation and the amount of each broker's compensation related to that transaction. For the purpose of this section, compensation includes anything of value paid or given by or at the direction of a viatical settlement provider or person acquiring an interest in one or more life insurance policies to a viatical settlement broker in connection with the viatical settlement contract.

(b) A complete reconciliation of the gross offer or bid by the viatical settlement provider to the net amount of proceeds or value to be received by the viator related to that

transaction. As used in this section, the term "gross offer" or "bid" means the total amount or value offered by the viatical settlement provider for the purchase of an interest in one or more life insurance policies, including commissions, compensation, or other proceeds or value being deducted from the gross offer or bid.

(2) The viator shall sign and date the disclosure statement before or concurrently with the viator's execution of a viatical settlement contract, with the viator retaining the duplicate copy of the disclosure statement.

(3) If a viatical settlement contract is entered into and the contract is subsequently amended or if there is a change in the viatical settlement provider's gross offer or bid amount, a change in the net amount of proceeds or value to be received by the viator, or a change in the information provided in the disclosure statement to the viator, the viatical settlement provider shall provide, in duplicate, an amended disclosure statement to the viator containing the information in subsection (1). The viator shall sign and date the amended disclosure statement, with the viator retaining the duplicate copy of the amended disclosure statement.

(4) Before a viatical settlement provider's execution of a viatical settlement contract or an amendment to such contract, the viatical settlement provider must obtain the signed and dated disclosure statement and any amended disclosure statement required by this section. In transactions for which a broker is

not used, the viatical settlement provider must obtain the signed and dated disclosure statement from the viator.

(5) The viatical settlement provider shall maintain the documentation required by this section pursuant to s. 626.9922(2) and shall make such documentation available to the office at any time for copying and inspection upon reasonable notice by the office to the viatical settlement provider.

Section 6. Subsection (7) of section 626.9924, Florida Statutes, is amended to read:

626.9924 Viatical settlement contracts; procedures; rescission.—

(7) At any time during the contestable period, within 20 days after a viator executes documents necessary to transfer rights under an insurance policy or within 20 days of any agreement, option, promise, or any other form of understanding, express or implied, to viaticate the policy, the provider must give notice to the insurer of the policy that the policy has or will become a viaticated policy. The notice must be accompanied by the documents required by s. 626.99287~~(5)(a)~~ and s. 626.99276 in their entirety.

Section 7. Subsection (2) of section 626.99245, Florida Statutes, is amended to read:

626.99245 Conflict of regulation of viaticals.— (2) This section does not affect the requirement of ss. 626.9911(15)~~(12)~~ and 626.9912(1) that a viatical settlement provider doing business from this state must obtain a viatical settlement

license from the office. As used in this subsection, the term "doing business from this state" includes effectuating viatical settlement contracts from offices in this state, regardless of the state of residence of the viator.

Section 8. Section 626.99273, Florida Statutes, is created to read:

626.99273 Prohibited practices and conflicts of interest.—

(1) With respect to a viatical settlement contract or an insurance policy, a viatical settlement broker may not knowingly solicit an offer from, effectuate a viatical settlement with, or make a sale to any viatical settlement provider, financing entity, or related provider trust that is controlling, controlled by, or under common control with such viatical settlement broker.

(2) With respect to a viatical settlement contract or an insurance policy, a viatical settlement provider may not knowingly enter into a viatical settlement contract with a viator if, in connection with such viatical settlement contract, anything of value will be paid to a viatical settlement broker that is controlling, controlled by, or under common control with such viatical settlement provider, financing entity, or related provider trust that is involved in such viatical settlement contract.

(3) A viatical settlement provider may not enter into a viatical settlement contract unless the viatical settlement promotional, advertising, and marketing materials, as may be

prescribed by rule, have been filed with the office. Such materials may not expressly indicate, or include any reference that would cause a viator to reasonably believe, that the life insurance is free for any period of time.

(4) A life insurance agent, insurer, viatical settlement broker, or viatical settlement provider may not make a statement or representation to an applicant or policyholder in connection with the sale of a life insurance policy to the effect that the insurance is free or without cost to the policyholder for any period of time.

(5) The commission may adopt rules implementing the provisions of this section.

Section 9. Section 626.99275, Florida Statutes, is amended to read:

626.99275 Prohibited practices; penalties.—

(1) It is unlawful for a ~~any~~ person to:

(a) ~~To~~ Knowingly enter into, broker, or otherwise deal in a viatical settlement contract the subject of which is a life insurance policy, knowing that the policy was obtained by presenting materially false information concerning any fact material to the policy or by concealing, for the purpose of misleading another, information concerning any fact material to the policy, where the viator or the viator's agent intended to defraud the policy's issuer.

(b) ~~To~~ Knowingly or with the intent to defraud, for the purpose of depriving another of property or for pecuniary gain,

issue or use a pattern of false, misleading, or deceptive life expectancies. (c) ~~To~~ Knowingly engage in any transaction, practice, or course of business intending thereby to avoid the notice requirements of s. 626.9924(7).

(d) ~~To~~ Knowingly or intentionally facilitate the change of state of residency of a viator to avoid the provisions of this chapter.

(e) Knowingly enter into a viatical settlement contract before the application for or issuance of a life insurance policy that is the subject of a viatical settlement contract or within a 5-year period commencing with the date of issuance of the policy or certificate, unless the viator provides a sworn affidavit and accompanying documentation in accordance with s. 626.9987.

(f) Knowingly issue, solicit, market, or otherwise promote the purchase of a life insurance policy for the purpose of or with an emphasis on selling the policy.

(g) Engage in a fraudulent viatical settlement act.

(2) A person who violates any provision of this section commits:

(a) A felony of the third degree, punishable as provided in s. 775.082, s. 775.083, or s. 775.084, if the insurance policy involved is valued at any amount less than $20,000.

(b) A felony of the second degree, punishable as provided in s. 775.082, s. 775.083, or s. 775.084, if the insurance

policy involved is valued at $20,000 or more, but less than $100,000.

(c) A felony of the first degree, punishable as provided in s. 775.082, s. 775.083, or s. 775.084, if the insurance policy involved is valued at $100,000 or more.

Section 10. Section 626.99276, Florida Statutes, is created to read:

626.99276 Notification to insurer required.—

(1) A copy of the sworn affidavit and the documentation required in s. 626.99287 must be submitted to the insurer if the viatical settlement provider or other party entering into a viatical settlement contract with a viator submits a request to the insurer for verification of coverage or if the viatical settlement provider submits a request to transfer the policy or certificate to the provider. If the request is made by a viatical settlement provider, the copy shall be accompanied by a sworn affidavit from the viatical settlement provider affirming that the copy is a true and correct copy of the documentation received by the provider.

(2) An insurer may not require, as a condition of responding to a request for verification of coverage or effecting the transfer of a policy pursuant to a viatical settlement contract, that the viator, insured, viatical settlement provider, or viatical settlement broker sign any disclosures, consent form, waiver form, or other form that has not been approved by the office for use in connection with

viatical settlement contracts in this state. (3) Upon receipt of a properly completed request for change of ownership or beneficiary of a policy, the insurer shall respond in writing within 30 calendar days confirming that the change has been effectuated or specifying the reasons why the requested change cannot be processed. The insurer may not unreasonably delay effectuating a change of ownership or beneficiary and may not otherwise seek to interfere with any viatical settlement contract lawfully entered into in this state.

Section 11. Section 626.99278, Florida Statutes, is amended to read:

626.99278 Viatical provider anti-fraud plan.—

(1) Each ~~Every~~ licensed viatical settlement provider and registered life expectancy provider must adopt an anti-fraud plan and file it with the Division of Insurance Fraud of the department. Each anti-fraud plan shall include:

(a) ~~(1)~~ A description of the procedures for detecting and investigating possible fraudulent acts and procedures for resolving material inconsistencies between medical records and insurance applications.

(b) ~~(2)~~ A description of the procedures for the mandatory reporting of possible fraudulent insurance acts and prohibited practices specified ~~set forth~~ in s. 626.99275 to the Division of Insurance Fraud ~~of the department~~.

(c) ~~(3)~~ A description of the plan for anti-fraud education and training of its underwriters or other personnel.

(d) ~~(4)~~ A written description or chart outlining the organizational arrangement of the anti-fraud personnel who are responsible for the investigation and reporting of possible fraudulent insurance acts and for the investigation of unresolved material inconsistencies between medical records and insurance applications.

(e) ~~(5)~~ For viatical settlement providers, a description of the procedures used to perform initial and continuing review of the accuracy of life expectancies used in connection with a viatical settlement contract or viatical settlement investment.

(2) Each licensed viatical settlement provider shall maintain in accordance with s. 626.9922:

(a) Documentation of compliance with its anti-fraud plan and procedures filed in accordance with this section.

(b) Documentation pertaining to resolved and unresolved material inconsistencies between medical records and insurance applications.

(c) Documentation of its mandatory reporting of the possible fraudulent acts and prohibited practices specified in s. 626.99275 to the Division of Insurance Fraud.

Section 12. Section 626.99287, Florida Statutes, is amended to read:

626.99287 Contestability of viaticated policies.—Except as hereinafter provided, if a viatical settlement contract is entered into within the 5-year period commencing with the date of issuance of the insurance policy or certificate to be

acquired, the viatical settlement contract is void and unenforceable by either party. Notwithstanding this limitation, such a viatical settlement contract is not void and unenforceable if the viator provides a sworn affidavit and accompanying documentation that certifies to the viatical settlement provider that one or more of the following conditions have been met within the 5-year period:

(1) The policy was issued upon the owner's exercise of conversion rights arising out of a group or term policy, provided the total of the time covered under the prior policy is at least 60 months. The time covered under a group policy shall be calculated without regard to any change in insurance carriers, provided the coverage has been continuous and under the same group sponsorship;

(2) The owner of the policy is a charitable organization exempt from taxation under 26 U.S.C. s. 501(c)(3);

(3) The owner of the policy is not a natural person;

(4) The viatical settlement contract was entered into before July 1, 2000;

(2) ~~(5)~~ The viator certifies by producing independent evidence to the viatical settlement provider that one or more of the following conditions have been met within the 5-year period:

(a) ~~1.~~ The viator or insured is terminally or chronically ill; ~~diagnosed with an illness or condition that is either:~~

~~a. Catastrophic or life threatening; or~~

~~b. Requires a course of treatment for a period of at least 3 years of long-term care of home health care; and~~

2. The condition was not known to the insured at the time the life insurance contract was entered into.

(b) The viator's spouse dies;

(c) The The viator divorces his or her spouse;

(d) The viator retires from full-time employment;

(e) The viator becomes physically or mentally disabled and a physician determines that the disability prevents the viator from maintaining full-time employment; or

(f) The owner of the policy was the insured's employer at the time the policy or certificate was issued and the employment relationship terminated;

(g) A final order, judgment, or decree is entered by a court of competent jurisdiction, on the application of a creditor of the viator, adjudicating the viator bankrupt or insolvent, or approving a petition seeking reorganization of the viator or appointing a receiver, trustee, or liquidator to all or a substantial part of the viator's assets.~~; or~~

(h) The viator experiences a significant decrease in income which is unexpected by the viator and which impairs his or her reasonable ability to pay the policy premium.

(3) The viator enters into a viatical settlement contract more than 2 years after a policy's issuance date and, with respect to the policy, at all times before such date each of the following conditions is met:

a. Policy premiums have been funded exclusively with unencumbered assets, including an interest in the life insurance policy being financed only to the extent of its net cash surrender provided by, or full recourse liability by, the insured;

b. An agreement or understanding with another person has not been entered to guarantee any such liability or to purchase, or be ready to purchase, the policy, including through an assumption or forgiveness of the loan;

c. The insured and the policy have not been evaluated for settlement.

~~If the viatical settlement provider submits to the insurer a copy of the viator's or owner's certification described above, then the provider submits a request to the insurer to effect the transfer of the policy or certificate to the viatical settlement provider, the viatical settlement agreement shall not be void or unenforceable by operation of this section. The insurer shall timely respond to such request. Nothing in this section shall prohibit an insurer from exercising its right during the contestability period to contest the validity of any policy on grounds of fraud.~~

T I T L E A M E N D M E N T

Remove lines 9-63 and insert:

licensees; increasing deposit requirement; deleting an obsolete provision regarding a deposit requirement; authorizing the commission to adopt rules; amending s. 626.9914, F.S.; adding an act that warrants the imposition of administrative penalties against viatical settlement provider licensees; increasing the amount of administrative fines that may be imposed by the Office of Insurance Regulation against licensees for certain violations; amending s. 626.99175, F.S.; deleting an obsolete provision; deleting an exception from registration requirements for life expectancy providers; creating s. 626.99185, F.S.; requiring viatical settlement providers to provide viators with a disclosure statement before or concurrently with a viator's execution of a viatical settlement contract; providing requirements and procedures for such disclosure statements; amending s. 626.9924, F.S.; amending cross-references to a requirement to provide specified documents with a notice that a policy has or willEnter Amending Text Here become a viaticated policy; amending s. 626.99245, F.S.; conforming a cross-reference; creating s. 626.99273, F.S.; prohibiting certain practices and conflicts of interest relating to viatical settlement contracts or insurance policies; requiring a viatical settlement provider to file certain promotional, advertising, and marketing materials with the office before entering into viatical settlement contracts; prohibiting certain references relating to the cost of life insurance policies in such materials and other specified statements and representations;

authorizing the commission to adopt rules; amending s. 626.99275, F.S.; prohibiting a person from entering into a viatical settlement contract before a specified date except under specified circumstances, from issuing, soliciting, marketing, or otherwise promoting the purchase of a policy under certain circumstances, and from engaging in a fraudulent viatical settlement act; providing criminal penalties for a violation of such prohibitions; creating s. 626.99276, F.S.; requiring specified affidavits and other documentation to be provided to an insurer for requests to verify coverage and to transfer a policy or certificate to a viatical settlement provider; prohibiting insurers from requiring certain forms that have not been approved by the office to be signed as a condition of responding to such requests; requiring insurers to respond in writing within a specified period to properly completed requests to change the ownership or beneficiary of a policy; amending s. 626.99278, F.S.; providing requirements for licensed viatical settlement providers to maintain specified documentation relating to anti-fraud plans and procedures, material inconsistencies between medical records and insurance applications, and reporting of specified fraudulent acts and prohibited practices; amending s. 626.99287, F.S., increasing the incontestability period; revising exceptions to incontestability; creating s.

HOUSE OF REPRESENTATIVES STAFF ANALYSIS

BILL #: HB 613 Workers' Compensation System Administration
SPONSOR(S): Sullivan
TIED BILLS: **IDEN./SIM. BILLS:** SB 986

REFERENCE	ACTION	ANALYST	STAFF DIRECTOR or BUDGET/POLICY CHIEF
1) Insurance & Banking Subcommittee		Lloyd	Luczynski
2) Government Operations Appropriations Subcommittee			
3) Regulatory Affairs Committee			

SUMMARY ANALYSIS

The workers' compensation law requires an employer to obtain coverage for their "employees" that provides for lost income and all medically necessary remedial treatment, attendance, and care resulting from work related injuries and occupational diseases. The Division of Workers' Compensation within the Department of Financial Services (DFS) provides regulatory oversight of the system. The DFS' responsibilities include enforcing employer compliance with coverage requirements, administration of the workers' compensation health care delivery system, collecting system data, and assisting injured workers regarding their benefits and rights.

The bill contains a variety of changes to the workers' compensation law. The changes relate to employer compliance and coverage responsibilities, DFS powers and duties, resolution of medical issues, repeal of an underutilized program, and elimination of certain fees. Issues addressed include:

- Changing the status of non-construction industry limited liability company (LLC) members to allow them to "opt-in" to the workers' compensation system, instead of their current status that allows them to "opt-out";
- Providing for a 25 percent penalty credit for certain employers;
- Establishing a deadline for employers to file certain documentation to receive a penalty reduction;
- Reducing the imputed payroll multiplier related to penalty calculations from 2 times to 1.5 times the statewide average weekly wage;
- Allowing employers to notify their insurers of their employee's coverage exemption, rather than requiring that a copy of the exemption be provided;
- Eliminating a 3-day response requirement applicable to employer held exemption information;
- Removing the requirement that construction employers maintain written exemption acknowledgements;
- Deleting a requirement that exemption revocations be filed by mail only;
- Removing unnecessary information from the exemption application;
- Relieving employers of the obligation to notify the DFS by telephone or telegraph within 24 hours of any work related death and relying instead on other existing reporting requirements;
- Removing insurers and employers from the medical reimbursement dispute provision since they meet their adjustment, disallowance and provider violation reporting duties through other provisions of law;
- Eliminating fees collected by the DFS related to new insurer registrations and Special Disability Trust Fund notices of claim and proofs of claim;
- Allowing a Judge of Compensation Claims to designate an expert medical examiner of their choosing, rather than only those that are certified by the DFS; and
- Eliminating the Preferred Worker Program, which has not been used in over ten years.

The bill has negative fiscal impact on state revenues. It has no impact on state expenditures or local government. It has an indeterminate positive impact on the private sector.

The bill is effective October 1, 2016.

FULL ANALYSIS

I. SUBSTANTIVE ANALYSIS

A. EFFECT OF PROPOSED CHANGES:

Background – Workers' Compensation

The workers' compensation law[1] requires employers[2] to obtain coverage for work related injuries and occupational diseases. The required coverage must provide injured "employees"[3] all medically necessary remedial treatment, attendance, and care, including medicines, medical supplies, durable medical equipment, and prosthetics.[4] Employers must also provide compensation for lost income when the injury causes the employee to miss more than 7 days of work.[5] The Division of Workers' Compensation within the Department of Financial Services (DFS) provides regulatory oversight of the system. The DFS' responsibilities include enforcing employer compliance with coverage requirements,[6] administration of the workers' compensation health care delivery system,[7] collecting system data,[8] and assisting injured workers[9] with accessing benefits and understanding their rights.[10]

Current Situation – Employer Failure to Comply with Coverage Requirements

Whether an employer is required to have workers' compensation insurance depends upon the employer's industry (i.e., construction, non-construction, or agricultural) and the number of employees. Employers may obtain coverage by purchasing a workers' compensation insurance policy from an insurer; purchasing coverage from the Workers' Compensation Joint Underwriting Association (for employers that are unable to purchase a workers' compensation insurance policy from an authorized insurance company); or qualifying as a self-insurer.[11]

Stop-Work Orders and Business Records Requests/Responses

If an employer fails to comply with coverage requirements, the DFS must issue a stop-work order (SWO) within 72 hours of the DFS determining employer non-compliance.[12] Non-compliance includes the failure of an employer to answer a written business records request within ten days of the request;

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[1] ch. 440, F.S.

[2] "Employer" means the state and all political subdivisions thereof, all public and quasi-public corporations therein, every person carrying on any employment, and the legal representative of a deceased person or the receiver or trustees of any person. "Employer" also includes employment agencies, employee leasing companies, and similar agents who provide employees to other persons. s. 440.02(16), F.S. The most common exception to this is non-construction industry employers with fewer than four employees. There are a number of other exceptions, exclusions, and exemptions that affect whether an employer must provide workers' compensation coverage generally or to a particular individual. See s. 440.02(15)–(17), F.S.

[3] s. 440.02(15), F.S. Generally, the term "employee" means any person who receives remuneration from an employer for the performance of any work or service while engaged in any employment under any appointment or contract for hire or apprenticeship, express or implied, oral or written, whether lawfully or unlawfully employed, and includes, but is not limited to, aliens and minors. s. 440.02(15)(a), F.S. However, there are numerous statutory inclusions and exclusions that determine whether a particular individual is an "employee" for purposes of the workers' compensation law.

[4] s. 440.13(2)(a), F.S.

[5] s. 440.12(1), F.S.

[6] s. 440.107(3), F.S.

[7] s. 440.13, F.S.

[8] Many information filing and reporting requirements occur throughout ch. 440, F.S. The primary employee, employer, and insurer reporting requirements are located in s. 440.185, F.S. The DFS may collect information electronically. s. 440.593, F.S.

[9] The terms "injured employee" and "injured worker" are used interchangeably throughout ch. 440, F.S., in relation to individuals claiming or receiving workers' compensation benefits. However, neither term is expressly defined in the workers' compensation law. Since the term "injured employee" implies a continuing employment relationship that may not in fact exist following an injury, this analysis will use the term "injured worker" exclusively, but it is intended to mean both "injured employee" and "injured worker" wherever it is used, unless the context or law requires otherwise. The term "injured employee" is not same as "employee." The former denotes one who is claiming benefits following an injury, while the latter denotes one who may be subject to the coverage requirements of the workers' compensation law, depending upon the circumstances of their employment and nature of their employer.

[10] s. 440.191, F.S.

[11] ss. 440.38, F.S. and 627.311(5)(a), F.S.

[12] s. 440.107(7)(a), F.S.

however, requests for documentation of a coverage exemption must be answered within three days.[13] SWOs require the employer to cease business operations and remain in effect until the DFS issues an order releasing the stop-work order. Additionally, employers are assessed penalties equal to two times what the employer would have paid in workers' compensation premiums for all periods of non-compliance during the preceding two-year period or $1,000, whichever is greater.[14] SWOs are issued for the following violations:

- failure to obtain workers' compensation insurance;
- materially understating or concealing payroll;
- materially misrepresenting or concealing employee duties to avoid paying the proper premium;
- materially concealing information pertinent to the calculation of an experience modification factor; and
- failure to produce business records in a timely manner.

In fiscal year 2014-2015, the DFS issued 2,727 SWOs with approximately $52.4 million in penalties to employers that violated the coverage requirements.[15]

Avoiding Work Stoppage and Minimizing Penalties

There are a couple of ways for a non-compliant employer to mitigate the impact of a DFS finding of non-compliance on their business operations. First, if the employer comes into compliance after initiation of an investigation, but before they are ordered to stop work, an SWO is not issued. Instead, if penalties are required by law, the DFS will only levy penalties. In that case, the penalties are levied via an Order of Penalty Assessment (OPA).[16] This permits the employer to avoid the work stoppage due to an SWO, while also achieving compliance. This also provides the employer an opportunity to reduce their potential penalty. If the employer has never received an SWO before, the employer may receive a credit against the penalty equal to the amount of the initial payment of workers' compensation premium resulting from them achieving compliance following the initiation of the DFS investigation.[17]

Imputation of Payroll for Penalty Purposes

Sometimes, an employer will either lack required payroll information or will ignore the DFS' business records request. In that instance, the DFS will issue an SWO; however, they will lack sufficient documentation to calculate the penalty. Section 440.107(7), F.S., provides a means for the DFS to impute the employer's payroll for penalty purposes.

The imputed payroll under the law is twice the statewide average weekly wage (SAWW)[18] for each individual that the employer failed to cover. Depending on the circumstances of a particular case, the DFS may have to impute payroll for all of the employees for the entire two-year period or the DFS may only have to impute payroll for a one or more employees for a small portion of the two-year period. It depends upon the quality and availability of the employer's records.

When the DFS power to impute payroll was added to the law in 2003, it was set at one and one-half times the SAWW. It was increased to twice the SAWW in 2014. The DFS suggests that this can lead to

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[13] s. 440.05(11), F.S.
[14] s. 440.107(7)(d), F.S.
[15] Florida Department of Financial Services, *Division of Workers' Compensation 2015 Results & Accomplishments Report*, at 2, *available at* http://www.myfloridacfo.com/Division/WC/PublicationsFormsManualsReports/Reports/AnnualReportWC2015.pdf. The DFS reports that they are able to collect between 25 percent and 35 percent of the penalties they assess. Florida Department of Financial Services, Agency Analysis of 2016 House Bill 613, p. 6 (Dec. 8, 2015).
[16] In fiscal year 2014-2015, the DFS issued 256 OPAs levying about $3.1 million in penalties when an employer came into compliance with the coverage requirements prior to the issuance of an SWO. Id, at 4.
[17] s. 440.107(7)(d)1., F.S.
[18] The statewide average weekly wage is determined by the DFS pursuant to s. 440.12(2), F.S.

"exorbitant penalty amounts that do not correlate with the violation committed by the employer."[19] The DFS imputed payroll against the employer in 1,584 cases in fiscal year 2014-2015.[20]

Effect of the Bill

The bill removes the three day response requirement applicable to exemption information held by the employer since the DFS maintains these records online. Also, the bill reduces the imputed payroll multiplier from twice the SAWW and returns it to the pre-2014 level of one and one-half times the SAWW.

The bill adds two new eligibility requirements to the existing penalty credit for achieving compliance after the initiation of an investigation and adds a second penalty credit. The bill requires non-compliant employers to document their purchase of coverage to the DFS within 28 days of the SWO or OPA to qualify for the reduction in penalty and requires that the employer has never before received an SWO or OPA, rather than just an SWO. The bill creates another penalty credit for non-compliant employers who have never previously received an SWO or OPA. If they maintain business records consistent with the requirements of s. 440.107(5), F.S.,[21] and timely respond to the written DFS business records requests (a 10-day response requirement), the DFS must reduce their penalty by 25 percent.

Current Situation – Members of a Limited Liability Company and Workers' Compensation Coverage Requirements

For purposes of workers' compensation coverage requirements, a member of a limited liability company (LLC),[22] if the member owns 10 percent of the company, is an "employee." As an "employee," the LLC member must be covered whenever workers' compensation is required to be provided by the LLC. If the LLC is engaged in the construction industry, coverage must always be provided, and if the LLC is not engaged in the construction industry[23] the LLC must obtain coverage if there are four or more "employees."

An LLC member is allowed to elect to be exempt from workers' compensation coverage requirement upon application to and approval by the DFS.[24] Individuals who elect an exemption are not considered "employees," for premium calculation purposes, and are not eligible to receive workers' compensation benefits if they suffer a workplace injury. The DFS maintains an online database of exemption holders.[25] The DFS reports that of the 367 non-construction LLCs that received an SWO in fiscal year 2014-2015, 32 corrected their non-compliance because one or more LLC members obtained exemptions.[26] The DFS reports that the number of non-construction exemption applications processed

[19] Email from Andrew Sabolic, Assistant Director of the Division of Workers' Compensation, Department of Financial Services, Re: data requests for system admin bill (Jan. 6, 2016).
[20] Id.
[21] Section 440.107(5), F.S., requires the DFS to adopt rules specifying the business records that the employer must maintain. Rule 69L-6.015, F.A.C., contains these requirements.
[22] Limited liability companies are organized under ch. 605, F.S.
[23] However, if the LLC is an agricultural employer, the workers' compensation coverage requirement applies if there are six or more regular employees and/or 12 or more seasonal employees who work for more than 30 days. s. 440.02(17)(c)2., F.S.
[24] s. 440.02(9) and (15)(b)1., F.S. LLC members with 10 percent or more ownership of the LLC are defined as "corporate officers" for purposes of workers' compensation coverage. "Corporate officers" are permitted to elect a coverage exemption.
[25] FLORIDA DEPARTMENT OF FINANCIAL SERVICES, *Division of Workers' Compensation Proof of Coverage Search Page,* https://apps8.fldfs.com/proofofcoverage/Search.aspx (last visited Jan. 4, 2016). Filter search by "Exemption Holder Name" or "Exemption Holder SSN."
[26] Email from Andrew Sabolic, Assistant Director of the Division of Workers' Compensation, Department of Financial Services, Re: data requests for system admin bill (Jan. 5, 2016). An additional 30 non-construction LLCs achieved compliance by purchasing coverage for four employees. Some portion of these may have been related to non-exempt LLC members falling within the definition of "employee," which would result in an SWO.

by them more than tripled from fiscal year 2010-2011 to fiscal year 2014-2015.[27] The DFS attributes this increase to the availability of exemptions to non-construction LLC members.[28]

Effect of the Bill

The bill removes non-construction industry LLC members that own 10 percent of the LLC from the definition of "employee." Accordingly, they are no longer subject to the coverage requirement or permitted to claim an exemption from coverage. Instead, the bill allows them, or any non-construction LLC member, regardless of ownership percentage, to "opt-in" to the workers' compensation system through an election of coverage[29] that they may file with the DFS.[30]

Current Situation – Medical Reimbursement Disputes

The DFS is responsible for resolving medical reimbursement disputes between health care providers and insurers[31] or employers.[32] Health care providers, insurers, and employers have 45 days from receipt of notice of disallowance or adjustment of payment from an insurer to file a reimbursement dispute petition with the DFS. Insurers have 30 days from receipt of the provider's petition to submit all documentation substantiating the insurer's disallowance or adjustment to the DFS; otherwise they waive all objections to the petition. The DFS has 120 days from receipt of all documentation to issue a written determination. The DFS's determination is subject to the hearing provisions of the Administrative Procedures Act.[33]

Insurers are required to report all instances of health care provider overutilization to the DFS.[34] The DFS has implemented rules formalizing the procedure for reporting alleged provider violations.[35] Any interested person can report an alleged provider violation through this procedure. Additionally, the DFS collects adjustment information for all reported workers' compensation medical bills. When the insurer properly codes and reports their adjustments and reimbursement decisions, the DFS can use their electronic database to identify alleged overutilization. Insurer compliance with electronic bill reporting requirements satisfies their statutory obligation to report all instances of overutilization.[36] The inclusion of insurers and employers in the medical reimbursement dispute provision can lead to confusion over the correct method for insurer or employer reporting of alleged provider violations and insurer reporting of medical overutilization issues.

Effect of the Bill

The bill removes insurers and employers from the provision allowing the filing of a medical reimbursement dispute over the disallowance or adjustment of a medical payment. Accordingly, only health care providers will be permitted to file petitions for resolution of medical billing disputes. Insurers

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[27] In fiscal year 2010-2011, the DFS processed 11,448 non-construction exemption applications. This increased to 36,496 applications processed in fiscal year 2014-2015. Email from Andrew Sabolic, Assistant Director of the Division of Workers' Compensation, Department of Financial Services, Re: data requests for system admin bill (Jan. 5, 2016).

[28] Florida Department of Financial Services, *Division of Workers' Compensation 2015 Results & Accomplishments Report*, at 6, *available at* http://www.myfloridacfo.com/Division/WC/PublicationsFormsManualsReports/Reports/AnnualReportWC2015.pdf.

[29] s. 440.02(15)(c)1., F.S.

[30] Despite an individual electing employee status, whether the employer is required to obtain workers' compensation coverage is still dependent upon whether the employer has the threshold number of employees. The threshold number is one employee for construction employers, four or more employees for non-construction employers, and six or more regular employees and/or 12 or more seasonal employees who work for more than 30 days for agricultural employers. s. 440.02(15)–(17), F.S.

[31] The terms "carrier" and "insurer" are commonly used interchangeably within the context of the workers' compensation law. In fact, the definition of "insurer" expressly includes the term "carrier." s. 440.02(38), F.S. "Carrier" means any person or fund authorized under s. 440.38 to insure under this chapter and includes a self-insurer, and a commercial self-insurance fund authorized under s. 624.462. s. 440.02(4), F.S. While this analysis uses the term "insurer" in this instance to maintain internal consistency, the portion of the bill described strikes the term "carrier" from statute.

[32] s. 440.13(7), F.S.

[33] ch. 120, F.S.

[34] s. 440.13(6), F.S.

[35] Chapter 69L-34, F.A.C.

[36] Rule 69L-34.002, F.A.C.

and employers will continue to meet their statutory reporting obligations through required data filing and elective violations reports described above.

Current Situation – Expert Medical Advisors and the Judges of Compensation Claims

The Office of the Judges of Compensation Claims is responsible for resolving workers' compensation benefit disputes.[37] A Judge of Compensation Claims (JCC) receives medical evidence and testimony in the course of administering their assigned cases. Whenever there is a conflict in medical evidence or medical opinion, the JCC must appoint an Expert Medical Advisor (EMA) to address the conflict.[38] EMAs are certified by the DFS.[39]

Certification as an EMA requires specialized workers' compensation training or experience and medical board certification or eligibility. The DFS is also required to "consider the qualifications, training, impartiality, and commitment of the health care provider to the provision of quality medical care at a reasonable cost."[40] Currently, there are 153 EMAs certified by the DFS.[41] The procedures that an EMA must abide by and the party responsible for the cost of the EMA's services are established by statute.[42]

The JCCs often have difficulty finding an eligible EMA to assist them with a case. This often occurs because there are too few EMAs in a particular specialty or the EMAs present in the local area of the injured worker have a conflict in participating in the matter because they have previously treated the injured worker or consulted in their care. When this occurs, the JCC identifies a willing provider with the appropriate qualifications and submits their information to the DFS for certification. Since the JCC has already considered the prospective EMA's qualifications, there is little benefit in going through the additional burden and delay of submitting the prospective EMA to the DFS for certification.

Effect of the bill

The bill allows a JCC to designate an EMA of their choosing, rather than only those that are certified as EMAs by the DFS. EMAs, whether certified by the DFS or designated by the JCC, will continue to be subject to the existing procedural requirements of statute.

Current Situation – Preferred Worker Program

In 1994, the Legislature created the Preferred Worker Program.[43] The program encourages the employment of certain disabled individuals by reimbursing an employer for the workers' compensation premium related to a "preferred worker." Under the program, a "preferred worker" is one that cannot return to their prior job due to a permanent impairment resulting from a workers' compensation injury or occupational disease. The preferred worker documents their status to the employer by applying for and receiving an identity card from the Department of Education. Subsequent to hiring a preferred worker, an employer can claim reimbursement for three years of workers' compensation premium associated with the preferred worker from the DFS via the Special Disability Trust Fund.[44]

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[37] s. 440.192, F.S.
[38] s. 440.25(4)(d), F.S.
[39] s. 440.13(9)(a), F.S.
[40] Id.
[41] FLORIDA DEPARTMENT OF FINANCIAL SERVICES, *Florida Division of Workers' Compensation Expert Medical Advisor List*, https://apps.fldfs.com/provider/ (last visited Jan. 5, 2016).
[42] s. 440.13(9), F.S.
[43] s. 440.49(8), F.S., and Chapter 69L-11, F.A.C.
[44] s. 440.49, F.S. The Special Disability Trust Fund (SDTF) is Florida's "Second Injury Fund." The SDTF reimburses self-insured employers and insurers for the excess workers' compensation benefits associated with an injured worker that was injured on the job and then had a second injury or re-injury. For a variety of reasons, in 1997, the SDTF was "cut-off" and limited to claims for second injuries occurring before Jan. 1, 1998. The SDTF continues to reimburse qualifying claims. In fiscal year 2014-2015, the SDTF disbursed reimbursements of about $63.7 million and received 1,228 reimbursement requests. Florida Department of Financial Services, *Division of Workers' Compensation 2015 Results & Accomplishments Report*, at 33, *available at* http://www.myfloridacfo.com/Division/WC/PublicationsFormsManualsReports/Reports/AnnualReportWC2015.pdf.

The program has experienced a small number of claims and has not made any program reimbursements in over a decade. The DFS reports that the program paid seven claims totaling $15,915.33 since the beginning of the program. The DFS last issued a reimbursement under the program in 2002.[45]

Effect of the Bill

The bill eliminates the Preferred Worker Program. This should have no impact on workers or employers given the lack of program activity.

Miscellaneous

The bill also makes the following changes:

- Deletes a requirement that exemption holders revoke their exemptions by mail. This will allow electronic revocations.[46] Since the DFS maintains an online exemption application and record review system, the DFS could add online revocation requests to their system.
- Removes the requirement that exemption applicants provide their Federal Tax Identification Number when filing an electronic application for exemption with the DFS.[47] The Internal Revenue Service does not issue Federal Tax Identification Numbers to individuals; rather, they are issued to businesses. The Federal Tax Identification Number of the applicant's employer will still be collected.
- Changes a requirement that employers provide their insurer with copies of their employee's certificate of exemption, instead the employer will notify the insurer of the exemptions.[48] Since the DFS maintains online exemption information, the insurer can still verify the exemption without needing a copy of the certificate of exemption.
- Removes a requirement that construction employers maintain written exemption acknowledgements by their corporate officers that hold an exemption certificate.[49]
- Removes a requirement that employers notify the DFS by telephone or telegraph within 24 hours of any work related death.[50] This relates to a defunct process whereby the DFS had a role in workplace safety investigations. However, the DFS' former workplace safety role is preempted to the federal government and implemented by the Occupational Safety and Health Administration. The DFS will continue to receive reports of death through an existing employer reporting requirement.[51]
- Eliminates the following fees collected by the DFS:
    - New insurer registration fee – the law requires the DFS to collect $100 from every new workers' compensation insurer that registers with the DFS.[52] New insurers will continue to register with the DFS as a workers' compensation insurer, except without the fee. The DFS reports that four new registrations were received in fiscal year 2014-2015.[53]
    - Special Disability Trust Fund (SDTF):
        - Notice of Claim Fee – every claim against the SDTF must be initiated with a notice of claim. The notice must include a $250 fee.[54]

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[45] Florida Department of Financial Services, Agency Analysis of 2016 House Bill 613, p. 2 (Dec. 8, 2015).
[46] s. 440.05(1), (2), and (5), F.S. DFS reports that 2,314 exemption holders filed voluntary revocations in fiscal year 2014-2015. Email from Andrew Sabolic, Assistant Director of the Division of Workers' Compensation, Department of Financial Services, Re: data requests for system admin bill (Jan. 6, 2016).
[47] s. 440.05(3), F.S.
[48] Id.
[49] s. 440.05(10), F.S.
[50] s. 440.185(3), F.S.
[51] s. 440.185(2), F.S.
[52] s. 440.52(1), F.S.
[53] Email from Andrew Sabolic, Assistant Director of the Division of Workers' Compensation, Department of Financial Services, Re: data requests for system admin bill (Jan. 5, 2016).
[54] s. 440.49(7) and (8), F.S.

- Proof of Claim Fee – an insurer that files a claim against the SDTF must file certain documents to perfect their claim. If the required documents are not filed in concert with their notice of claim, they must file a proof of claim, which must include a $500 fee.[55]

  Insurers will continue to be allowed to file notices of claim and proofs of claim. The SDTF received no notices of claim or proofs of claim in fiscal year 2013-2014 and one notice of claim in fiscal year 2014-2015.[56]
- Revises multiple cross-references to conform to changes made by the bill.
- Makes edits to statute unrelated to the substantive provisions of the bill consistent with House Bill Drafting protocols.

B. SECTION DIRECTORY:

Section 1. Amends s. 440.02, F.S., to revise definitions.

Section 2. Amends s. 440.021, F.S., to conform a cross-reference.

Section 3. Amends s. 440.05, F.S., relating to election of exemption; revocation of election; notice; certification.

Section 4. Amends s. 440.107, F.S., relating to stop-work orders and penalties assessed.

Section 5. Amends s. 440.13, F.S., relating to medical services reimbursement disputes and expert medical advisors.

Section 6. Amends s. 440.185, F.S., relating to required death notifications.

Section 7. Amends s. 440.42, F.S., to conform a cross-reference.

Section 8. Amends s. 440.49, F.S., relating to the Preferred Worker Program and Special Disability Trust Fund notice of claim and proof of claim fees.

Section 9. Amends s. 440.50, F.S., to conform a cross-reference.

Section 10. Amends s. 440.52, F.S., relating to the insurer registration fee.

Section 11. Amends s. 624.4626, F.S., to conform a cross-reference.

Section 12. Provides an effective date of October 1, 2016.

II. FISCAL ANALYSIS & ECONOMIC IMPACT STATEMENT

A. FISCAL IMPACT ON STATE GOVERNMENT:

1. Revenues:

   The fiscal impact on state government has not been estimated, yet. Since the DFS reports only collecting $400 in fiscal year 2014-2015 on the fees eliminated by the bill, the fee elimination is likely to have little effect on state revenues. In regard to change in the imputed payroll multiplier from 2 times to 1.5 times the statewide average weekly wage, it is notable that when this provision was increased from 1.5 times to 2 times the statewide average weekly wage by 2014 CS/CS/HB 271, its impact was not mentioned in the final bill analysis. Therefore, it is likely to be negligible.

[55] Id.

[56] AMI Risk Consultants, Inc., *State of Florida Special Disability Trust Fund Actuarial Review as of June 30, 2015*, at 5, *available at* http://www.myfloridacfo.com/Division/WC/pdf/State-of-Florida-Disability-Trust-Fund_2015_FINAL_09-10-15.pdf.

The DFS estimates that the bill will have negative impact on state revenues; $1,500 due to the fee reductions and $1,000,000 due to the availability of the new penalty credit. The DFS estimates that this may represent an approximate 1 percent reduction in Workers' Compensation Administration Trust Fund revenue based upon experienced penalty collection rates.[57]

2. Expenditures:

None.

B. FISCAL IMPACT ON LOCAL GOVERNMENTS:

1. Revenues:

None.

2. Expenditures:

None.

C. DIRECT ECONOMIC IMPACT ON PRIVATE SECTOR:

The bill is likely to have a positive impact on the private sector since it eliminates a number of burdensome requirements and facilitates use of online resources maintained by the DFS. It also provides opportunities to non-compliant employers to reduce penalties while incentivizing compliance with the law.

D. FISCAL COMMENTS:

None.

III. COMMENTS

A. CONSTITUTIONAL ISSUES:

1. Applicability of Municipality/County Mandates Provision:

Not Applicable. This bill does not appear to affect county or municipal governments.

2. Other:

None.

B. RULE-MAKING AUTHORITY:

None.

C. DRAFTING ISSUES OR OTHER COMMENTS:

The bill removes the requirement that Judges of Compensation Claims use DFS certified Expert Medical Advisors (EMAs) to resolve conflicts in medical evidence or medical opinion; rather, the Judges will use "Expert Medical Advisors" that may not be DFS certified EMAs. While s. 440.13(9)(a), F.S., specifies certain requirements and considerations to be used by the DFS for certification and recertification of EMAs; however, these would no longer apply to the Expert Medical Advisors selected by the Judges. No alternative criteria or guidance is provided concerning selection or qualification of Expert Medical Advisors to be used by the Judges in resolving workers' compensation benefit disputes.

IV. AMENDMENTS/ COMMITTEE SUBSTITUTE CHANGES

[57] Florida Department of Financial Services, Agency Analysis of 2016 House Bill 613, p. 4 (Dec. 8, 2015).

A bill to be entitled

An act relating to workers' compensation system administration; amending s. 440.02, F.S.; revising definitions; amending s. 440.021, F.S.; conforming a cross-reference; amending s. 440.05, F.S.; requiring members of limited liability companies to submit specified notices; deleting a required item to be listed on a notice of election to be exempt; revising specified rules regarding the maintenance of business records by an officer of a corporation; removing the requirement that the Department of Financial Services issue a specified stop-work order; amending s. 440.107, F.S.; requiring that the department allow an employer who has not previously been issued an order of penalty assessment to receive a specified credit to be applied to the penalty; prohibiting the application of a specified credit unless the employer provides specified documentation and proof of payment to the department within a specified period; requiring the department to reduce the final assessed penalty by a specified percentage for employers who have not been previously issued a stop-work order or order of penalty assessment; revising the penalty calculation for the imputed weekly payroll for an employee; amending s. 440.13, F.S.; eliminating the certification requirements when an expert medical

advisor is selected by a judge of compensation claims; amending s. 440.185, F.S.; deleting the requirement that employers notify the department within 24 hours of any injury resulting in death; amending s. 440.42, F.S.; conforming a cross-reference; amending s. 440.49, F.S.; revising definitions; revising the requirements for filing a claim; deleting the preferred worker program; deleting the notification fees on certain filed claims which supplement the Special Disability Trust Fund; conforming cross-references; amending s. 440.50, F.S.; conforming cross-references; amending s. 440.52, F.S.; deleting a fee for certain registration of insurance carriers; amending s. 624.4626, F.S.; conforming a cross-reference; providing an effective date.

Be It Enacted by the Legislature of the State of Florida:

Section 1. Subsection (9) and paragraph (c) of subsection (15) of section 440.02, Florida Statutes, are amended to read:

440.02 Definitions.—When used in this chapter, unless the context clearly requires otherwise, the following terms shall have the following meanings:

(9) "Corporate officer" or "officer of a corporation" means any person who fills an office provided for in the corporate charter or articles of incorporation filed with the

Division of Corporations of the Department of State or as authorized or required under part I of chapter 607. For persons engaged in the construction industry, the term "officer of a corporation" includes a member owning at least 10 percent of a limited liability company as defined in and organized pursuant to chapter 605.

(15)

(c) "Employee" includes:

1. A sole proprietor, a member of a limited liability company, or a partner who is not engaged in the construction industry, devotes full time to the proprietorship, limited liability company, or partnership, and elects to be included in the definition of employee by filing notice thereof as provided in s. 440.05.

2. All persons who are being paid by a construction contractor as a subcontractor, unless the subcontractor has validly elected an exemption as permitted by this chapter, or has otherwise secured the payment of compensation coverage as a subcontractor, consistent with s. 440.10, for work performed by or as a subcontractor.

3. An independent contractor working or performing services in the construction industry.

4. A sole proprietor who engages in the construction industry and a partner or partnership that is engaged in the construction industry.

Section 2. Section 440.021, Florida Statutes, is amended

to read:

440.021 Exemption of workers' compensation from chapter 120.—Workers' compensation adjudications by judges of compensation claims are exempt from chapter 120, and no judge of compensation claims shall be considered an agency or a part thereof. Communications of the result of investigations by the department pursuant to s. 440.185(3) ~~s. 440.185(4)~~ are exempt from chapter 120. In all instances in which the department institutes action to collect a penalty or interest which may be due pursuant to this chapter, the penalty or interest shall be assessed without hearing, and the party against which such penalty or interest is assessed shall be given written notice of such assessment and shall have the right to protest within 20 days of such notice. Upon receipt of a timely notice of protest and after such investigation as may be necessary, the department shall, if it agrees with such protest, notify the protesting party that the assessment has been revoked. If the department does not agree with the protest, it shall refer the matter to the judge of compensation claims for determination pursuant to s. 440.25(2)-(5). Such action of the department is exempt from the provisions of chapter 120.

Section 3. Subsections (1), (2), (3), (5), (10), and (11) of section 440.05, Florida Statutes, are amended to read:

440.05 Election of exemption; revocation of election; notice; certification.—

(1) Each corporate officer who elects not to accept the

provisions of this chapter or who, after electing such exemption, revokes that exemption shall submit ~~mail~~ to the department ~~in Tallahassee~~ notice to such effect in accordance with a form to be prescribed by the department.

(2) Each sole proprietor, member of a limited liability company, or partner who elects to be included in the definition of "employee" or who, after such election, revokes that election must submit ~~mail~~ to the department ~~in Tallahassee~~ notice to such effect, in accordance with a form to be prescribed by the department.

(3) ~~Each officer of a corporation who is engaged in the construction industry and who elects an exemption from this chapter or who, after electing such exemption, revokes that exemption must submit a notice to such effect to the department on a form prescribed by the department.~~ The notice of election to be exempt must be electronically submitted to the department by the officer of a corporation who is allowed to claim an exemption as provided by this chapter and must list the name, ~~federal tax identification number,~~ date of birth, driver license number or Florida identification card number, and all certified or registered licenses issued pursuant to chapter 489 held by the person seeking the exemption, the registration number of the corporation filed with the Division of Corporations of the Department of State, and the percentage of ownership evidencing the required ownership under this chapter. The notice of election to be exempt must identify each corporation that

employs the person electing the exemption and must list the social security number or federal tax identification number of each such employer and the additional documentation required by this section. In addition, the notice of election to be exempt must provide that the officer electing an exemption is not entitled to benefits under this chapter, must provide that the election does not exceed exemption limits for officers provided in s. 440.02, and must certify that any employees of the corporation whose officer elects an exemption are covered by workers' compensation insurance. Upon receipt of the notice of the election to be exempt, receipt of all application fees, and a determination by the department that the notice meets the requirements of this subsection, the department shall issue a certification of the election to the officer, unless the department determines that the information contained in the notice is invalid. The department shall revoke a certificate of election to be exempt from coverage upon a determination by the department that the person does not meet the requirements for exemption or that the information contained in the notice of election to be exempt is invalid. The certificate of election must list the name of the corporation listed in the request for exemption. A new certificate of election must be obtained each time the person is employed by a new or different corporation that is not listed on the certificate of election. A notice ~~copy~~ of the certificate of election must be sent to each workers' compensation carrier identified in the request for exemption.

Upon filing a notice of revocation of election, an officer who is a subcontractor or an officer of a corporate subcontractor must notify her or his contractor. Upon revocation of a certificate of election of exemption by the department, the department shall notify the workers' compensation carriers identified in the request for exemption.

(5) A notice given under subsection (1), subsection (2), or subsection (3) shall become effective when issued by the department or 30 days after it ~~an application for an exemption~~ is received by the department, whichever occurs first. However, if an accident or occupational disease occurs less than 30 days after the effective date of the insurance policy under which the payment of compensation is secured or the date the employer qualified as a self-insurer, such notice is effective as of 12:01 a.m. of the day following the date it is submitted ~~mailed~~ to the department ~~in Tallahassee~~.

(10) Each officer of a corporation who is actively engaged in the construction industry and who elects an exemption from this chapter shall maintain business records as specified by the department by rule~~, which rules must include the provision that any corporation with exempt officers engaged in the construction industry must maintain written statements of those exempted persons affirmatively acknowledging each such individual's exempt status~~.

(11) Any corporate officer permitted by this chapter to claim an exemption must be listed on the records of this state's

Secretary of State, Division of Corporations, as a corporate officer. ~~The department shall issue a stop-work order under s. 440.107(7) to any corporation who employs a person who claims to be exempt as a corporate officer but who fails or refuses to produce the documents required under this subsection to the department within 3 business days after the request is made.~~

Section 4. Paragraphs (d) and (e) of subsection (7) of section 440.107, Florida Statutes, are amended to read:

440.107 Department powers to enforce employer compliance with coverage requirements.—

(7)

(d)1. In addition to any penalty, stop-work order, or injunction, the department shall assess against any employer who has failed to secure the payment of compensation as required by this chapter a penalty equal to 2 times the amount the employer would have paid in premium when applying approved manual rates to the employer's payroll during periods for which it failed to secure the payment of workers' compensation required by this chapter within the preceding 2-year period or $1,000, whichever is greater.

a. For employers who have not been previously issued a stop-work order or order of penalty assessment, the department must allow the employer to receive a credit for the initial payment of the estimated annual workers' compensation policy premium, as determined by the carrier, to be applied to the penalty. Before applying the credit to the penalty, the employer

must provide the department with documentation reflecting that the employer has secured the payment of compensation pursuant to s. 440.38 and proof of payment to the carrier. In order for the department to apply a credit for an employer that has secured workers' compensation for leased employees by entering into an employee leasing contract with a licensed employee leasing company, the employer must provide the department with a written confirmation, by a representative from the employee leasing company, of the dollar or percentage amount attributable to the initial estimated workers' compensation expense for leased employees, and proof of payment to the employee leasing company. The credit may not be applied unless the employer provides the documentation and proof of payment to the department within 28 days after service of the stop-work order or first order of penalty assessment upon the employer.

b. For employers who have not been previously issued a stop-work order or order of penalty assessment, the department must reduce the final assessed penalty by 25 percent if the employer has complied with administrative rules adopted pursuant to subsection (5) and has provided such business records to the department within 10 business days after the employer's receipt of the written request to produce business records.

c. The $1,000 penalty shall be assessed against the employer even if the calculated penalty after the credit and 25 percent reduction have ~~has~~ been applied is less than $1,000.

2. Any subsequent violation within 5 years after the most

recent violation shall, in addition to the penalties set forth in this subsection, be deemed a knowing act within the meaning of s. 440.105.

(e) When an employer fails to provide business records sufficient to enable the department to determine the employer's payroll for the period requested for the calculation of the penalty provided in paragraph (d), for penalty calculation purposes, the imputed weekly payroll for each employee, corporate officer, sole proprietor, or partner shall be the statewide average weekly wage as defined in s. 440.12(2) multiplied by 1.5 ~~2~~.

Section 5. Paragraph (a) of subsection (7) and paragraphs (a) and (f) of subsection (9) of section 440.13, Florida Statutes, are amended to read:

440.13 Medical services and supplies; penalty for violations; limitations.—

(7) UTILIZATION AND REIMBURSEMENT DISPUTES.—

(a) Any health care provider~~, carrier, or employer~~ who elects to contest the disallowance or adjustment of payment by a carrier under subsection (6) must, within 45 days after receipt of notice of disallowance or adjustment of payment, petition the department to resolve the dispute. The petitioner must serve a copy of the petition on the carrier and on all affected parties by certified mail. The petition must be accompanied by all documents and records that support the allegations contained in the petition. Failure of a petitioner to submit such

documentation to the department results in dismissal of the petition.

(9) EXPERT MEDICAL ADVISORS.—

(a) The department shall certify expert medical advisors in each specialty to assist the department ~~and the judges of compensation claims~~ within the advisor's area of expertise as provided in this section. The department shall, in a manner prescribed by rule, in certifying, recertifying, or decertifying an expert medical advisor, consider the qualifications, training, impartiality, and commitment of the health care provider to the provision of quality medical care at a reasonable cost. As a prerequisite for certification or recertification, the department shall require, at a minimum, that an expert medical advisor have specialized workers' compensation training or experience under the workers' compensation system of this state and board certification or board eligibility.

(f) If the department or a judge of compensation claims orders the services of an ~~a certified~~ expert medical advisor to resolve a dispute under this section, the party requesting such examination must compensate the advisor for his or her time in accordance with a schedule adopted by the department. If the employee prevails in a dispute as determined in an order by a judge of compensation claims based upon the expert medical advisor's findings, the employer or carrier shall pay for the costs of such expert medical advisor. If a judge of compensation

claims, upon his or her motion, finds that an expert medical advisor is needed to resolve the dispute, the carrier must compensate the advisor for his or her time in accordance with a schedule adopted by the department. The department may assess a penalty not to exceed $500 against any carrier that fails to timely compensate an advisor in accordance with this section.

Section 6. Subsection (3) of section 440.185, Florida Statutes, is amended to read:

440.185 Notice of injury or death; reports; penalties for violations.—

~~(3) In addition to the requirements of subsection (2), the employer shall notify the department within 24 hours by telephone or telegraph of any injury resulting in death. However, this special notice shall not be required when death results subsequent to the submission to the department of a previous report of the injury pursuant to subsection (2).~~

Section 7. Subsection (3) of section 440.42, Florida Statutes, is amended to read:

440.42 Insurance policies; liability.—

(3) No contract or policy of insurance issued by a carrier under this chapter shall expire or be canceled until at least 30 days have elapsed after a notice of cancellation has been sent to the department and to the employer in accordance with the provisions of s. 440.185(6) ~~s. 440.185(7)~~. For cancellation due to nonpayment of premium, the insurer shall mail notification to the employer at least 10 days prior to the effective date of the

cancellation. However, when duplicate or dual coverage exists by reason of two different carriers having issued policies of insurance to the same employer securing the same liability, it shall be presumed that only that policy with the later effective date shall be in force and that the earlier policy terminated upon the effective date of the latter. In the event that both policies carry the same effective date, one of the policies may be canceled instanter upon filing a notice of cancellation with the department and serving a copy thereof upon the employer in such manner as the department prescribes by rule. The department may by rule prescribe the content of the notice of retroactive cancellation and specify the time, place, and manner in which the notice of cancellation is to be served.

Section 8. Paragraph (b) of subsection (2), paragraph (c) of subsection (4), paragraph (c) of subsection (6), paragraphs (c) and (d) of subsection (7), subsection (8), and paragraph (d) of subsection (9) of section 440.49, Florida Statutes, are amended to read:

440.49 Limitation of liability for subsequent injury through Special Disability Trust Fund.—

(2) DEFINITIONS.—As used in this section, the term:

~~(b) "Preferred worker" means a worker who, because of a permanent impairment resulting from a compensable injury or occupational disease, is unable to return to the worker's regular employment.~~

In addition to the definitions contained in this subsection, the department may by rule prescribe definitions that are necessary for the effective administration of this section.

(4) PERMANENT IMPAIRMENT OR PERMANENT TOTAL DISABILITY, TEMPORARY BENEFITS, MEDICAL BENEFITS, OR ATTENDANT CARE AFTER OTHER PHYSICAL IMPAIRMENT.—

(c) Temporary compensation and medical benefits; aggravation or acceleration of preexisting condition or circumstantial causation.—If an employee who has a preexisting permanent physical impairment experiences an aggravation or acceleration of the preexisting permanent physical impairment as a result of an injury or occupational disease arising out of and in the course of her or his employment, or suffers an injury as a result of a merger as defined in paragraph (2)(b) ~~(2)(c)~~, the employer shall provide all benefits provided by this chapter, but, subject to the limitations specified in subsection (7), the employer shall be reimbursed by the Special Disability Trust Fund created by subsection (9) for 50 percent of its payments for temporary, medical, and attendant care benefits.

(6) EMPLOYER KNOWLEDGE, EFFECT ON REIMBURSEMENT.—

(c) An employer's or carrier's right to apportionment or deduction pursuant to ss. 440.02(1), 440.15(5)(b), and 440.151(1)(c) does not preclude reimbursement from such fund, except when the merger comes within the definition of paragraph (2)(b) ~~(2)(c)~~ and such apportionment or deduction relieves the employer or carrier from providing the materially and

substantially greater permanent disability benefits otherwise contemplated in those paragraphs.

(7) REIMBURSEMENT OF EMPLOYER.—

(c) A proof of claim must be filed on each notice of claim on file as of June 30, 1997, within 1 year after July 1, 1997, or the right to reimbursement of the claim shall be barred. A notice of claim on file on or before June 30, 1997, may be withdrawn and refiled if, at the time refiled, the notice of claim remains within the limitation period specified in paragraph (a). Such refiling shall not toll, extend, or otherwise alter in any way the limitation period applicable to the withdrawn and subsequently refiled notice of claim. ~~Each proof of claim filed shall be accompanied by a proof-of-claim fee as provided in paragraph (9)(d).~~ The Special Disability Trust Fund shall, within 120 days after receipt of the proof of claim, serve notice of the acceptance of the claim for reimbursement. This paragraph shall apply to all claims notwithstanding the provisions of subsection (12).

(d) ~~Each notice of claim filed or refiled on or after July 1, 1997, must be accompanied by a notification fee as provided in paragraph (9)(d).~~ A proof of claim must be filed within 1 year after the date the notice of claim is filed or refiled~~,~~ ~~accompanied by a proof-of-claim fee as provided in paragraph (9)(d),~~ or the claim shall be barred. ~~The notification fee shall be waived if both the notice of claim and proof of claim are submitted together as a single filing.~~ The Special Disability

Trust Fund shall, within 180 days after receipt of the proof of claim, serve notice of the acceptance of the claim for reimbursement. This paragraph shall apply to all claims notwithstanding the provisions of subsection (12).

~~(8) PREFERRED WORKER PROGRAM.—The Department of Education or administrator shall issue identity cards to preferred workers upon request by qualified employees and the Department of Financial Services shall reimburse an employer, from the Special Disability Trust Fund, for the cost of workers' compensation premium related to the preferred workers payroll for up to 3 years of continuous employment upon satisfactory evidence of placement and issuance of payroll and classification records and upon the employee's certification of employment. The Department of Financial Services and the Department of Education may by rule prescribe definitions, forms, and procedures for the administration of the preferred worker program. The Department of Education may by rule prescribe the schedule for submission of forms for participation in the program.~~

(8)~~(9)~~ SPECIAL DISABILITY TRUST FUND.—

~~(d) The Special Disability Trust Fund shall be supplemented by a $250 notification fee on each notice of claim filed or refiled after July 1, 1997, and a $500 fee on each proof of claim filed in accordance with subsection (7). Revenues from the fee shall be deposited into the Special Disability Trust Fund and are exempt from the deduction required by s. 215.20. The fees provided in this paragraph shall not be imposed~~

~~upon any insurer which is in receivership with the department.~~

Section 9. Paragraph (b) of subsection (1) of section 440.50, Florida Statutes, is amended to read:

440.50 Workers' Compensation Administration Trust Fund.—

(1)

(b) The department is authorized to transfer as a loan an amount not in excess of $250,000 from such special fund to the Special Disability Trust Fund established by s. 440.49(8) ~~s. 440.49(9)~~, which amount shall be repaid to the ~~said~~ special fund in annual payments equal to not less than 10 percent of moneys received for the ~~such~~ Special Disability Trust Fund.

Section 10. Subsection (1) of section 440.52, Florida Statutes, is amended to read:

440.52 Registration of insurance carriers; notice of cancellation or expiration of policy; suspension or revocation of authority.—

(1) Each insurance carrier who desires to write workers' ~~such~~ compensation insurance in compliance with this chapter shall be required, before writing such insurance, to register with the department ~~and pay a registration fee of $100. This shall be deposited by the department in the fund created by s. 440.50~~.

Section 11. Subsection (2) of section 624.4626, Florida Statutes, is amended to read:

624.4626 Electric cooperative self-insurance fund.—

(2) A self-insurance fund that meets the requirements of

this section is subject to the assessments set forth in ss. 440.49(8) ~~ss. 440.49(9)~~, 440.51(1), and 624.4621(7), but is not subject to any other provision of s. 624.4621 and is not required to file any report with the department under s. 440.38(2)(b) which is uniquely required of group self-insurer funds qualified under s. 624.4621.

Section 12. This act shall take effect October 1, 2016.

HOUSE OF REPRESENTATIVES STAFF ANALYSIS

BILL #: HB 717 Consumer Credit
SPONSOR(S): Burgess
TIED BILLS: **IDEN./SIM. BILLS:** CS/SB 626

REFERENCE	ACTION	ANALYST	STAFF DIRECTOR or BUDGET/POLICY CHIEF
1) Insurance & Banking Subcommittee		Bauer GB	Luczynski NJ
2) Government Operations Appropriations Subcommittee			
3) Regulatory Affairs Committee			

SUMMARY ANALYSIS

In 2006, Congress enacted the federal Military Lending Act (MLA) to provide protections to military personnel on active duty for more than 30 days, active National Guard or Reserve personnel, and their dependents from certain closed-end "consumer credit" products (tax refund anticipation loans, payday loans, and auto title loans with certain terms). The MLA protections, which have been implemented by the U.S. Department of Defense (DoD) by rule and are enforceable by various federal financial regulatory agencies, include:

- A 36 percent cap on military annual percentage rate, or MAPR;
- Written and oral disclosures;
- A ban on rollovers and refinancings, unless the new loan results in more favorable terms for the borrower;
- A ban on mandatory waivers of consumer protection laws, including the Servicemembers Civil Relief Act (which protects servicemembers from being sued while on active duty), and a ban on mandatory arbitration; and
- A ban on prepayment penalties and mandatory allotments (i.e., automatic payroll deductions used to repay the loan).

At the state level, various loan products such as payday, title, and consumer finance loans are regulated by the Office of Financial Regulation (OFR), which also charters and supervises state financial institutions such as banks and credit unions. These lenders are required by chs. 516, 537, 560, F.S., or the Financial Institutions Codes to be licensed by the OFR and to comply with interest or annual percentage rate caps, disclosure requirements, and other provisions.

Due to the MLA's narrow definition of "consumer credit," many lending abuses against the military and their dependents have continued. In response, the DoD amended its MLA regulation this year to significantly expand the definition of "consumer credit," thus subjecting a greater class of loan products to the MLA's requirements, and to enhance some of the protections. The amended MLA regulation became effective on October 1, 2015, with various delayed compliance deadlines.

The bill authorizes the OFR to enforce the MLA and the MLA regulations at the state level by authorizing the OFR to take administrative action against state financial institutions, deferred presentment providers (payday lenders), consumer finance lenders, and title lenders for violations of the MLA and the MLA regulations.

The bill does not have a fiscal impact on local government. The bill has an indeterminate impact to state revenues and a negative impact on state expenditures, due to the OFR's request for two full-time employees ($126,132) to implement the bill. The bill exposes certain consumer lenders in this state to additional penalties and fines; however, it may have a positive impact on service members and their dependents who engage in consumer credit transactions in Florida.

The bill provides an effective date of October 3, 2016.

FULL ANALYSIS

I. SUBSTANTIVE ANALYSIS

A. EFFECT OF PROPOSED CHANGES:

Current Situation

Consumer Debt and the Military

In 2006, Congress requested that the U.S. Department of Defense (DoD) to conduct a study on the impact of predatory lending on the U.S. military.[1] The 2006 DoD report included short-term loans (such as payday, auto title, and tax refund anticipation loans) and installment loans (such as unsecured loans targeting military personnel and rent-to-own loan products) in its findings on predatory lending practices, which the DoD concluded shared the following characteristics:

- Predatory lending practices targeted young, financially inexperienced borrowers with bank accounts and steady jobs, but with small savings, flawed credit, or high debt; in addition, predatory lenders did not consider the borrowers' ability to repay.
- Predatory lenders targeted military personnel through proximity (around military bases) or through the use of affinity marketing techniques, especially through the internet.
- Predatory loans typically involve high fees or interest rates which circumvent state and federal limits, and also result in "debt traps" through refinancings and loan flipping.[2]

The 2006 DoD report noted that predatory lending negatively impacts servicemembers and their families by undermining military readiness and morale, and adds to the cost of an all-volunteer fighting force.[3] While the DoD noted its own efforts to educate, counsel, and assist servicemembers from predatory lending practices, it noted that it cannot prevent predatory lending without assistance from both state and federal legislatures and enforcement agencies. Specifically, DoD opined that the most effective state protections combine strict usury limits and vigorous enforcement.[4]

The DoD made several recommendations to Congress, including a 36 percent federal ceiling on annual percentage rate (APR), uniform price disclosures, prohibitions on mandatory arbitration, and a prohibition on lenders from making loans to servicemembers that violate consumer protections laws of the state in which their base is located.[5]

Federal Military Lending Act of 2006

Following the DoD's 2006 report and recommendations, Congress enacted the Military Lending Act (MLA) in 2006 to provide protections to military personnel on active duty for more than 30 days, active National Guard or Reserve personnel, and their dependents from certain "consumer credit" products.[6] The MLA protections, which are enforceable by various federal financial regulators,[7] include:

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[1] Section 579 of the National Defense Authorization Act (FY 2006).
[2] U.S. DEPARTMENT OF DEFENSE, *Report on Predatory Lending Practices Directed at Members of the Armed Forces and Their Dependents* (Aug. 9, 2006), on file with the Insurance & Banking Subcommittee staff.
[3] Id. at p. 53.
[4] Id. at pp. 46-48.
[5] Id. at pp. 50-52.
[6] H.R. 5122, Section 670 of the John Warner National Defense Authorization Act of 2007; codified at 10 U.S.C. § 987. Covered dependents include the spouse, child in specified situations, parent or parent-in-law, and an unmarried person for whom the covered servicemember has legal custody. 10 U.S.C. § 987(i)(2); 10 U.S.C. § 1072(2).
[7] In addition to providing civil remedies to aggrieved servicemembers and their dependents, the MLA is enforceable by the Federal Deposit Insurance Corporation, the Office of the Comptroller of the Currency, the National Credit Union Administration, the CFPB, the Federal Trade Commission, and other specified agencies. 10 U.S.C. § 986(f)(6).

- A 36 percent cap on military annual percentage rate, or MAPR (which includes interest, fees, credit service and renewal charges, credit insurance premiums, and other fees for credit-related products sold in connection with the loan);
- Written and oral disclosures;
- A ban on rollovers and refinancings, unless the new loan results in more favorable terms for the borrower;
- A ban on mandatory waivers of consumer protection laws, including the Servicemembers Civil Relief Act (which protects servicemembers from being sued while on active duty), and a ban on mandatory arbitration; and
- A ban on prepayment penalties and mandatory allotments (i.e., automatic payroll deductions used to repay the loan).

The DoD's regulation implementing the MLA currently defines the types of loans subject to these protections as only:
- Closed-end payday loans up to $2,000 and with a term of 91 days or fewer;
- Closed-end auto title loans with a term of 181 days or fewer; and
- Closed-end tax refund anticipation loans.

However, the current MLA regulation specifically excludes many other loan products from the definition of "consumer credit," including residential mortgages, home equity lines of credit, loans to finance the purchase or lease of motor vehicles, credit cards, overdraft loans, military installment loans, and all forms of open-end credit.[8]

2015 MLA Amendments

Following the enactment of the MLA, several organizations, including the DoD, acknowledged some of the shortcomings of the MLA, particularly its narrow definition of "consumer credit" that allowed lenders to structure their loan products to circumvent the MLA[9]:

- A 2012 report by the Consumer Federation of America found that while the MLA was largely successful in curbing abusive lending to the military, the narrow definition of "consumer credit," allowed loopholes for problematic credit products to be exploited, including bank credit products (similar to payday lending) that were excluded from the MLA regulation, resulting in uneven enforcement by state and federal regulators.[10]
- The Consumer Financial Protection Bureau (CFPB), created by Congress in 2010, began its supervision of payday lenders in 2012.
    - In 2013, the CFPB concluded that payday loans cannot be defined simply as closed-end loans where the principal and interest are due the next payday (generally, within two weeks to a month). Payday loans can be of longer duration, be structured as open-end credit, and incorporate installment payments.[11]
    - The CFPB's first enforcement action against a payday lender also included findings that the lender overcharged servicemembers and their families, in violation of the MLA's 36 percent APR cap.[12]

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[8] 32 C.F.R. § 232.3(2).

[9] Hanging Chen, *What Military Families Need to Know About High-Cost Lenders*, PROPUBLICA (Oct. 9, 2014), http://www.propublica.org/article/what-military-families-need-to-know-about-high-cost-lenders; Herb Weisbaum, *Military Lending Act 'Loopholes' Are Costing Troops Money*, NBCNEWS (Jan. 14, 2015), at http://www.nbcnews.com/business/personal-finance/military-lending-act-loopholes-are-costing-troops-money-n282961.

[10] Jean Ann Fox, *The Military Lending Act Five Years Later*, CONSUMER FEDERATION OF AMERICA (May 29, 2012), http://consumerfed.org/pdfs/Studies.MilitaryLendingAct.5.29.12.pdf.

[11] CONSUMER FINANCIAL PROTECTION BUREAU, *Payday Loans and Deposit Advance Products* (Apr. 24, 2013), at http://files.consumerfinance.gov/f/201304_cfpb_payday-dap-whitepaper.pdf.

[12] CONSUMER FINANCIAL PROTECTION BUREAU, *Consent Order In the Matter of: Cash America International, Inc.* (Nov. 20, 2013), at http://files.consumerfinance.gov/f/201311_cfpb_cashamerica_consent-order.pdf.

- In 2014, the Consumer Financial Protection Bureau (CFPB) issued a report on high-cost credit and the military, citing several examples illustrating how consumer credit products can be structured to fall outside the scope of the current MLA, such as contracting for loans greater than 91 days for payday loans or 181 days for auto loans.[13]

- In 2013, Congress requested that DoD determine whether the MLA regulation should be enhanced to protect covered borrowers from "continuing and evolving predatory lending practices."[14] In April 2014, the DoD issued a report noting significant concerns about the loopholes in state policy and marketplace changes that have blurred the differences between payday, auto title, and installment loans.[15]

In July 2015, the DoD amended the MLA regulation to broaden the coverage of MLA protections by expanding the definition of "consumer credit." The new MLA regulation eliminates the "closed-end" qualifier of consumer credit, and the limitation that consumer credit means only payday loans, vehicle title loans, and tax refund anticipation loans of certain duration. Instead, the MLA regulation will mean any "credit offered or extended to a covered borrower primarily for personal, family, or household purposes, and that is (i) subject to a finance charge; or (ii) payable by a written agreement in more than four installments." The new MLA regulation still excludes residential mortgages and auto finance loans.[16] However, this new definition is more consistent with credit that is subject to the federal Truth in Lending Act (TILA), although the MAPR requires inclusion of some fees or charges that are not considered finance charges under the TILA regulation, Reg Z.[17]

Additionally, the new MLA regulation permits creditors to use two methods to ascertain whether a consumer is a covered borrower for purposes of the regulation's protections. Under the final rule, creditors are granted a safe harbor if they use either or both of the two methods -- the MLA database (maintained by the DoD) or consumer reports from a nationwide consumer credit reporting agency -- to verify borrower status and comply with recordkeeping requirements. Creditors are allowed to rely on the initial covered borrower check for up to 60 days after a firm offer of credit is extended to the borrower.

The new MLA regulation became effective on October 1, 2015; however, compliance is required for consumer credit transactions that begin or are established on or after October 3, 2016. The regulation provides a limited delayed compliance deadline of October 3, 2017 for credit card accounts, which may be extended by the DoD until October 3, 2018.[18]

The DoD acknowledged that the amended MLA regulation will not entirely eliminate financial distress among servicemembers; however, the DoD expects that the new regulation should reduce negative credit reporting consequences to servicemembers, improve their capacity to manage and pay debts, and improve military readiness and servicemember retention (through reduced involuntary separations due to revoked security clearances).[19]

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[13] CONSUMER FINANCIAL PROTECTION BUREAU, *The Extension of High-Cost Credit to Servicemembers and Their Families* (Dec. 2014), at: http://files.consumerfinance.gov/f/201412_cfpb_the-extension-of-high-cost-credit-to-servicemembers-and-their-families.pdf.

[14] H.R. 4319, National Defense Authorization Act for FY 2013.

[15] U.S. DEPARTMENT OF DEFENSE, *Report: Enhancement of Protections on Consumer Credit for Members of the Armed Forces and Their Dependents* (Apr. 2014), on file with the Insurance & Banking Subcommittee staff.

[16] 32 C.F.R. § 232.3(f).

[17] The purpose of TILA (which applies to all borrowers, not just servicemembers) is to promote the informed use of credit through "a meaningful disclosure of credit terms so that the consumer will be able to compare more readily the various credit terms available to him." TILA and Reg Z requires the calculation and disclosure of Annual Percentage Rate (APR) for all "consumer loans," which include mortgage loans, home equity lines of credit, reverse mortgages, open-credit, certain student loans, and installment loans. 15 U.S.C. §§ 1601(a) , 1604-1606. TILA is codified at 15 U.S.C. §1601 *et seq.*, as implemented by Reg Z, 12 C.F.R. pt. 226.

[18] 32 C.F.R. § 232.13.

[19] Limitation on Terms of Consumer Credit Extended to Service Members and Dependents: Final Rule, 80 Fed. Reg. 43,560, 43,599-43,600 (Jul. 22, 2015) (to be codified at 32 C.F.R. pt. 232).

MLA and State Regulation of Consumer Credit

While the MLA generally does not preempt state law (except to the extent of any inconsistency, and allows states to provide additional protections to borrowers), the MLA does prohibit states from authorizing creditors to violate any state APR, interest cap, or other state consumer lending protections in relation to a borrower who is a servicemember or dependent.[20]

Below is an overview of current Florida laws regulating consumer credit, applicable to all consumers in Florida, which are enforced by the Office of Financial Regulation (OFR). Currently, none of these laws specifically authorize the OFR to take administrative action for lending practices specifically against a servicemember or a servicemember's dependents.

Regulation of State Financial Institutions

The OFR's Division of Financial Institutions charters and regulates depository entities that engage in financial institution business in Florida in accordance with the Florida Financial Institutions Codes (Codes).[21] State-chartered financial institutions include banks, trust companies, credit unions, international banking entities, capital stock associations, and savings banks.[22] The OFR may examine, investigate, and take disciplinary actions against state-chartered financial institutions for violation of the codes, including the imposition of a *cease and desist order* pursuant to s. 655.033, F.S. The OFR is authorized to pursue a cease and desist order against a state financial institution, subsidiary, service corporation, or financial-institution-affiliated party when it has reason to believe that such party is engaging in or has engaged in conduct that is:

(a) An unsafe or unsound practice;
(b) A violation of any law relating to the operation of a financial institution;
(c) A violation of any rule of the Financial Services Commission[23];
(d) A violation of any order of the OFR;
(e) A breach of any written agreement with the OFR;
(f) A prohibited act or practice pursuant to s. 655.0322, F.S.; or
(g) A willful failure to provide information or documents to the OFR or any appropriate federal agency, or any of its representatives, upon written request.

Regulation of State Non-Depository Lenders

In addition, the OFR's Division of Consumer Finance is responsible for the licensing and regulation of *non-depository* financial service entities and individuals, and conducts examinations and compliance investigations for licensed entities to determine compliance with Florida law. The OFR's Division of Consumer Finance has regulatory authority over other small consumer loans authorized under ch. 520 (retail installment sellers), ch. 537 (title loans), and part IV of ch. 560 (deferred presentment or payday loans), F.S.:

- *Deferred Presentment Providers (Payday Lenders)*

  A "money services business" (MSB) is generally any person who acts as a payment instrument seller, foreign currency exchanger, check casher, or money transmitter. If an MSB is located in

[20] 10 U.S.C. § 987(d)(2).
[21] chs. 655, 657, 658, 660, 663, 665, and 667, F.S.
[22] The OFR does not regulate financial institutions chartered under federal law or under other states' laws. Regardless of charter type, every financial institution has a primary federal regulator (the Federal Deposit Insurance Corporation, the Board of Governors of the Federal Reserve System, or the Office of the Comptroller of the Currency).
[23] Pursuant to s. 20.121(3)(a), F.S., the Financial Services Commission (the Governor and Cabinet) serves as the OFR's agency head for purposes of rulemaking and appoints the OFR's commissioner, who serves as the agency head for purposes of final agency action for all areas within the OFR's regulatory authority

or does business in Florida, or into this state from outside of Florida or the U.S., the MSB must be licensed with the OFR pursuant to the Money Services Businesses Act (ch. 560, F.S.).[24]

An MSB licensed under Part II or Part III of ch. 560, F.S., may also file a declaration of intent with the OFR to conduct business as a deferred presentment provider (also known as a payday lender) pursuant to Part IV of ch. 560, F.S. A deferred presentment transaction (or payday loan) is a type of loan where a person exchanges a check, like a paycheck, up to $500 in exchange for currency or a payment instrument (e.g., electronic funds transfer, check, or money order) and the lender agrees to hold the check for a specified period of time before depositing or redeeming the check. Repayment terms range from a minimum of 7 days to a maximum of 31 days. The maximum allowable fees are 10 percent of the currency or payment instrument provided, as well as a verification fee of up to $5 per transaction. For each transaction, the deferred presentment provider must comply with the disclosure requirements of Regulation Z. Borrowers may have only one active payday loan at a time, but may secure a new loan 24 hours after paying off the original loan.[25]

- *Consumer Finance Lenders*

The Florida Consumer Finance Act (ch. 516, F.S.) sets forth licensing and loan contract requirements for consumer finance lenders in Florida. Ch. 516, F.S., sets forth maximum interest rates for *consumer finance loans*, which are loans of money, credit, goods, or a provision of a line of credit, in an amount or to a value of $25,000 or less at an interest rate greater than 18 percent per annum.[26] Consumer finance loans may be secured or unsecured. The maximum allowable interest rates on consumer finance loans are tiered and capped based on a range of principal within each tier:

- 30 percent per year, computed on the first $3,000 of the principal amount,
- 24 percent per year on that part of principal between $3,001 and $4,000, and
- 18 percent per year on that part of principal between $4,001 and $25,000.

These principal amounts are the same as the financed amounts determined by the Federal Truth-in-Lending Act (TILA), and Regulation Z (Reg Z) of the Board of Governors of the Federal Reserve System.[27] The maximum interest rates and finance charges under ch. 516, F.S., are computed on a simple-interest basis, and not a compounding or other basis. The APR for all loans under ch. 516, F.S., may equal, but cannot exceed, the APR for the loan as required to be computed and disclosed by TILA and Reg Z.[28] In addition to the applicable interest described above, consumer finance lenders may also charge borrowers certain charges and fees, such as a credit check up to $25, a bad check charge of up to $20, and any insurance premiums.[29]

- *Title Lenders*

The Florida Title Loan Act (ch. 537, F.S.), sets forth licensing and loan contract requirements for title loan lenders in Florida. A title lender provides loans secured through transfer of a motor vehicle certificate of title, with the loan amount dependent on the vehicle's value. Title lenders charge tiered interest rates according to principal amount, similar to consumer finance loans under ch. 516, F.S. The maturity date of a title loan is 30 days after the agreement date, but the loan can be extended for one or more 30-day periods by mutual consent of the lender and the

[24] ss. 560.103(22) and 560.125(1), F.S.
[25] s. 560.404, F.S.
[26] s. 516.01(2), F.S.
[27] s. 560.031(1), F.S.
[28] s. 560.031(2), F.S.
[29] s. 516.031(3), F.S.

borrower.[30] Unlike consumer finance lenders, title lenders are prohibited from selling or charging for any type of insurance in connection with a title loan.[31]

Effect of the Bill

The bill amends the following provisions to authorize the OFR to take administrative action (denial, suspension, or revocation of licensure or registration or imposition of fines) for a violation of the MLA or the MLA regulation:

- Section 516.07, F.S., relating to the OFR's administrative authority over consumer finance lenders,
- Section 537.013, F.S., relating to the OFR's administrative authority over title lenders,
- Section 560.114, F.S., relating to the OFR's administrative authority over money services businesses in connection with a deferred presentment transaction, and
- Section 655.033, F.S., relating to the OFR's cease and desist authority over a financial institution, subsidiary, service corporation, or financial institution-affiliated party.

The bill provides that it applies to a consumer credit transaction or account for consumer credit established on or after October 3, 2016, except it does not apply to a credit card account exempted under 32 C.F.R. s. 232.13(c) until the exemption expires.

B. SECTION DIRECTORY:

Section 1. Amends s. 516.07, F.S., regarding grounds for denial of license or for disciplinary action.

Section 2. Amends s. 537.013, F.S., relating to prohibited acts.

Section 3. Amends s. 560.114, F.S., relating to disciplinary actions; penalties.

Section 4. Amends s. 655.033, F.S., relating to cease and desist orders.

Section 5. Provides a statement of applicability.

Section 6. Provides an effective date of October 3, 2016.

II. FISCAL ANALYSIS & ECONOMIC IMPACT STATEMENT

A. FISCAL IMPACT ON STATE GOVERNMENT:

1. Revenues:

   Indeterminate. The amount of fines that the OFR would collect through enforcement of the MLA through this bill is unknown.

2. Expenditures:

   The OFR's Division of Consumer Finance indicated it would incur additional duties and responsibilities to enforce the bill, and would need an additional two full-time employees to absorb the added effort. Salaries and benefit for the two FTEs would amount to $126,132 in additional agency appropriations.[32]

[30] s. 537.011(3), F.S.
[31] s. 537.013(1)(h), F.S.
[32] Florida Office of Financial Regulation, Agency Analysis of 2016 House Bill 717, p. 4 (Nov. 30, 2015). The OFR is self-supporting in that all of its operating revenues are derived from its regulated individuals and entities. Currently, application fees and other regulatory fees and fines collected by the Division of Consumer Finance are deposited into the Regulatory Trust Fund. *See* ss. 516.03(1); 537.004(10); 560.1092, F.S.

B. FISCAL IMPACT ON LOCAL GOVERNMENTS:

1. Revenues:

None.

2. Expenditures:

None.

C. DIRECT ECONOMIC IMPACT ON PRIVATE SECTOR:

Indeterminate. The bill exposes certain consumer lenders in this state to additional penalties and fines. However, it may have a positive impact on servicemembers and their dependents who engage in consumer credit transactions in Florida.

D. FISCAL COMMENTS:

None.

III. COMMENTS

A. CONSTITUTIONAL ISSUES:

1. Applicability of Municipality/County Mandates Provision:

Not applicable. This bill does not appear to affect county or municipal governments.

2. Other:

None.

B. RULE-MAKING AUTHORITY:

None provided by the bill.

C. DRAFTING ISSUES OR OTHER COMMENTS:

An amendment is anticipated to clarify the OFR's authority to enforce the MLA regulations under the Financial Institutions Codes and to make the bill identical to its Senate companion, CS/SB 626.

IV. AMENDMENTS/ COMMITTEE SUBSTITUTE CHANGES

A bill to be entitled

An act relating to consumer credit; amending s. 516.07, F.S.; authorizing the Office of Financial Regulation to deny a license or take disciplinary action against a person who violates the Military Lending Act or the regulations adopted under that act in connection with a consumer finance loan under the Florida Consumer Finance Act; amending s. 537.013, F.S.; prohibiting a title loan lender or its agent or employee from violating the Military Lending Act or the regulations adopted under that act; amending s. 560.114, F.S.; authorizing the office to take disciplinary action or deny a license of a money services business, authorized vendor, or affiliated party in connection with a deferred presentment transaction for violating the Military Lending Act or the regulations adopted under that act; amending s. 655.033, F.S.; authorizing the office to issue a cease and desist order against a state financial institution, subsidiary, service corporation, financial institution-affiliated party, or individual for violating the Military Lending Act or the regulations adopted under that act; providing applicability; providing an effective date.

Be It Enacted by the Legislature of the State of Florida:

Section 1. Paragraph (q) is added to subsection (1) of section 516.07, Florida Statutes, to read:

516.07 Grounds for denial of license or for disciplinary action.—

(1) The following acts are violations of this chapter and constitute grounds for denial of an application for a license to make consumer finance loans and grounds for any of the disciplinary actions specified in subsection (2):

(q) Violating any provision of the Military Lending Act, 10 U.S.C. s. 987, or the regulations adopted under that act in 32 C.F.R. part 232, in connection with a consumer finance loan made under this chapter.

Section 2. Paragraph (o) is added to subsection (1) of section 537.013, Florida Statutes, to read:

537.013 Prohibited acts.—

(1) A title loan lender, or any agent or employee of a title loan lender, shall not:

(o) Violate any provision of the Military Lending Act, 10 U.S.C. s. 987, or the regulations adopted under that act in 32 C.F.R. part 232, in connection with a title loan made under this chapter.

Section 3. Paragraph (cc) is added to subsection (1) of section 560.114, Florida Statutes, to read:

560.114 Disciplinary actions; penalties.—

(1) The following actions by a money services business,

authorized vendor, or affiliated party constitute grounds for the issuance of a cease and desist order; the issuance of a removal order; the denial, suspension, or revocation of a license; or taking any other action within the authority of the office pursuant to this chapter:

(cc) Violating any provision of the Military Lending Act, 10 U.S.C. s. 987, or the regulations adopted under that act in 32 C.F.R. part 232, in connection with a deferred presentment transaction conducted under part IV of this chapter.

Section 4. Subsection (1) of section 655.033, Florida Statutes, is amended to read:

655.033 Cease and desist orders.—

(1) The office may issue and serve upon any state financial institution, subsidiary, or service corporation, or upon any financial institution-affiliated party, a complaint stating charges whenever the office has reason to believe that such state financial institution, subsidiary, service corporation, financial institution-affiliated party, or individual named therein is engaging in or has engaged in conduct that is:

(a) An unsafe or unsound practice;

(b) A violation of any law relating to the operation of a financial institution;

(c) A violation of any rule of the commission;

(d) A violation of any order of the office;

(e) A breach of any written agreement with the office;

(f) A prohibited act or practice pursuant to s. 655.0322; ~~or~~

(g) A willful failure to provide information or documents to the office or any appropriate federal agency, or any of its representatives, upon written request; or~~.~~

(h) A violation of any provision of the Military Lending Act, 10 U.S.C. s. 987, or the regulations adopted under that act in 32 C.F.R. part 232.

Section 5. This act applies to a consumer credit transaction or account for consumer credit established on or after October 3, 2016, except it does not apply to a credit card account exempted under 32 C.F.R. s. 232.13(c) until the exemption expires.

Section 6. This act shall take effect October 3, 2016.

INSURANCE & BANKING SUBCOMMITTEE

HB 717 by Rep. Burgess
Consumer Credit

AMENDMENT SUMMARY
January 13, 2016

Amendment 1 by Rep. Burgess (Lines 62-86): In addition to imposing a cease and desist order, the amendment authorizes the OFR to seek injunctive relief, to remove a financial institution-affiliated party, and to impose administrative fines against financial institution entities for violations of the MLA or MLA regulations, pursuant to a new statute in the Financial Institutions Codes, s. 655.035, F.S. The amendment will make the bill identical to its Senate companion, CS/SB 626.

COMMITTEE/SUBCOMMITTEE AMENDMENT

Bill No. HB 717 (2016)

Amendment No. 1

COMMITTEE/SUBCOMMITTEE ACTION

ADOPTED	__ (Y/N)
ADOPTED AS AMENDED	__ (Y/N)
ADOPTED W/O OBJECTION	__ (Y/N)
FAILED TO ADOPT	__ (Y/N)
WITHDRAWN	__ (Y/N)
OTHER	_____

Committee/Subcommittee hearing bill: Insurance & Banking Subcommittee

Representative Burgess offered the following:

Amendment (with title amendment)

Remove lines 62-86 and insert:

Section 4. Section 655.035, Florida Statutes, is created to read:

655.035 Military lending.—Pursuant to s. 655.032, the office may conduct an investigation that it deems necessary to determine whether a financial institution, a subsidiary, a service corporation, an affiliate, or other person is engaging in or has engaged in conduct that is a violation of any provision of the Military Lending Act, 10 U.S.C. s. 987, or the regulations adopted under that act in 32 C.F.R. part 232. If the office has reason to believe that a person has violated any such provision or regulation, the office may initiate a proceeding

against such person in accordance with s. 655.033, s. 655.034, s. 655.037, or s. 655.041.

T I T L E A M E N D M E N T

Remove lines 17-23 and insert:

the regulations adopted under that act; creating s. 655.035, F.S.; authorizing the office to conduct an investigation to determine whether a person is violating the Military Lending Act or the regulations adopted under that act; authorizing the office to seek specified remedies for such violations; providing

HOUSE OF REPRESENTATIVES STAFF ANALYSIS

BILL #: HB 817 Mergers and Acquisitions Brokers
SPONSOR(S): Raulerson
TIED BILLS: **IDEN./SIM. BILLS:** CS/SB 286

REFERENCE	ACTION	ANALYST	STAFF DIRECTOR or BUDGET/POLICY CHIEF
1) Insurance & Banking Subcommittee		Bauer	Luczynski
2) Government Operations Appropriations Subcommittee			
3) Regulatory Affairs Committee			

SUMMARY ANALYSIS

A sale of a privately held company can be structured as an asset sale or a stock sale, depending on the needs and circumstances of the buyer and seller. Generally, an *asset sale* is the sale of individual assets and liabilities, such as equipment, fixtures, leaseholds, goodwill, trade secrets, and inventory, without a transfer of title or ownership of the business. On the other hand, a buyer acquires ownership in the business in a *stock sale* through a purchase of shareholders' stock. Due to complex taxation, liability, and operational considerations involved in asset or stock sales, buyers and sellers often utilize the services of "mergers and acquisitions brokers" (M&A brokers), in addition to professional services by attorneys and accountants, to assist in the valuation, contract negotiation, and transitional aspects of a sale.

While the sale of a company's *assets* is not a securities transaction, a sale or exchange of a company's *stock* is a securities transaction, and thus triggers the application of state and federal securities laws, requiring registration of both the securities and the broker-dealer with the U.S. Securities & Exchange Commission (SEC) and the state securities regulator, unless applicable exemption are available. In Florida, the securities regulator is the Office of Financial Regulation (OFR), which enforces the Florida Securities and Investor Protection Act (ch. 517, F.S., "the Act"). Currently, M&A brokers engaging in stock sales must be registered at both state and federal levels as a broker-dealer.

Registration of M&A securities and M&A brokers and ongoing regulatory compliance can entail significant costs that are passed onto the buyers and sellers of privately held companies. In response to industry efforts to enhance small business capital formation and to reduce regulatory burdens, the SEC and a national securities regulator association have recently developed guidelines and criteria for exempting the M&A broker from federal and state broker-dealer registration.

The bill amends the Act to create state-level transactional and broker exemptions for securities transactions conducted by an M&A broker. If certain conditions are met, brokers operating exclusively as M&A brokers utilizing the M&A transactional exemption will not have to register with the OFR. The bill also defines "control person," "eligible privately held company," "mergers and acquisitions broker," "public shell company," and sets forth grounds disqualifying an M&A broker from the broker exemption.

The bill has an indeterminate fiscal impact on state governments, and does not have a fiscal impact on local governments. The bill may have a positive impact on the private sector by reducing regulatory burdens and costs on M&A brokers and the buyers and sellers of eligible privately held companies who use the services of M&A brokers.

The bill has an effective date of July 1, 2016.

FULL ANALYSIS

I. SUBSTANTIVE ANALYSIS

A. EFFECT OF PROPOSED CHANGES:

Current Situation

Mergers & Acquisitions Brokers

When a privately held business is sold, the sale can be structured as either an asset sale or a stock sale, depending on the parties' negotiated agreement. Generally, an *asset sale* is the sale of individual assets and liabilities, such as equipment, fixtures, leaseholds, goodwill, trade secrets, and inventory, without a transfer of title or ownership of the business. On the other hand, a buyer acquires ownership in the business in a *stock sale* through a purchase of shareholders' stock. Generally, buyers prefer asset sales and sellers prefer stock sales, for a number of taxation and liability reasons.[1]

Because taxation and liability are primary considerations in the sale and purchase of privately held businesses, both owners and prospective buyers of small- and mid-cap companies often seek, in addition to legal and accounting advice, the assistance of professional business brokerage advice from "mergers and acquisitions brokers" (M&A brokers). Such business brokerage services may include:

- Business valuation and financial modeling,
- Soliciting or marketing, locating, and screening potential buyers and sellers,
- Advising a buyer or seller with contract negotiation and execution,
- Due diligence, and
- Assistance with transitional changes in ownership and control, such as human resources and intellectual property.

While the sale of a company's *assets* is not a securities transaction, a sale or exchange of a company's *stock* for compensation is a securities transaction[2] and thus triggers the application of state and federal securities law, requiring registration of both the securities and the M&A broker with the U.S. Securities & Exchange Commission (SEC) and applicable state securities regulators, unless an applicable exemption is available. As discussed in further detail below, state and federal securities laws and regulations are designed to govern the offer, sale, distribution, and trading of securities and to regulate the market participants in those transactions in order to protect the investing public. While some exemptions currently exist to provide regulatory relief to smaller businesses, none specifically exempt M&A brokers serving smaller businesses and thus require them to register, regardless of the size, scope, or frequency of their business brokerage activities.

According to the bill's proponents, initial costs of broker registration and ongoing compliance can be significant – an estimated $150,000 initially and more than $75,000 annually. These regulatory costs are passed on to the small business buyers and sellers who use the services of an M&A broker.[3] In 2005, an American Bar Association task force on private placement broker-dealers issued a report noting that the regulatory model was lengthy, costly, and not "right-sized" for M&A brokers who only effect several M&A transactions a year and otherwise do not hold customer funds or securities.[4]

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[1] ALLIED BUSINESS GROUP, *Asset Sale vs. Stock Sale: What's the Difference?*, at http://www.alliedbizgroup.com/resources/publications/asset-sale-vs-stock-sale.html (last visited Dec. 18, 2015).

[2] Both federal and Florida securities law broadly define "security" to include, among other things: notes; stocks; bonds; debentures; certificates of deposit; evidence of indebtedness; and investment contracts. 15 U.S.C. § 77b(a)(1) and s. 517.021(22), F.S.

[3] ALLIANCE OF MERGER & ACQUISITION ADVISORS AND INTERNATIONAL BUSINESS BROKERS ASSOCIATION, *S. 1923 and H.R. 2274: Highlights and History* (Aug. 20, 2014), on file with the Insurance & Banking Subcommittee staff.

[4] AMERICAN BAR ASSOCIATION, *Report and Recommendation of the Task Force on Private Placement Broker-Dealers* (Jun. 20, 2005), at: http://www.sec.gov/info/smallbus/2009gbforum/abareport062005.pdf.

Federal Securities Regulation

The federal Securities Act of 1933 ("'33 Act") requires every offer or sale of securities using the means and instrumentalities of interstate commerce to be registered with the U.S. Securities & Exchange Commission (SEC), unless an exemption is available.[5] The '33 Act's emphasis on disclosure of important financial information through the registration of securities enables investors to make informed judgments about whether to purchase a company's securities. While the SEC requires that the information provided be accurate, it does not guarantee it. Investors who purchase securities and suffer losses have important recovery rights if they can prove that there was incomplete or inaccurate disclosure of important information.[6] Once a company is registered under the '33 Act or becomes publicly traded, it becomes subject to periodic reporting requirements under the federal Securities Exchange Act of 1934 ('34 Act), which also requires registration of market participants like broker-dealers and exchanges.[7]

Generally, any person acting as "broker" or "dealer" as defined in the '34 Act must be registered with the SEC and join a self-regulatory organization (SRO), the Financial Industry Regulatory Authority (FINRA), a national securities exchange, or both. The '34 Act broadly defines "broker" as "any person engaged in the business of effecting transactions in securities for the account of others," which the SEC has interpreted to include involvement in any of the key aspects of a securities transaction, including solicitation, negotiation, and execution.[8] In addition, broker-dealers must also comply with state registration requirements.

Federal Regulatory Policy on M&A Brokers

In 2014, the SEC issued a no-action letter that defined "M&A brokers" and outlined the activities that could be conducted and transactions that could be effected without requiring federal registration with the SEC. The SEC opined that it would not require M&A brokers to be registered as broker-dealers with the SEC when the M&A broker was a broker "...engaged in the business of effecting securities transactions solely in connection with the transfer of ownership and control of a privately-held company through the purchase, sale... involving securities or assets of the company to a buyer that will actively operate the company or the business conducted with the assets of the company." Prior to the release of this no-action letter, it was unclear when an M&A broker had to be registered with the SEC, often resulting in some sectors engaging in unregistered activity.[9]

The SEC no-action letter applies only to federal registration requirements of the '34 Act. Other provisions of the federal securities laws, including the anti-fraud provisions, continue to apply to these transactions.[10] In addition, bills have been introduced in Congress in recent years to exempt certain M&A brokers from federal registration requirements, although none have passed both houses.[11]

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[5] 15 U.S.C. §§ 77a-77aa.

[6] U.S. SECURITIES AND EXCHANGE COMMISSION, *The Laws That Govern the Securities Industry*, http://www.sec.gov/about/laws.shtml (last visited Dec. 18, 2015).

[7] *Id.*

[8] 15 U.S.C. §§ 78c(4) and 78o. U.S. SECURITIES AND EXCHANGE COMMISSION, *Guide to Broker-Dealer Registration*, http://www.sec.gov/divisions/marketreg/bdguide.htm#II (last visited Dec. 18, 2015).

[9] U.S. SECURITIES AND EXCHANGE COMMISSION, *No-Action Letter Re: M&A Brokers* (Jan. 31, 2014; revised Feb. 4, 2014), http://www.sec.gov/divisions/marketreg/mr-noaction/2014/ma-brokers-013114.pdf. The request for the SEC no-action letter cited the 2005 ABA task force report (see footnote 4, *supra*) , which discussed the "gray market" and potential liability for violations of securities laws for individuals who raise funds for small businesses or engage in M&A activities on a commission basis.

[10] A SEC no-action letter only expresses the SEC staff's enforcement position on a requesting individual or entity's particular facts and circumstances. It does not have the force of law or adopted regulations. *See* U.S. SECURITIES AND EXCHANGE COMMISSION, *No-Action Letters*, at http://www.sec.gov/answers/noaction.htm (last visited Dec. 18, 2015).

[11] Small Business Mergers, Acquisitions, Sales, and Brokerage Simplification Act, H.R. 686 and S. 1010, 114th Cong. (2015) and H.R. 2274 and S. 1923, 113th Cong. (2014). These and similar bills apply only to federal registration and would not preempt state registration laws.

State Securities Regulation

In addition to federal securities laws, "Blue Sky Laws" are state laws that protect the investing public through registration requirements for both broker-dealers and securities offerings, merit review of offerings, and various investor remedies for fraudulent sales practices and activities.[12] In Florida, the Securities and Investor Protection Act, ch. 517, F.S. ("the Act"), regulates securities issued, offered, and sold in the state of Florida. The Florida Office of Financial Regulation (the OFR)'s Division of Securities regulates and registers the offer and sale of securities in, to, or from Florida by firms, branch offices, and individuals affiliated with these firms in accordance with the Act and ch. 69W, Fla. Admin. Code.[13]

As mentioned above, brokers engaged in interstate commerce must be federally registered and must also register with state in which the broker has an office or engages in business with the state. The Act prohibits dealers, associated persons, and issuers from offering or selling securities in this state unless registered with the OFR as a broker, or are specifically exempted.[14] State broker registration requires completion of a registration form, submission of fingerprints for state and federal criminal background checks, minimum net capital requirements, payment of registration fees, and a review by the OFR to determine the applicant's fitness for registration in accordance with the Act.[15]

Additionally, all *securities* in Florida must be registered with the OFR unless they meet one of the transactional exemptions in ss. 517.051 or 517.061, F.S., or are federally covered (i.e., under the exclusive jurisdiction of the SEC).[16] It is important to note that exempt securities are still subject to the Act's anti-fraud and boiler room provisions.[17]

Currently, the Act contains two transactional exemptions for certain merger transactions:

- Mergers where two corporations have $500,000 or more in assets and where the sale price is $50,000 or more, are transactions that qualify for a securities registration exemption under s. 517.061(8), F.S.
- Similarly, mergers approved by the vote of the security holders are transactions that qualify for a securities registration exemption under s 517.061(9), F.S.

Brokers who facilitate transactions through one of these two exemptions are currently exempt from registration pursuant to s. 517.12(3), F.S. Failure to meet the precise requirements of these exemptions, can subject the issuer to civil, criminal, and administrative liability for the sale of unregistered securities, which is a third-degree felony in Florida.[18] Civil remedies under the act include rescission and damages.[19] In addition, issuers must comply with disclosure requirements in state and federal laws that provide potential investors with full and fair disclosures regarding the security. However, there is no blanket M&A *broker* exemption in the Act.

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[12] U.S. SECURITIES AND EXCHANGE COMMISSION, *Blue Sky Laws*, http://www.sec.gov/answers/bluesky.htm (last visited Dec. 18, 2015).

[13] Pursuant to s. 20.121(3)(a), F.S., the Financial Services Commission (the Governor and Cabinet) serves as the OFR's agency head for purposes of rulemaking and appoints the OFR's Commissioner, who serves as the agency head for purposes of final agency action for all areas within the OFR's regulatory authority.

[14] s. 517.12, F.S.

[15] *Id.* and s. 517.161, F.S.

[16] s. 517.07, F.S. If a security is registered with the SEC, s. 517.082, F.S., requires the broker or issuer to notify OFR that the security is federally registered.

[17] s. 517.061; *see* ss. 517.301, 517.311, and 517.312, F.S.

[18] s. 517.302(1), F.S.

[19] s. 517.211(3)-(5), F.S.

State Securities Regulators' Model Rule - M&A Broker Exemption

Since at least 2012, California, South Dakota, Texas, and Utah have adopted limited broker-dealer or transactional exemptions for M&A transactions.[20] In September 2015, the North American Securities Administrators Association (NASAA), adopted a model rule, which provides a uniform approach to state-level securities regulation and provides an exemption for M&A brokers if certain conditions are met.[21]

Effect of the Bill

The bill provides a transactional exemption for the offer or sale of securities of an eligible privately held company through a registered dealer or through an M&A broker, if certain conditions are met. The bill also exempts the M&A broker from registration with the OFR if certain conditions are met.

The bill provides that an *M&A broker* is a person that acts as a broker in carrying out securities transactions solely in connection with the transfer of ownership of eligible privately held companies. Further, the bill provides that the broker must reasonably believe that:

- After the completion of the transaction, any person who acquires securities or assets of the eligible privately held company will be the *control person* of the eligible privately held company.
    - The bill defines the term "*control person*" as an individual or certain entity that possesses the power to direct the management or policies of a company through ownership of securities, by contract, or otherwise. The bill also lists grounds for presuming control.
- Any person that is offered securities in exchange for securities or assets of the eligible, privately held company will receive financial statements of the issuer prior to becoming legally bound to complete the transaction.

An *eligible privately held company* is a privately company that is a "going concern" and meets certain requirements:

- The company does not have any class of securities which is registered or required to be registered with the SEC, or for which the company is required to report with the SEC.
- In the fiscal year immediately preceding the fiscal year during which the M&A broker begins to provide services for the securities transaction, the company has earnings before interest, taxes, depreciation, and amortization (EBITDA) of less than $25 million or has gross revenues of less than $250 million.

To provide protections for buyers and sellers, the bill provides several grounds disqualifying M&A brokers from the exemption (and thus requiring registration) if he or she:

- Receives, holds, transmits, or has custody of the funds or securities to be exchanged by the parties;
- Engages on behalf of an issuer in a public offering of securities which are required to be registered with the SEC;
- Engages on behalf of an issuer in a public offering of securities for which the issuer is required to file certain documents pursuant to 15 U.S.C. s. 78o(d);
- Engages on behalf of any party in a transaction involving a *public shell company*, which the bill defines as a company (in concert with an eligible privately held company and at the time of the transaction) that holds federally registered securities, lacks or has only nominal operations, and lacks or has only nominal or cash assets; or
- Is subject to certain federal securities administrative actions:
    - Suspension or revocation of registration or being the subject to a final order under the '34 Act [15 U.S.C. § 78o(b)(4) and (b)(4)(H)];

[20] On file with the Insurance & Banking Subcommittee staff.

[21] The NASAA is a voluntary association whose membership consists of 67 state, provincial, and territorial securities regulators/administrators in the 50 states, the District of Columbia, Puerto Rico, the U.S. Virgin Islands, Canada, and Mexico. The NASAA's Model Rule, *Exempting Certain Merger & Acquisition Brokers from Registration*, was adopted Sept. 29, 2015: http://nasaa.cdn.s3.amazonaws.com/wp-content/uploads/2011/07/MA-Broker-Model-Rule-adopted-Sept.-29-2015.pdf.

- Statutory disqualification with respect to membership, participation, or association with a SRO, under the '34 Act [15 U.S.C. § 78c(a)(39)]; or
- Felony and "bad boy" disqualifications under section 926 of the Investor Protection and Securities Reform Act of 2010.

As with other exemptions in the Act, the bill's exemption does not preclude the OFR from investigating and prosecuting cases involving fraud, false representations, and other prohibited practices in ss. 517.301, 517.311, and 517.312, F.S. However, because the M&A exemption covers a business transaction (i.e., the offer or sale of securities of privately held companies rather than the offer or sale of securities to the general public), the OFR has indicated that the covered transaction does not implicate significant investor protection concerns.[22]

B. SECTION DIRECTORY:

Section 1. Amends s. 517.061, F.S., relating to exempt transactions.

Section 2. Amends s. 517.12, F.S., relating to registration of dealers, associated persons, intermediaries, and investment advisers.

Section 3. Provides an effective date of July 1, 2016.

II. FISCAL ANALYSIS & ECONOMIC IMPACT STATEMENT

A. FISCAL IMPACT ON STATE GOVERNMENT:

1. Revenues:

   According to the OFR, the bill has an indeterminate impact on state government revenues.[23]

2. Expenditures:

   According to the OFR, the bill has an indeterminate impact on state government expenditures.[24]

B. FISCAL IMPACT ON LOCAL GOVERNMENTS:

1. Revenues:

   None.

2. Expenditures:

   None.

C. DIRECT ECONOMIC IMPACT ON PRIVATE SECTOR:

The bill may have a positive impact on the private sector by reducing regulatory burdens and costs on M&A brokers, as well as on the buyers and sellers of privately held eligible companies who use the services of M&A brokers in Florida.

D. FISCAL COMMENTS:

None.

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[22] Office of Financial Regulation, Agency Analysis of 2016 House Bill 817, pp. 2-3 (Dec. 29, 2015).
[23] *Id.* at 3.
[24] *Id.*

III. COMMENTS

A. CONSTITUTIONAL ISSUES:

1. Applicability of Municipality/County Mandates Provision:

   Not applicable. This bill does not appear to affect county or municipal governments.

2. Other:

   None.

B. RULE-MAKING AUTHORITY:

None provided by the bill.

C. DRAFTING ISSUES OR OTHER COMMENTS:

An amendment is anticipated to make the bill consistent with the NASAA Model Rule and the Act, and to make the bill identical to the Senate companion, CS/SB 286.

IV. AMENDMENTS/ COMMITTEE SUBSTITUTE CHANGES

A bill to be entitled

An act relating to mergers and acquisitions brokers; amending s. 517.061, F.S.; providing an exemption from specified registration requirements for a specified offer or sale of securities; amending s. 517.12, F.S.; defining terms; providing that a mergers and acquisitions broker is exempt from registration with the Office of Financial Regulation of the Financial Services Commission; providing exceptions to the exemption; providing an effective date.

Be It Enacted by the Legislature of the State of Florida:

Section 1. Subsection (22) is added to section 517.061, Florida Statutes, to read:

517.061 Exempt transactions.—Except as otherwise provided in s. 517.0611 for a transaction listed in subsection (21), the exemption for each transaction listed below is self-executing and does not require any filing with the office before claiming the exemption. Any person who claims entitlement to any of the exemptions bears the burden of proving such entitlement in any proceeding brought under this chapter. The registration provisions of s. 517.07 do not apply to any of the following transactions; however, such transactions are subject to the provisions of ss. 517.301, 517.311, and 517.312:

(22) The offer or sale of securities of an eligible

privately held company, as defined in s. 517.12(22)(a), through a dealer registered under s. 517.12 or through a mergers and acquisitions broker, as defined in s. 517.12(22)(a), if the mergers and acquisitions broker is exempt from registration as a dealer under s. 517.12(22).

Section 2. Subsection (22) is added to section 517.12, Florida Statutes, to read:

517.12 Registration of dealers, associated persons, intermediaries, and investment advisers.—

(22)(a) As used in this subsection, the term:

1. "Control person" means an individual, a partnership, a trust, or other organization that possesses the power, directly or indirectly, to direct the management or policies of a company through ownership of securities, by contract, or otherwise. A person is presumed to control a company if, with respect to a particular company, such person:

a. Is a director, a general partner, a member, or a manager of a limited liability company, or is an officer who exercises executive responsibility;

b. Has the power to vote at least 20 percent of a class of voting securities or has the power to sell or direct the sale of at least 20 percent of a class of voting securities; or

c. In the case of a partnership or limited liability company, may receive upon dissolution, or has contributed, at least 20 percent of the capital.

2. "Eligible privately held company" means a privately

held company that is a going concern and meets all of the following conditions:

a. The company does not have any class of securities which is registered, or which is required to be registered, with the Securities and Exchange Commission under the Securities Exchange Act of 1934, 15 U.S.C. s. 781, or for which the company files, or is required to file, summary and periodic information, documents, and reports under the Securities Exchange Act of 1934, 15 U.S.C. s. 78o(d).

b. In the fiscal year immediately preceding the fiscal year during which the mergers and acquisitions broker begins to provide services for the securities transaction, the company, in accordance with its historical financial accounting records, has earnings before interest, taxes, depreciation, and amortization of less than $25 million or has gross revenues of less than $250 million. On July 1, 2016, and every 5 years thereafter, each dollar amount in this sub-subparagraph shall be adjusted by dividing the annual value of the Employment Cost Index for wages and salaries for private industry workers, or any successor index, as published by the Bureau of Labor Statistics, for the calendar year preceding the calendar year in which the adjustment is being made, by the annual value of such index or successor index for the calendar year ending December 31, 2012, and multiplying such dollar amount by the quotient obtained. Each dollar amount determined under this sub-subparagraph shall be rounded to the nearest multiple of $100,000.

The term includes a company in bankruptcy proceedings which solicits, engages in research and development activities, or carries out business transactions.

3. "Mergers and acquisitions broker" means a person that acts, directly or indirectly, as a broker in carrying out securities transactions solely in connection with the transfer of ownership of eligible privately held companies. A mergers and acquisitions broker may act on behalf of a seller or buyer through the purchase, sale, exchange, issuance, repurchase, or redemption of securities or assets of the eligible privately held company. The broker must reasonably believe that:

a. After the transaction is completed, any person who acquires securities or assets of the eligible privately held company, acting alone or in concert, will be the control person of the eligible privately held company or will be the control person for the business conducted with the assets of the eligible privately held company; and

b. If any person is offered securities in exchange for securities or assets of the eligible privately held company, such person will, before becoming legally bound to complete the transaction, receive or be given reasonable access to the most recent year-end financial statements of the issuer of the securities offered in exchange. The most recent year-end financial statements shall be customarily prepared by the issuer's management in the normal course of operations. If the

financial statements of the issuer are audited, reviewed, or compiled, the most recent year-end financial statements must include any related statement by the independent accountant; a balance sheet dated not more than 120 days before the date of the offer; and information pertaining to the management, business, results of operations for the period covered by the foregoing financial statements, and material loss contingencies of the issuer.

4. "Public shell company" means a company, in concert with an eligible privately held company and at the time of a transaction, which:

a. Has any class of securities which is registered, or which is required to be registered, with the Securities and Exchange Commission under the Securities Exchange Act of 1934, 15 U.S.C. s. 78l, or for which the company files, or is required to file, summary and periodic information, documents, and reports under the Securities Exchange Act of 1934, 15 U.S.C. s. 78o(d);

b. Does not have any operations or has only nominal operations; and

c. Does not have any assets; or has only nominal assets, assets consisting only of cash, or assets consisting of cash equivalents.

(b) A mergers and acquisitions broker is exempt from registration under this section unless the mergers and acquisitions broker:

1. Directly or indirectly, in connection with the transfer of ownership of an eligible privately held company, receives, holds, transmits, or has custody of the funds or securities to be exchanged by the parties to the transaction;

2. Engages on behalf of an issuer in a public offering of any class of securities which is registered, or which is required to be registered, with the Securities and Exchange Commission under the Securities Exchange Act of 1934, 15 U.S.C. s. 78l;

3. Engages on behalf of an issuer in a public offering of any class of securities for which the issuer files, or is required to file, summary and periodic information, documents, and reports under the Securities Exchange Act of 1934, 15 U.S.C. s. 78o(d);

4. Engages on behalf of any party in a transaction involving a public shell company;

5. Is subject to a suspension or revocation of registration under the Securities Exchange Act of 1934, 15 U.S.C. s. 78o(b)(4);

6. Is subject to a statutory disqualification described in the Securities Exchange Act of 1934, 15 U.S.C. s. 78c(a)(39);

7. Is subject to a disqualification under the rules adopted by the Securities and Exchange Commission under s. 926 of the Investor Protection and Securities Reform Act of 2010, Pub. L. No. 111-203; or

8. Is subject to a final order described in the Securities

Exchange Act of 1934, 15 U.S.C. s. 78o(b)(4)(H).

Section 3. This act shall take effect July 1, 2016.

INSURANCE & BANKING SUBCOMMITTEE

HB 817 by Rep. Raulerson
Mergers & Acquisitions Brokers

AMENDMENT SUMMARY
January 13, 2016

Amendment 1 by Rep. Raulerson (strike-all): Amends the bill to make it consistent with ch. 517, F.S., and the NASAA Model Rule, and makes the bill identical to its Senate companion, CS/SB 286.

Amendment No. 1

COMMITTEE/SUBCOMMITTEE ACTION

ADOPTED	____	(Y/N)
ADOPTED AS AMENDED	____	(Y/N)
ADOPTED W/O OBJECTION	____	(Y/N)
FAILED TO ADOPT	____	(Y/N)
WITHDRAWN	____	(Y/N)
OTHER		

Committee/Subcommittee hearing bill: Insurance & Banking Subcommittee

Representative Raulerson offered the following:

Amendment (with title amendment)

Remove everything after the enacting clause and insert:

Section 1. Subsection (22) is added to section 517.061, Florida Statutes, to read:

517.061 Exempt transactions.—Except as otherwise provided in s. 517.0611 for a transaction listed in subsection (21), the exemption for each transaction listed below is self-executing and does not require any filing with the office before claiming the exemption. Any person who claims entitlement to any of the exemptions bears the burden of proving such entitlement in any proceeding brought under this chapter. The registration provisions of s. 517.07 do not apply to any of the following

transactions; however, such transactions are subject to the provisions of ss. 517.301, 517.311, and 517.312:

(22) The offer or sale of securities, solely in connection with the transfer of ownership of an eligible privately held company, through a merger and acquisition broker in accordance with s. 517.12(22).

Section 2. Subsection (22) is added to section 517.12, Florida Statutes, to read:

517.12 Registration of dealers, associated persons, intermediaries, and investment advisers.—

(22)(a) As used in this subsection, the term:

1. "Broker" has the same meaning as "dealer" as defined in s. 517.021.

2. "Control person" means an individual or entity that possesses the power, directly or indirectly, to direct the management or policies of a company through ownership of securities, by contract, or otherwise. A person is presumed to be a control person of a company if, with respect to a particular company, the person:

a. Is a director, a general partner, a member, or a manager of a limited liability company, or is an officer who exercises executive responsibility or has a similar status or function;

b. Has the power to vote 20 percent or more of a class of voting securities or has the power to sell or direct the sale of 20 percent or more of a class of voting securities; or

c. In the case of a partnership or limited liability company, may receive upon dissolution, or has contributed, 20 percent or more of the capital.

3. "Eligible privately held company" means a company that meets all of the following conditions:

a. The company does not have any class of securities which is registered, or which is required to be registered, with the United States Securities and Exchange Commission under the Securities Exchange Act of 1934, 15 U.S.C. ss. 78a et seq., or with the office under s. 517.07, or for which the company files, or is required to file, summary and periodic information, documents, and reports under s. 15(d) of the Securities Exchange Act of 1934, 15 U.S.C. s. 78o(d).

b. In the fiscal year immediately preceding the fiscal year during which the merger and acquisition broker begins to provide services for the securities transaction, the company, in accordance with its historical financial accounting records, has earnings before interest, taxes, depreciation, and amortization of less than $25 million or has gross revenues of less than $250 million. On July 1, 2016, and every 5 years thereafter, each dollar amount in this sub-subparagraph shall be adjusted by dividing the annual value of the Employment Cost Index for wages and salaries for private industry workers, or any successor index, as published by the Bureau of Labor Statistics, for the calendar year preceding the calendar year in which the adjustment is being made, by the annual value of such index or

successor index for the calendar year ending December 31, 2012, and multiplying such dollar amount by the quotient obtained. Each dollar amount determined under this sub-subparagraph shall be rounded to the nearest multiple of $100,000.

4. "Merger and acquisition broker" means any broker and any person associated with a broker engaged in the business of effecting securities transactions solely in connection with the transfer of ownership of an eligible privately held company, regardless of whether that broker acts on behalf of a seller or buyer, through the purchase, sale, exchange, issuance, repurchase, or redemption of, or a business combination involving, securities or assets of the eligible privately held company.

5. "Public shell company" means a company that at the time of a transaction with an eligible privately held company:

a. Has any class of securities which is registered, or which is required to be registered, with the United States Securities and Exchange Commission under the Securities Exchange Act of 1934, 15 U.S.C. ss. 78a et seq., or with the office under s. 517.07, or for which the company files, or is required to file, summary and periodic information, documents, and reports under s. 15(d) of the Securities Exchange Act of 1934, 15 U.S.C. s. 78o(d);

b. Has nominal or no operations; and

c. Has nominal assets or no assets, assets consisting solely of cash and cash equivalents, or assets consisting of any amount of cash and cash equivalents and nominal other assets.

(b) Prior to the completion of any securities transaction described in s. 517.061(22), a merger and acquisition broker must receive written assurances from the control person with the largest percentage of ownership for both the buyer and seller engaged in the transaction that:

1. After the transaction is completed, any person who acquires securities or assets of the eligible privately held company, acting alone or in concert, will be a control person of the eligible privately held company or will be a control person for the business conducted with the assets of the eligible privately held company; and

2. If any person is offered securities in exchange for securities or assets of the eligible privately held company, such person will, before becoming legally bound to complete the transaction, receive or be given reasonable access to the most recent year-end financial statements of the issuer of the securities offered in exchange. The most recent year-end financial statements shall be customarily prepared by the issuer's management in the normal course of operations. If the financial statements of the issuer are audited, reviewed, or compiled, the most recent year-end financial statements must include any related statement by the independent certified public accountant; a balance sheet dated not more than 120 days

before the date of the exchange offer; and information pertaining to the management, business, and results of operations for the period covered by the foregoing financial statements, and material loss contingencies of the issuer.

(c) A merger and acquisition broker engaged in a transaction exempt under s. 517.061(22) is exempt from registration under this section unless the merger and acquisition broker:

1. Directly or indirectly, in connection with the transfer of ownership of an eligible privately held company, receives, holds, transmits, or has custody of the funds or securities to be exchanged by the parties to the transaction;

2. Engages on behalf of an issuer in a public offering of any class of securities which is registered, or which is required to be registered, with the United States Securities and Exchange Commission under the Securities Exchange Act of 1934, 15 U.S.C. ss. 78a et seq., or with the office under s. 517.07; or for which the issuer files, or is required to file, periodic information, documents, and reports under s. 15(d) of the Securities Exchange Act of 1934, 15 U.S.C. s. 78o(d);

3. Engages on behalf of any party in a transaction involving a public shell company;

4. Is subject to a suspension or revocation of registration under s. 15(b)(4) of the Securities Exchange Act of 1934, 15 U.S.C. s. 78o(b)(4);

5. Is subject to a statutory disqualification described in s. 3(a)(39) of the Securities Exchange Act of 1934, 15 U.S.C. s. 78c(a)(39);

6. Is subject to a disqualification under United States Securities and Exchange Commission Rule 506(d), 17 C.F.R. s. 230.506(d); or

7. Is subject to a final order described in s. 15(b)(4)(H) of the Securities Exchange Act of 1934, 15 U.S.C. s. 78o(b)(4)(H).

Section 3. This act shall take effect July 1, 2016.

T I T L E A M E N D M E N T

Remove everything before the enacting clause and insert:

A bill to be entitled

An act relating to merger and acquisition brokers; amending s. 517.061, F.S.; providing an exemption from certain registration requirements with the Office of Financial Regulation for a specified offer or sale of securities; amending s. 517.12, F.S.; providing definitions; requiring a merger and acquisition broker to receive certain written assurances from a specified person before completion of specified securities transactions; providing an exemption from certain registration requirements with the office for a merger and acquisition broker under certain circumstances;

specifying disqualifying conditions for the exemption;
providing an effective date.