

The Florida Senate
BILL ANALYSIS AND FISCAL IMPACT STATEMENT

(This document is based on the provisions contained in the legislation as of the latest date listed below.)

Prepared By: The Professional Staff of the Governmental Oversight and Accountability Committee

BILL: SB 1126

INTRODUCER: Senators Richter, Ring, and Storms

SUBJECT: Investor Protection

DATE: March 27, 2009

REVISED: _____

	ANALYST	STAFF DIRECTOR	REFERENCE	ACTION
1.	Johnson	Burgess	BI	Fav/1 amendment
2.	Cellon	Cannon	CJ	Favorable
3.	McKay	Wilson	GO	Favorable
4.			JU	
5.			WPSC	
6.				

Please see Section VIII. for Additional Information:

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|------------------------------|-------------------------------------|---|
| A. COMMITTEE SUBSTITUTE..... | ☐ | Statement of Substantial Changes |
| B. AMENDMENTS..... | ☒ | Technical amendments were recommended |
| | ☐ | Amendments were recommended |
| | ☐ | Significant amendments were recommended |

I. Summary:

In the last two years, multibillion dollar investment scandals have plagued Florida and other areas of the United States. Recent Florida-related cases include the following:

- Arthur Nadel provided false information to investors about the returns of six hedge funds and overstated the value of the funds by \$350 million.¹
- Stanford Group Company, which had 19 locations in the United States, including four offices in Florida, fraudulently marketed and sold an estimated \$8 billion of “self-styled” certificates of deposits to investors.²
- Bernard Madoff engineered a Ponzi scheme that defrauded investors of an estimated \$50 billion. Approximately one in five of the investors were Florida residents.³

The complexity of fraudulent investments and the huge volume of investors may lead to delays in the investigation and prosecution of persons operating fraudulent schemes, thereby increasing

¹ www.sec.gov

² Ibid.

³ *One in five Bernard Madoff investors from Florida*, Miami Herald, February 6, 2009.

the losses to investors. The Senate Bill provides greater enforcement tools and regulatory oversight for securities transactions in Florida, which will increase the state's effectiveness in combating securities fraud. The bill provides the following changes:

- Authorizes the Office of Statewide Prosecution to initiate and pursue investigations for securities transactions and money laundering and to prosecute criminal violations.
- Authorizes the Attorney General to investigate and bring action against violations of the fraud provisions of ch. 517, F.S., the Securities and Investors Protection Act. The Attorney General may seek injunctive relief, restitution, and civil penalties. Currently, the Office of Financial Regulation (OFR) has the jurisdiction under ch. 517, F.S.
- Requires the OFR to adopt disciplinary guidelines for persons who violate ch. 517, F.S.
- Increases the cap on administrative fines from \$5,000 to \$10,000 per violation.
- Authorizes the emergency suspension of persons subject to ch. 517, F.S., for failure to provide books and records to the OFR within 30 days of a request.

This bill substantially amends the following sections of the Florida Statutes: 16.56, 517.021, 517.072, 517.12, 517.121, 517.1215, 517.1217, 517.131, 517.141, 517.161, 517.1611, 517.191, 517.221, 517.275, and 905.34.

II. Present Situation:

Office of Financial Regulation

The Office of Financial Regulation (OFR), which is under the Financial Services Commission, regulates state-chartered financial institutions, mortgage brokers, finance companies, securities transactions, and money services businesses.⁴ Chapter 517, F.S., the Florida Securities and Investor Protection Act, governs the regulation of securities transactions. The OFR's jurisdiction includes the registration, regulation, examination, and investigation of broker dealers, associated persons, branch offices, and investment advisors and the registration of securities.

As of June 30, 2008, the OFR reported 267,210 active agents, 7,545 dealers, and 10,734 branch offices in Florida. For fiscal years 2006-07 and 2007-08, the OFR imposed administrative fines totaling approximately \$1.5 million on ch. 517, F.S., registrants.

Pursuant to s. 517.221(3), F.S., the OFR is authorized to impose and collect an administrative fine not to exceed \$5,000 against any person who is found to have violated any provision of ch. 517, F.S., any rule or order of the OFR, or any agreement entered into between the person and the OFR.⁵ The OFR has the authority to seek injunctive relief and other remedies, including restitution.⁶ Violations of certain provisions of this chapter can be prosecuted as a third-degree felony, and for certain actions, if statutorily prescribed monetary and violation repetition thresholds are reached, such violations can be prosecuted as first-degree felonies. For fiscal year 2007-08, the OFR referred 34 cases to state and federal prosecutors.

⁴ Section 20.121(3), F.S. The Financial Services Commission consists of the Governor, the Chief Financial Officer, the Attorney General, and the Commission of Agriculture.

⁵ Section 517.221, F.S.

⁶ Section 517.191, F.S.

The Securities Guaranty Fund, established under ch. 517, F.S., provides compensation to persons adjudged by a court of competent jurisdiction to have suffered monetary damages as a result of a violation of ss. 517.07, F.S., (registration of securities) or 517.301, F.S., (fraudulent transactions) by a ch. 517, F.S., licensee. Compensation from the fund is limited to the amount of the unsatisfied portion of a judgment or \$10,000, whichever is less. Compensation excludes costs and attorney's fees.

Regulation of Viatical Investments

In general, a viatical settlement transaction is an agreement under which the owner of a life insurance policy ("viator") sells the policy to another person ("viatical settlement provider") in exchange for an upfront payment, which is generally less than the expected death benefit under the policy. Rather than retaining the policy, the provider usually sells all or a part of the policy to one or more investors ("viatical settlement purchasers"). In return for providing funds, these investors receive the death benefit, or a proportionate share thereof, upon the passing of the insured. In 2005, legislation was enacted that requires the investment transaction to be regulated as a security under ch. 517, F.S. These investments must be registered with either the OFR or the federal Securities and Exchange Commission. In addition, persons offering such investments must register with the OFR and provide full and fair disclosures concerning viatical settlement investments to prospective investors.

Department of Legal Affairs

The Attorney General heads the Department of Legal Affairs. The Attorney General is responsible for the enforcement of state consumer protection and antitrust laws as well as civil prosecution of criminal racketeering. The only cases for which the Department of Legal Affairs can initiate an investigation on its own for securities violations, without a request by the OFR, is in cases of securities fraud that also violate the Racketeer Influenced and Corrupt Organization Act (RICO), s. 895.02, F.S.

Office of Statewide Prosecution

The Office of Statewide Prosecution (OSP) is housed within the Department of Legal Affairs.⁷ The Statewide Prosecutor is appointed by the Attorney General from a list of nominees selected by the Florida Supreme Court Judicial Nominating Commission. The mission of the OSP is to investigate and prosecute multi-circuit organized crime, and to aid other state and local law enforcement officials in their investigations of organized crime. The OSP has jurisdiction if the crime has occurred in more than one judicial circuit or is part of a conspiracy in more than one judicial circuit. Section 16.56, F.S., authorizes the OSP to investigate and prosecute the crimes of bribery, burglary, carjacking, home-invasion robbery, usury, extortion, gambling, kidnapping, larceny, murder, prostitution, perjury, robbery, narcotics, RICO violations, Anti-Fencing Act violations, Anti-Trust Act violations, certain computer-related crimes, fraud, and certain violations of the Florida Drug and Cosmetic Act.⁸ During the past 2 years, the OSP made 18 arrests/prosecutions related to securities fraud, ordered \$30 million in restitution, and opened eight investigations regarding securities fraud.

⁷ Article IV, s. 4 of the Florida Constitution, and s. 16.56, F.S., provide the jurisdiction and authority of the Office of Statewide Prosecution.

⁸ Section 16.56(1)(a), F.S.

Statewide Grand Jury

Current law limits the subject matter jurisdiction of the statewide grand jury and does not include criminal violations of the Florida Money Laundering Act or the Florida Securities and Investor Protection Act.⁹

Florida Money Laundering Act

Section 896.101, F.S., the Florida Money Laundering Act, criminalizes the act of money laundering; prohibits structuring transactions to evade federal filings; and, provides civil and criminal forfeiture for violations. Chapter 560, F.S., which relates to the regulation of money services businesses by the OFR, provides that money services businesses are subject to the provisions of ch. 896 F.S., relating to offenses related to financial transactions, and the OFR is authorized to take actions against any money services businesses violating ch. 896, F.S.

III. Effect of Proposed Changes:

Sections 1 and 15 provide additional investigative and prosecutorial powers for the Office of the Statewide Prosecutor, and the statewide grand jury. Sections 1 and 15 expand the jurisdiction of the Office of Statewide Prosecution and the statewide grand jury, respectively, to include the investigation and prosecution of any criminal violation of the Florida Money Laundering Act and any criminal violation of the Florida Securities and Investor Protection Act. Currently, the Office of Statewide Prosecution can pursue money laundering as a RICO predicate. Currently, state attorneys have the authority to pursue criminal violations of ch. 517, F.S., and s. 896.101, F.S.

Sections 2 and 3 revises provisions related to viatical settlement investments. Enumerated transactions excluded from the current definition of the term, “viatical settlement investment” under s. 517.021(23), F.S., are transferred to s. 517.072, F.S., as self-proving exemptions that will be subject to the fraud provisions under ss. 517.301, 517.311, and 517.312, F.S. These excluded transactions would remain exempt from the registration requirements of s. 517.07 and s. 517.12, F.S.

Section 4 revises provisions related to the registration of dealers, associated persons, investment advisers, and branch offices. The section requires each applicant or any natural person listed on the application form to submit fingerprint cards, which would include officers and directors of the applicants. Current law requires each applicant to file a set of fingerprints and does not require officers or directors of the applicant to submit fingerprint cards.

The section also revises the registration renewal process for branch offices to allow for reinstatement during a late period and payment of a reinstatement fee. Currently, a branch office that applies for renewal after December 31 must file a new application with the office, while dealers, investment advisers, and associated persons may request reinstatement with the office by January 31 if they do not meet the December 31 renewal deadline.

Section 5 authorizes the OFR to immediately suspend a registrant if the registrant fails to provide books and records within 30 days after a written request by the office. Such suspension is immediately rescinded if the registrant submits the records to the office. For purposes of

⁹ Section 905.34, F.S.

s. 120.60(6), F.S., failure to provide such records constitutes an immediate and serious danger to the public health, safety, and welfare.

Sections 8 and 9 revise provisions relating to the Securities Guaranty Fund to provide technical, clarifying changes by requiring a claimant to have a judgment which makes a specific finding of a violation of ss. 517.07 and 517.031, F.S., by a person registered under ch. 517, F.S. The bill also clarifies that any payment from the Securities Guaranty Fund does not include post-judgment interest awarded by a court.

Section 10 expands the authority of the OFR by allowing the OFR to revoke, deny, or suspend the registration of any partner, member, officer, director of the applicant or registrant or any person controlling the applicant or registrant if certain violations occur. Currently, the OFR may take such actions against the applicant or registrant. The section also allows the OFR to revoke, deny, or suspend the registration if such person has been:

- convicted of, or has entered a plea of guilty or nolo contendere to, a crime, *regardless of whether adjudication was withheld*;
- has been the subject of any award or action of any national securities, commodities, or options dispute resolution forum; or
- been arrested for any conduct that would authorize revocation under s. 517.161(1), F.S.

Section 11 requires the commission to adopt by rule disciplinary guidelines applicable to each ground for disciplinary action that may be imposed by the OFR. Such disciplinary guidelines would be based on the severity and repetition of specific offenses. The section also requires the commission to adopt rules establishing licensure and renewal disqualifying periods for applicants based on criminal convictions of the applicant.

Section 12 expands the authority of the Attorney General to investigate and bring action against violations of the fraud provisions of ch. 517, F.S., upon approval of the office. The fraud provisions include s. 517.275, s. 527.301, s. 517.311, and s. 517.312, F.S.¹⁰ The Attorney General may recover any costs and attorney fees related to the investigation or enforcement. Currently, the OFR only has enforcement authority.

In addition to any other remedy, the OFR is authorized to apply to the court to impose a civil penalty against any person found to have violated ch. 517, F.S., in an amount not to exceed \$10,000 for an individual or \$25,000 for any other person, or the gross amount of any gain to such defendant for each violation other than s. 517.301, F.S., plus \$50,000 for an individual or \$250,000 for any other person, or the gross amount of any gain to such defendant for each violation of s. 517.301, F.S.

¹⁰ See s. 517.275, F.S., relating to commodities violations regulated under the federal Commodity Exchange Act or regulations of the Commodity Futures Trading Commission, relating to fraudulent transactions; s. 517.301, F.S., relating to fraudulent transaction; s. 517.311, F.S., relating to false representations in issuing or selling securities; and s. 517.312, F.S., providing for rescission and recovery of damages for fraudulent transactions.

Section 13 authorizes the OFR to bar, permanently or for a specified time, any person found to have violated any provision of ch. 517, F.S., any rule or order adopted by the commission or the OFR.

The section also provides that notwithstanding any limitation provided in any other chapter, time limitations do not apply to any enforcement actions brought by the OFR under its authority under ch. 517, F.S. According to the OFR, the retention period for books and records range from a period of 3-6 years. Currently, s. 95.11, F.S., establishes limitations for actions other than for recovery of real property. These limitations range from a period of 30 days to 20 years, including 2 years for an action founded upon a violation of any provision of ch. 517, F.S.

The bill also provides technical, conforming changes to ch. 517, F.S. References to the terms, “National Association of Securities Dealers” (NASD) and the term, “New York Stock Exchange” (NYSE) with the term, “Financial Industry Regulatory Authority” (FINRA) since the NASD and NYSE were merged to form FINRA.

The bill takes effect on July 1, 2009.

IV. Constitutional Issues:

A. Municipality/County Mandates Restrictions:

None.

B. Public Records/Open Meetings Issues:

None.

C. Trust Funds Restrictions:

None.

V. Fiscal Impact Statement:

A. Tax/Fee Issues:

None.

B. Private Sector Impact:

The increased enforcement authority the bill provides for the Attorney General, Office of Statewide Prosecution, and the OFR will greatly enhance the state’s efforts in investigating and prosecuting securities fraud and money laundering related crimes.

The OFR estimates that the bill will require an additional 1,200 individuals (officers and directors) to submit fingerprints. The fingerprint processing fee is \$43.25 per person.

C. **Government Sector Impact:**

The bill allows the OFR to impose an immediate suspension in cases where firms fail to provide previously requested records, which will aid the OFR in its oversight of registrants. This additional authority for OFR will ultimately protect consumers since such noncompliance could be indicative of more serious regulatory problems of a firm.

The increased fines authorized under the bill could generate an indeterminate increase in revenues for the OFR.

The bill allows the Attorney General to recover any costs and attorney fees related to the investigation or enforcement of ch. 517, F.S. Money recovered by the Attorney General for costs, attorney fees, and civil penalties for a violation would be deposited in the Legal Affairs Revolving Trust Fund.

VI. **Technical Deficiencies:**

None.

VII. **Related Issues:**

None.

VIII. **Additional Information:**

A. **Committee Substitute – Statement of Substantial Changes:**

(Summarizing differences between the Committee Substitute and the prior version of the bill.)

None.

B. **Amendments:**

Barcode 978174 by Banking and Insurance on March 4, 2009:

The amendment provides technical, clarifying changes.