

## HOUSE OF REPRESENTATIVES STAFF ANALYSIS

**BILL #:** CS/HB 483

Investor Protection

**SPONSOR(S):** Insurance, Business & Financial Affairs Policy Committee, Grady and others

**TIED BILLS:** **IDEN./SIM. BILLS:** SB 1126

	REFERENCE	ACTION	ANALYST	STAFF DIRECTOR
1)	Insurance, Business & Financial Affairs Policy Committee	19 Y, 0 N, As CS	Kliner	Cooper
2)	Public Safety & Domestic Security Policy Committee	7 Y, 0 N	Padgett	Kramer
3)	General Government Policy Council		Kliner	Hamby
4)	Full Appropriations Council on General Government & Health Care			
5)				

### SUMMARY ANALYSIS

The bill:

Expands the jurisdiction of the Office of Statewide Prosecution (OSP), and the statewide grand jury, by adding violations of the Florida Money Laundering Act and the Florida Securities and Investor Protection Act to the list of offenses that may be considered by a statewide grand jury and prosecuted by the OSP. In addition, it specifies additional investigation and enforcement authority of the Florida Attorney General (AG) for securities violations, and authorizes the AG to recover costs and attorney fees.

Expands the class of persons related to or associated with an applicant for registration as a dealer, associated person, or issuer of securities or registrant for which specified violations may result in adverse actions taken against registrations, clarifies that fingerprint cards are required by officers and directors of applicants, and authorizes the Office of Financial Regulation (OFR) to bar specified persons from submitting applications or notifications for license or registration under specified circumstances.

Allows the OFR to impose an emergency suspension in cases where a dealer, associated person, or issuer of securities fails to provide books and records requested by the OFR pursuant to its authority. Permits the OFR to consider the following as a ground for a denial, suspension, or revocation action:

- A finding of a violation of Chapter 517, F.S., in an arbitration proceeding;
- A conviction of, or entrance of a plea of guilty or nolo contendere to, a crime contemplated under this subsection will be considered regardless of whether adjudication has been withheld;
- Whether the registrant is arrested for a crime which would be the basis for a denial, revocation, or suspension under §517.161(1), F.S.

Moves certain enumerated transactions, which are excluded from the definition of "viatical settlement investment, making the enumerated transactions available as self-proving exemptions that will be subject to the fraud provisions under chapter 517, F.S., and remain exempt from the registration requirements of §§517.07 and 517.12, F.S.

The bill provides an effective date of July 1, 2009.

Fiscal: No discernable impact to General Revenue.

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

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**DATE:** 4/8/2009

## HOUSE PRINCIPLES

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

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

## FULL ANALYSIS

### I. SUBSTANTIVE ANALYSIS

#### A. EFFECT OF PROPOSED CHANGES:

##### **Present Situation:**

##### Florida Securities and Investor Protection Act

The Office of Financial Regulation (OFR)<sup>1</sup> regulates securities transactions under chapter 517, F.S., the Florida Securities and Investor Protection Act (the Securities Act). Under s. 517.07, F.S., a security must be registered, either with the OFR or with the federal Securities and Exchange Commission (SEC). 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 registered with the SEC. The law also requires a broker dealer and a sales agent to be registered with OFR. An applicant who registers a security in Florida must file detailed financial and other information, such as a prospectus, with the OFR. An applicant must include the names and addresses of directors, officers, and partners of the issuer; the location of the issuer's principal business office; a general description of the type of business to be transacted by the issuer; a capitalization statement of the issuer; a balance sheet; a detailed statement of the plan upon which the issuer proposes to transact business; cash resources; and other detailed financial information. All statements, exhibits, and documents relating to the registration of a security are made under oath.

The law prohibits the sale of a security registered with the OFR until each potential purchaser receives a prospectus containing at least the information specified by law. Staff of OFR indicates that the information provided by a prospectus provides a potential investor with full and fair disclosures concerning the security. In addition, s. 517.161, F.S., requires that prior to recommending a security, a licensed company or agent is required to determine that the investment is suitable for the prospective purchaser. Determining the suitability of an investment involves considering the purchaser's financial status, tax status, investment objectives, and investment experience.

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<sup>1</sup> The OFR is an entity under the Financial Services Commission. The Financial Services Commission consists of the Governor, the Chief Financial Officer, the Attorney General, and the Commissioner of Agriculture. The Commission is an independent entity housed within the Department of Financial Services.

Section 517.111, F.S., provides for the suspension, revocation, or denial of the registration of a security and s. 517.161, F.S., provides similar sanctions against dealers, investment advisers, associated persons, and branch offices. In the course of its investigation of its licensees, the OFR may suspend, revoke, or restrict a license if the licensee:

- Has violated any provision of this chapter or any rule or order made under chapter 517, F.S.;
- Has made a material false statement in the application for registration;
- Has been guilty of a fraudulent act in connection with rendering investment advice or in connection with any sale of securities;
- Has made a misrepresentation or false statement to, or concealed any essential or material fact from, any person in the rendering of investment advice or the sale of a security to such person;
- Has failed to account to persons interested for all money and property received;
- Has not delivered, after a reasonable time, to persons entitled thereto securities held or agreed to be delivered;
- Is rendering investment advice or selling or offering for sale securities through any associated person that is not registered;
- Has demonstrated unworthiness to transact the business of dealer, investment adviser, or associated person;
- Has exercised management or policy control over the securities of any dealer or investment adviser that has been declared bankrupt, or had a trustee appointed under the Securities Investor Protection Act; or is insolvent;
- Has been convicted of, or has entered a plea of guilty or nolo contendere to, a crime against the laws of this state or any other state or of the United States or of any other country or government which relates to registration as a dealer, investment adviser, issuer of securities, associated person, or branch office; which relates to the application for such registration; or which involves moral turpitude or fraudulent or dishonest dealing;
- Has had a final judgment entered against her or him in a civil action upon grounds of fraud, embezzlement, misrepresentation, or deceit;
- Is of bad business repute;
- Has been the subject of any decision, finding, injunction, suspension, prohibition, revocation, denial, judgment, or administrative order by any court of competent jurisdiction, administrative law judge, or by any state or federal agency, national securities, commodities, or option exchange, or national securities, commodities, or option association, involving a violation of any federal or state securities or commodities law or any rule or regulation promulgated thereunder, or any rule or regulation of any national securities, commodities, or options exchange or national securities, commodities, or options association, or has been the subject of any injunction or adverse administrative order by a state or federal agency regulating banking, insurance, finance or small loan companies, real estate, mortgage brokers or lenders, money transmitters, or other related or similar industries. The office may not deny registration to any applicant who has been continuously registered with the office for 5 years from the entry of such decision, finding, injunction, suspension, prohibition, revocation, denial, judgment, or administrative order provided such decision, finding, injunction, suspension, prohibition, revocation, denial, judgment, or administrative order has been timely reported to the office pursuant to the commission's rules; or
- Made payment to the OFR for a registration or notice filing with a check or electronic transmission of funds that is dishonored by the applicant's, registrant's, or notice filer's financial institution.

Persons who have suffered monetary damages resulting from a licensee's violations of the Securities Act or by a licensee's engaging in acts of fraud, deceit, or by falsification or concealment of facts, may be eligible to receive funds from the state Security Guaranty Fund.

## The Security Guaranty Fund

Under relevant sections of Chapter 517, F.S., the Chief Financial Officer is required to establish and maintain a Securities Guaranty Fund. This fund receives deposits from assessment fees that OFR licensees pay as part of their registration fees. Proceeds of the fund are disbursed to persons who have suffered monetary damages resulting from a licensee's violations of the Securities Act or by a licensee's engaging in acts of fraud, deceit, or by falsifying or concealing facts. The Securities Act compensates victims with the unsatisfied portion of their judgment or \$10,000, whichever is less, and limits payments for claims to \$100,000 against one licensee. Court costs and attorney's fees are not eligible for Fund disbursement. Prejudgment interest is an element of "actual or compensatory damages" to be paid by the Fund.<sup>2</sup>

## The Financial Industry Regulatory Authority

The Financial Industry Regulatory Authority (FINRA), is the largest non-governmental regulator for all securities firms doing business in the United States. FINRA oversees nearly 5,000 brokerage firms, about 172,000 branch offices and approximately 663,000 registered securities representatives.

Created in July 2007 through the consolidation of National Association of Securities Dealers, Inc., and the member regulation, enforcement and arbitration functions of the New York Stock Exchange, FINRA touches virtually every aspect of the securities business—from registering and educating industry participants to examining securities firms, writing rules, enforcing those rules and the federal securities laws, informing and educating the investing public, providing trade reporting and other industry utilities, and administering the largest dispute resolution forum for investors and registered firms. It also performs market regulation under contract for The NASDAQ Stock Market, the American Stock Exchange, the International Securities Exchange and the Chicago Climate Exchange.

## The Viatical Settlement as Investment

A viatical settlement allows one to invest in another person's life insurance policy. With a viatical settlement, one purchases the policy (or part of it) at a price that is less than the death benefit of the policy. One collects the death benefit when the seller dies. The return on the investment depends upon the seller's life expectancy and the actual date he or she dies. If the seller dies before the estimated life expectancy, the result is a higher return. But if the seller lives longer than expected, the return will be lower. A loss can also occur if the person lives long enough so that one has to pay additional premiums to maintain the policy.<sup>3</sup> Prior to 2005, the Office of Insurance Regulation (OIR) alone regulated viatical settlements.

In 1990, approximately \$80 million worth of life insurance was viaticated as compared to an estimated \$1 billion in 1999. Today, the industry is growing exponentially as investors seek out not only the terminally ill, but the swelling ranks of generally healthy, elderly Americans interested in profiting from their life insurance policies before they die. It is estimated that \$13 billion worth of life insurance policies were sold by policyholders to investors in 2005--up from \$5 million in 1989 and \$200 million in 1998 and it is projected that by 2030, the number could reach \$160 billion.<sup>4</sup>

In 2005, Chapter 517, F.S., was amended to require the OFR to regulate viatical settlement investments as securities under the Securities Act.<sup>5</sup> Currently the law:

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<sup>2</sup> Gallo v. Department of Banking and Finance, 749 So.2d 582 (Fla. 5th DCA 2000).

<sup>3</sup> See, <http://www.sec.gov/answers/viaticalsettle.htm>

<sup>4</sup> *Affirming viatical settlement laws: the NAIC developed the viatical settlements model act to protect insureds and to create a transparent and fair viatical settlements market.* (Legal Insight: Regulatory/Law)(National Association of Insurance Commissioners). Best's Review, September 1, 2007, by Frank N. Darras. [http://www.accessmylibrary.com/coms2/summary\\_0286-33754408\\_ITM](http://www.accessmylibrary.com/coms2/summary_0286-33754408_ITM).

<sup>5</sup> Chapter No. 2005-237, LOF.

- Defines a viatical settlement investment as an agreement for the purchase, sale, assignment, transfer, devise, or bequest of any legal or equitable interest in a viaticated policy;
- Provides that a viatical settlement investment does not include certain financing arrangements that involve large institutional investors or transfers of viaticated policies pursuant to court orders;
- Provides that a viatical settlement investment is not an exempt security under certain provisions in the Act and that transactions in viaticated policies are not exempt transactions under certain provisions in the Act, unless the sale is to a qualified institutional buyer;
- Defines a “qualified institutional buyer” to mean a designated institution which invests at least \$100 million of either its own funds or funds of others on a discretionary basis;
- Grants rule authority to the Financial Services Commission to:
  - establish requirements and standards for the filing, content, and circulation of a prospectus or other sales literature for several types of securities in order to determine whether such offering is fair, just, or equitable;
  - establish disclosures to purchasers of viatical settlement investments and recordkeeping requirements for sellers of such investments;
  - specify requirements for investment advisors deemed to have custody of client funds; and,
  - govern the conduct by and prohibited business practices for investment advisors, dealers, and their associated persons.
  
- Provides for a separate viatical settlement broker license because brokering may now be done by a licensed life insurance agent who is self appointed;
- Outlines grounds for the DFS to deny an application for or suspend or revoke a license for specified persons involved in viatical settlement contract transactions;
- Requires viatical settlement providers to file annual audited financial statements and detailed reports containing data supporting the accuracy of life expectancies for each viatical settlement contract with the DFS, and to maintain a deposit of \$100,000;
- Mandates criminal penalties for persons, in issuing a life expectancy, to issue such an expectancy that is not based upon generally accepted medical or actuarial practices; to receive compensation which is contingent upon providing a designated life expectancy, or knowingly understate or overstate a life expectancy with the intent to defraud;
- Provides that the OIR regulates viatical settlement purchase agreements prior to the effective date of the bill (July 1, 2005) and specifies that the OIR may deny a license for a viatical settlement provider; and
- Specifies requirements for a viatical settlement provider to maintain his or her license and the process by which such providers handle in-process viatical settlement purchase agreements.

Since 2005, viatical settlements have been regulated by both offices within the Department of Financial Services: the OIR and the OFR. A violation of the Viatical Settlement Act<sup>6</sup> is an unfair trade practice under ss. 626.9521 and 626.9541, F.S., and is subject to the penalties provided in the insurance code. In addition, an insurance agent who sells viatical settlements may be fined by the OFR for violations of the Securities Act.<sup>7</sup>

### Viatical Settlement Fraud

Historically, some insurance companies have offered an accelerated death benefits option which allows the insured an opportunity to receive up to 80% of the death benefit at any time within the last year of their projected life. The remaining 20% is then paid to the insured's estate. On the other hand, the business of viatical settlements involves the selling of a policy death benefit, at less than face value, by a terminally ill person to a third party. This is accomplished, for a commission, with the assistance of a

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<sup>6</sup> Chapter 626, Part X, F.S.

<sup>7</sup> Kligfeld v. State, Office of Financial Regulation, 876 So.2d 36 (Fla. 4th DCA 2004).

broker who offers the policies to settlement provider companies for bid, with the highest bidder obtaining the policy for resale to investors. The broker receives a commission based on the sale price.

Since the viatical settlement industry's start in the 1980's, fraud has escalated and, pursuant to the Florida Statewide Grand Jury Report on Fraud in the Viatical Industry, as much as 40-50% of the life insurance policies viaticated may have been procured by fraud. Experts estimate that investors have lost hundreds of millions of dollars in these types of investments.<sup>8</sup>

Types of viatical fraud include the following:

- Clean-sheeting -- Clean-sheeting occurs when a person with a life-threatening illness applies for new life insurance and does not disclose the truth about his/her health.
- Dirty-sheeting -- Dirty-sheeting occurs when a healthy person viaticates a life insurance policy. The healthy person provides false medical information to indicate that he or she has a life-threatening illness.
- Wet-ink policies -- These are new life insurance policies that are sold immediately after being issued -- before the ink is dry. These policies were applied for by the insureds who intended to sell them immediately after they were issued. The applicants committed fraud on the application by claiming they need life insurance for estate planning purposes, and that a relative would be beneficiary. Wet ink is common when healthy seniors are solicited by insurance agents who sign them up for new insurance with the intent to sell these policies. The applicants/insureds do not pay any premiums or are reimbursed for the first premium.
- Life expectancy fraud -- The viatical company informs investors that the life expectancy of an insured is short (i.e., 12 months) when it has data to show that life expectancy may be 60 months or longer.
- Viatical Ponzi scam -- There have been two major fraud cases that were Ponzi scams, in which so-called viatical company provided false medical and life insurance reports for so-called viators who did not exist. In the American Benefit Services/Financial Federated investigation and subsequent civil and criminal trials, a few policies were purchased after the company realized it was under investigation. These were not true viatical companies. They did not provide any benefit to people who were terminally ill. They used the funds they collected from investors to buy luxuries for themselves.<sup>9</sup>
- Premium Financed (SOLI, IOLI, SPIN-LIFE) -- Wealthy seniors are solicited to apply for new life insurance and the settlement company arranges for premiums to be financed until the policy no longer is contestable. This is a tactic to get around laws that require owners and beneficiaries to have an insurable interest when applying for new life insurance.

Most recently, on January 5, 2009, the United States Attorney for the Southern District of Florida announced the Indictment of Joel Steinger, Steven Steiner, Michael McNerney and Anthony Livoti, Jr., in connection with their involvement with Mutual Benefits Corp. ("MBC"), a viatical and life settlement company that raised more \$1.25 billion from over 30,000 investors worldwide from October 1994 through May 2004. According to the 25-count Indictment, Steinger and Steiner, two of the founding principals of MBC, and attorneys McNerney and Livoti, participated in a wide-scale fraud involving the sale of these investments, falsely promising investors "safe" and "secure" investments when they knew that MBC had, among other things, improperly acquired policies, pressured doctors to rubber-stamp false life expectancy figures, and mismanaged escrowed premium funds in a "Ponzi" scheme fashion. The Indictment charges the defendants with conspiracy, mail fraud, wire fraud and money laundering in violation of 18 U.S.C. §§ 1341, 1343, 1349, and 1956(h); the criminal case has been filed in the United States District Court for the Southern District of Florida.<sup>10</sup>

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<sup>8</sup> First Interim Report of the Fifteenth Statewide Grand Jury, February 4, 2000, in the Supreme Court of the state of Florida, Case No. 95,746. <http://myfloridalegal.com/pages.nsf/Main/5c25232ad7fd568785256cca005bf6ea> See, also, <http://www.crimes-of-persuasion.com/Crimes/Telemarketing/Outbound/Major/Investments/viatical.htm>

<sup>9</sup> A list of events and actions in chronological order may be found at [http://www.viatical-expert.net/Dir/abs\\_dir.htm](http://www.viatical-expert.net/Dir/abs_dir.htm)

<sup>10</sup> <http://www.sec.gov/litigation/litreleases/2009/lr20846.htm>

## The Florida Department of Law Enforcement

The Florida Department of Law Enforcement (FDLE) routinely partners with local, state, and federal criminal justice agencies to prevent, investigate, and solve crimes of every nature, from assistance fraud to acts of terrorism. In the state securities arena, the FDLE currently conducts criminal history record checks on securities dealers.

## The Office of Statewide Prosecution

The Office of Statewide Prosecution (OSP), within the Office of the Florida Attorney General, investigates and prosecutes multi-judicial circuit organized crime and assists other law enforcement officials in their efforts against organized crimes.<sup>11</sup> The prosecutors in the Office work regularly with their federal and state counterparts to coordinate efforts against criminal activity. Section 16.56, F.S., lists the specific crimes the OSP investigates and prosecutes, and includes any attempt, solicitation, or conspiracy to commit any of the crimes specifically enumerated, as well as any enumerated crime facilitated by or connected to use of the Internet.<sup>12</sup> Two financially-related issues that are not specifically enumerated in the list of crimes under the statute's purview, however, are money laundering, and viatical settlement fraud.<sup>13</sup>

## Effect of Proposed Changes

Expanding the investigative and prosecutorial authority of the Florida Attorney General's Office, the bill:

- Authorizes the OSP and the statewide grand jury to investigate and enforce violations of the Florida Money Laundering Act and the Florida Securities and Investor Protection Act.
- Authorizes the Attorney General, to investigate, enforce, and bring an action to obtain injunctive relief, restitution, civil penalties, and remedies for violations of s. 517.275, F.S., (the federal Commodity Exchange Act), s. 517.301, F.S., (fraudulent transactions; falsification or concealment of facts), s. 517.311, F.S., (false representations; deceptive words), or s. 517.312, F.S., (boiler rooms), or violations of any rule or order issued under such sections. Moneys recovered by the Attorney General for costs, attorney fees, and civil penalties for a violation of this section will be deposited in the Legal Affairs Revolving Trust Fund.

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<sup>11</sup> A recent case, Luger v. State, 983 So.2d 49 (Fla. 4th DCA 2008), found that the defendant was entitled to a factual hearing to determine statewide prosecutor's jurisdiction because the information did not contain factual allegations establishing that the crimes occurred in multiple circuits. Because it was a challenge to the trial court's subject matter jurisdiction, the defendant was permitted to raise the issue on appeal following his guilty plea to the charges.

<sup>12</sup> Bribery, burglary, criminal usury, extortion, gambling, kidnapping, larceny, murder, prostitution, perjury, robbery, carjacking, and home-invasion robbery; any crime involving narcotic or other dangerous drugs; any violation of the provisions of the Florida Racketeer Influenced and Corrupt Organization Act; the Florida Anti-Fencing Act; the Florida Antitrust Act of 1980; crime involving, or resulting in, fraud or deceit upon any person; crime relating to computer pornography and child exploitation; computer-related crimes listed in chapter 815; violations of the Florida Drug and Cosmetic Act; violations of the Florida Motor Fuel Tax Relief Act of 2004; Medicaid and Medicaid provider fraud; and any crime involving voter registration, voting, or candidate or issue petition activities.

<sup>13</sup> Viatical fraud is discussed in the Present Situation section of this analysis. Generally, money laundering is a process where funds that are generated by illegal activities are concealed, disguised, or made to appear legitimate to evade detection, prosecution, seizure and taxation by the government. Typically associated with drug trafficking, or the mass sale of stolen goods, the prosecution of money laundering has also included suspected links to financing terrorism. The OSP has, and does prosecute individuals for violations of chapter 896, F.S., however, only as a predicate crime, for instance, under Florida RICO statutes. Because the enumerated violations in s. 16.56, F.S., mirror the subject matter jurisdiction for the OSP grand jury, violations of the Florida Money Laundering Act and the Securities Act are not listed as subject matter jurisdiction of a state-wide grand jury.

The bill authorizes the OFR:

- To suspend the registration of a dealer, investment adviser, branch office, or associated person in the event the registrant fails to provide OFR with requested records required by s. 517.121, F.S., within 30 days of a written request. In addition, the OFR's regulation of an investment adviser is expanded to include acts that "directly or indirectly" advise someone regarding securities.<sup>14</sup>
- To expand its review of an applicant or registrant by increasing the number of persons whose prior actions the OFR may review when considering an applicant's suitability in the performance of its authority to deny an applicant's registration, or to revoke, restrict, or suspend a registration. Along with the applicant or registrant, the OFR may consider the actions of any partner, *member*,<sup>15</sup> officer, or director of the applicant, as well as any person having a similar status or who performs similar functions, and any person who controls the applicant directly or indirectly. In reviewing such actions, the OFR may also consider any conviction, or plea of guilty or nolo contendere to a crime relating to securities law of this, or any other country or government, regardless of whether adjudication was withheld. The OFR may also consider whether such person has been the subject of an award issued against him or her by an administrative, civil or criminal adjudicatory body from any state in this or any other country or government, including any national securities, commodities, or options dispute resolution forum.<sup>16</sup> Registration may also be suspended or restricted if the registrant is arrested for any conduct that would authorize the OFR to revoke licensure.
- To promulgate rules establishing sanction guidelines for registrant violations of chapter 517, F.S., or administrative rules. The Commission is directed to base the level or harshness of a sanction upon the severity and repetition of the offense; to distinguish between minor offenses and those which threaten health, safety and welfare; to provide reasonable notice to the public; and to ensure that penalties are imposed in a consistent manner.
- To promulgate rules establishing periods of time in which an applicant, a partner, member, officer, director of the applicant or any person having similar status or who performs similar functions, will be ineligible for licensure based upon criminal convictions, pleas of nolo contendere, or pleas of guilt, regardless of whether adjudication was withheld. Periods of ineligibility may include 15 years for felonies, and five years for misdemeanors that relate to registration, application for registration, moral turpitude or fraudulent or dishonest dealing. The administrative period of ineligibility shall be imposed in addition to any other civil or criminal period imposed by court determination. The rules may consider mitigating factors, as well as additional ineligibility periods based upon imprisonment or community supervision, multiple offenses, and factors reasonably related to an applicant's criminal history. Section 112.011, F.S., regarding the removal of disqualifications for employment of felons, is not applicable to the registration provisions of chapter 517, F.S.
- To seek a court order directing a defendant to make restitution, and conferring standing to the OFR to request restitution on behalf of the victims in cases brought by the OFR pursuant to chapter 517, F.S.
- To seek from a court civil penalties:
  - Not to exceed \$10,000 for a natural person or \$25,000 for any other person, or
  - In an amount equal to the gross amount of any pecuniary gain to such defendant for each such violation plus \$50,000 for a natural person or \$250,000 for any other person, (other than a violation of Section 517.301, F.S.), or

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<sup>14</sup> The OFR has observed situations where associated persons who are registered with a separate investment adviser and broker dealer are inducing their clients to sell stocks in order to purchase insurance products.

<sup>15</sup> A "member" is not defined in chapter 517, F.S., however, the OFR reports that the "members" about whom they seek information are associates within a business organization such as a Limited Liability Company, or LLC.

<sup>16</sup> According to the OFR, most customer complaints are evaluated through arbitration proceedings. Arbitration decisions must be disclosed on an applicant or registrant's disciplinary history. This may be the only evidence of misconduct related to consumer complaints in an application. Further, arbitration proceedings arguably are conducted with similar proceedings to trials.



- In an amount equal to the gross amount of any pecuniary gain to such defendant for each violation of Section 517.301, F.S. (fraudulent transactions; falsification or concealment of facts).
- To apply to a court to impose civil penalties for a violation of chapter 517, F.S., a rule or order adopted by the Commission or the OFR, or a written agreement entered into with the OFR.
- To permanently or temporarily bar any person from submitting an application for licensure who is found to have violated chapter 517, F.S., any rule or order promulgated by the OFR or the Commission, or any written agreement entered into with the OFR. In addition, this section provides that time limitations provided in Florida Statutes (i.e., statutes of limitation, pursuant to s. 95.11, F.S.) other than those provided in chapter 517, F.S., do not apply to enforcement actions brought by the OFR pursuant to its authority provided in chapter 517, F.S.

In addition, the bill:

- Increases the not-to-exceed cap for an administrative fine from \$5,000 to \$10,000, for a violation of chapter 517, F.S., any rule or order promulgated by the OFR or the Commission, or any written agreement entered into with the OFR.
- Incorporates the rules and regulations promulgated under amendments to the Commodity Exchange Act by the Futures Trading Act of 1986, Futures Trading Practices Act of 1992, the Commodity Futures Trading Commission (CFTC) Reauthorization Act of 1995, Legal Certainty for Bank Products Act of 2000, Commodity Futures Modernization Act of 2000, and the CFTC Reauthorization Act of 2008, so that violations of the Commodity Exchange Act and the rules and regulations promulgated thereunder by the CFTC, are violations of chapter 517, F.S.<sup>17</sup>
- Excludes postjudgment interest from a Securities Guaranty Fund disbursement.
- Adds “branch office” to the registration renewal provision of s. 517.12(11), F.S., which provides for reinstatement during a late period and payment of a reinstatement fee.<sup>18</sup>
- Transfers a list of transactions that are not considered viatical settlement investments from the general definition section of the chapter to the chapter section providing for the applicability of viatical settlement investment exemptions. These transactions are exempt from the securities registration requirement and the requirement for the registration of dealers, associated persons, investment advisers, and branch offices. The transactions are subject, however, to the prohibition against fraudulent transactions, the falsification or concealment of facts, false representations, deceptive words, boiler rooms, and other prohibited practices, and remedies for these transactions. The transactions include:
  - The transfer or assignment of an interest in a previously viaticated policy from a natural person who transfers or assigns no more than one such interest in 1 calendar year. The provision of stop-loss coverage to a viatical settlement provider, financing entity, or related provider trust, as those terms are defined in s. 626.9911, F.S., by an authorized or eligible insurer.
  - The transfer or assignment of a viaticated policy from a licensed viatical settlement provider to another licensed viatical settlement provider, a related provider trust, a financing entity, or a special purpose entity, as those terms are defined in s. 626.9911, F.S., or to a contingency insurer provided that such transfer or assignment is not the direct or indirect promotion of any scheme or enterprise with the intent of violating or evading any provision of this chapter.

<sup>17</sup> As a general rule, a cross-reference to a specific statute incorporates the language of the referenced statute as it existed at the time the reference was enacted, unaffected by any subsequent amendments to or repeal of the incorporated statute. See, *Overstreet v. Blum*, 227 So. 2d 197 (Fla. 1969); *Hecht v. Shaw*, 112 Fla. 762, 151 So. 333 (1933); *Van Pelt v. Hilliard*, 75 Fla. 792, 78 So. 693 (1918); and *State ex rel. Springer v. Smith*, *ibid*.

<sup>18</sup> Currently a branch office who applies for renewal after December 31 must file a new application with the OFR, while dealers, investment advisers, and associated persons may request reinstatement with the OFR by January 31 if they miss the December 31 renewal deadline. This addition will allow for a branch office’s registration to be reinstated within a certain period of time if the branch office’s registration is not renewed on time.

- The transfer or assignment of a viaticated policy to a bank, trust company, savings institution, insurance company, dealer, investment company as defined in the Investment Company Act of 1940, pension or profit-sharing trust, or qualified institutional buyer as defined in United States Securities and Exchange Commission Rule 144A, 17 C.F.R. s. 230.144A(a), or to an accredited investor as defined by Rule 501 of Regulation D of the Securities Act Rules, provided such transfer or assignment is not for the direct or indirect promotion of any scheme or enterprise with the intent of violating or evading any provision of this chapter.
  - The transfer or assignment of a viaticated policy by a conservator of a viatical settlement provider appointed by a court of competent jurisdiction who transfers or assigns ownership of viaticated policies pursuant to that court's order.
- Replaces, in several places, a reference to the self-regulatory arm of the securities industry – the National Association of Securities Dealers and the New York Stock Exchange – with a reference to its successor organization, the Financial Industry Regulatory Authority.

## B. SECTION DIRECTORY:

**Section 1** amends paragraphs (a) and (b) of s. 16.56, F.S., adding a criminal violation of the Florida Money Laundering Act and a criminal violation of the Florida Securities and Investor Protection Act to the list of offenses that may be prosecuted by the OSP. In addition, paragraph (a) is amended to require general allegations in the information regarding OSP jurisdiction.

**Section 2** amends subsections (4), (13) and (23) of s. 517.021, F.S., replacing a reference to the self-regulatory arm of the securities industry – the National Association of Securities Dealers and the New York Stock Exchange – with a reference to its successor organization, the Financial Industry Regulatory Authority. This section increases the regulation of an investment advisor to include acts “directly or indirectly” advising someone regarding securities. This section removes a list of transactions that are not considered viatical settlement investment, from the general definition section of the chapter.

**Section 3** amends s. 517.072, F.S., by splitting existing statutory language regarding the non-applicability of certain exemptions to viatical settlement investments into subsections (1) and (2). This section also creates subsection (3), adding the list of transactions that were removed from s. 517.021(23), F.S. This section exempts these transactions from certain registration requirements yet these are expressly subject to regulations prohibiting certain practices.

**Section 4** amends subsections (7), (8), and (11), and paragraph (b) of subsection (15) of s. 517.12, F.S., expanding the information the Office of Financial Regulation (OFR) may require about the applicant, and removing an unnecessary reference to investment adviser from s. 517.12(8), F.S.

**Section 5** creates subsection (3) of s. 517.121, F.S., authorizing the OFR to suspend the registration of a dealer, investment adviser, branch office, or associated person in the event the registrant fails to provide OFR with requested records required by this section within 30 days of a written request

**Sections 6 and 7** amends subsection (2) of s. 517.1215, F.S., and s. 517.1217, F.S., providing a conforming reference to the FINRA.

**Section 8** amends subsection (1) of s. 517.141, F.S., specifically excluding postjudgment interest as a compensable damage a person may apply for when seeking a disbursement from the Securities Guaranty Fund.

**Section 9** amends subsections (1) and (6) of s. 517.161, F.S., expanding the authority of the OFR to deny an applicant’s registration, or to revoke, restrict, or suspend a registration by increasing the

number of persons whose actions the OFR may review. This section also provides a conforming reference to the Financial Industry Regulatory Authority (FINRA).

**Section 10** creates s. 517.1611, F.S., providing rule making authority to the Commission to establish sanction guidelines for registrant violations of chapter 517, F.S., or administrative rules.

**Section 11** amends subsection (3) of s. 517.191, F.S., providing authority to the OFR to seek a court order directing a defendant to make restitution, and conferring standing to the OFR to request restitution on behalf of the victims in cases brought by the OFR, and authority to seek civil penalties. This section creates subsection (5) of s. 517.191, F.S., authorizing the Attorney General, upon approval by the OFR, to investigate, enforce, and bring an action to obtain injunctive relief, restitution, civil penalties, and any remedy provided for in s. 517.191, F.S.

**Section 12** amends subsection (3) of s. 517.221, F.S., and creates subsection (4) and (5) of s. 517.221, F.S., increasing the not-to-exceed cap for administrative fines, and authorizing the OFR to permanently or temporarily bar any person from submitting an application for licensure. This section provides that time limitations provided in Florida Statutes (i.e., statutes of limitation, pursuant to s. 95.11, F.S.) other than those provided in chapter 517, F.S., do not apply to enforcement actions brought by the OFR pursuant to its authority provided in chapter 517, F.S.

**Section 13** amends s. 517.275, F.S., incorporating the rules and regulations promulgated under amendments to the Commodity Exchange Act by the Futures Trading Act of 1986, Futures Trading Practices Act of 1992, CFTC Reauthorization Act of 1995, Legal Certainty for Bank Products Act of 2000, Commodity Futures Modernization Act of 2000, and the CFTC Reauthorization Act of 2008.

**Section 14** amends subsection (9) of s. 905.34, F.S., increasing the jurisdiction of the statewide grand jury by adding criminal violations of the Florida Money Laundering Act, and the Florida Securities and Investor Protection Act to the list of crimes specifically enumerated in s. 16.56, F.S.

**Section 15** provides an effective date of July 1, 2009.

## II. FISCAL ANALYSIS & ECONOMIC IMPACT STATEMENT

### A. FISCAL IMPACT ON STATE GOVERNMENT:

#### 1. Revenues:

	<u>FY 09/10</u>	<u>FY 10/11</u>	<u>FY 11/12</u>
<u>FDLE Operating Trust Fund</u>	\$28,800	\$28,800	\$28,800
Approximately 1,200 criminal history record checks annually (1,200 x \$24 = \$28,800)			

#### 2. Expenditures: See, Part II, D., FISCAL COMMENTS

### B. FISCAL IMPACT ON LOCAL GOVERNMENTS:

#### 1. Revenues:

None determined.

#### 2. Expenditures:

None determined.

C. DIRECT ECONOMIC IMPACT ON PRIVATE SECTOR:

FDLE Crim Hist. and Fingerprint retention

<u>FY 09/10</u>	<u>FY 10/11</u>	<u>FY 11/12</u>
\$51,900	\$51,900	\$51,900

Approximately 1,200 criminal history record checks annually  
(1,200 x \$43.25 = \$51,900)

Each request is \$43.25; \$24 goes into the FDLE Operating Trust Fund; \$19.25 from each request is forwarded to the FBI; not revenue for Florida; but expense for private sector.

D. FISCAL COMMENTS:

According to the FDLE, while the impact of this bill does not necessitate additional FTE, this bill in combination with additional background screening bills could rise to the level requiring additional staffing. It is anticipated that fee revenue will offset expenses associated with an additional FTE, if needed

**III. COMMENTS**

A. CONSTITUTIONAL ISSUES:

1. Applicability of Municipality/County Mandates Provision:

This bill does not appear to require counties or municipalities to take an action requiring the expenditure of funds, does not appear to reduce the authority that counties or municipalities have to raise revenue in the aggregate, and does not appear to reduce the percentage of state tax shared with counties or municipalities.

2. Other:

None noted.

B. RULE-MAKING AUTHORITY:

The Financial Services Commission is granted rule making authority to promulgate rules establishing sanction guidelines for registrant violations of chapter 517, F.S., or administrative rules, and to promulgate rules establishing periods of time in which an applicant, a partner, member, officer, director of the applicant or any person having similar status or who performs similar functions, will be ineligible for licensure based upon criminal convictions, pleas of nolo contendere, or pleas of guilt, regardless of whether adjudication was withheld.

The Financial Services Commission may establish, by rule, a method to submit a set of fingerprints to the Office of Financial Regulation, as an alternative to requiring fingerprints be taken by an authorized law enforcement agency.

C. DRAFTING ISSUES OR OTHER COMMENTS:

None.

#### **IV. AMENDMENTS/COUNCIL OR COMMITTEE SUBSTITUTE CHANGES**

On March 12, 2009, the Insurance, Business & Financial Affairs Policy Council adopted an amendment offered by the bill's sponsor. The amendment makes a few necessary but technical changes to the bill, as well as clarifying language to provide consistency with existing federal and state requirements, and removes redundant language.

The CS version of the bill differs from the bill as originally filed as follows:

The CS clarifies which individuals the office requires fingerprints from for registration, and removes the requirement that the FDLE retain the fingerprints sent by the OFR as part of the registration process. Nearly all registrants have provided fingerprints pursuant to federal regulations and the FBI is working on a system that, when completed, may provide an opportunity to interface with Florida's network.

The CS removes the 30 day deadline a registrant has to provide documentation at the request of the OFR, upon penalty of suspension, and instead requires the registrant promptly provide the requested documents. This language tracks federal regulations.

The CS removes a requirement that a claimant allege a specific violation of Florida Statute sections before being considered as eligible for funds disbursed from the Securities Guaranty Fund. This is unnecessary as a complaint will allege specific statute violations.

The CS removes a reference to a national securities, commodities, or options dispute resolution forum from the paragraph listing the universe of civil and administrative actions and forums the registrant, if found to be implicated therein, could result in the suspension, denial, or revocation of registration in the state.

The CS removes specific examples of sanctions that could be included in Financial Services Commission rules on disciplinary guidelines.

The CS clarifies Commission rule-making authority for disqualifying periods by rolling up "serious" and "other" felonies into one category for "felony" and removing the seven-year disqualifying period. A felony shall result in a 15 year period, and a misdemeanor shall result in a 5 year period.

The CS requires that the approval from the OFR to the AG to enforce sections of Chapter 517, F.S., be written. This section also clarifies that Attorney General action does not limit the OFR to bring an administrative action against any person that is the subject of the AG action and permits the OFR to participate with the AGs office in its action.

The CS clarifies the inapplicability of any limitations statutes in an enforcement action to require such action to be brought within six years from the time the facts giving rise to the action were discovered or should have been discovered. Six years is the typical retention period for business records. In any case, an action cannot be brought more than 10 years from the date of the violation.