

SENATE STAFF ANALYSIS AND ECONOMIC IMPACT STATEMENT

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

Date: April 20, 1998 Revised: \_\_\_\_\_

Subject: Weight-Loss Practices Act

	<u>Analyst</u>	<u>Staff Director</u>	<u>Reference</u>	<u>Action</u>
1.	<u>Munroe</u>	<u>Wilson</u>	<u>HC</u>	<u>Favorable/CS</u>
2.	<u>Rhea</u>	<u>Wilson</u>	<u>GO</u>	<u>Favorable/CS</u>
3.	_____	_____	<u>WM</u>	_____
4.	_____	_____	_____	_____
5.	_____	_____	_____	_____

**I. Summary:**

Committee Substitute for Committee Substitute for Senate Bill 2188 transfers, renumbers, and amends provisions which currently constitute the Florida Commercial Weight-Loss Practices Act. The bill requires weight-loss providers to register with the Department of Health prior to operating in Florida. The bill prohibits sexual misconduct in the practice of dietetics and nutrition. The bill provides that any complaint or record maintained by the Department of Health pursuant to the discipline of a registered weight-loss provider and, after final action, any proceeding held by the department to discipline a registered weight-loss provider shall remain open and available to the public.

This bill transfers, renumbers, and amends the following sections of the Florida Statutes: 501.057(468.821), 501.0571(468.822), 501.0573(468.823), 501.0575(468.824), 501.0577(468.825), 501.0579(468.826) and 501.0581(468.827).

This bill amends section 455.604, Florida Statutes, and creates sections 468.828, 468.8281, 468.829, and 468.519, Florida Statutes.

**II. Present Situation:**

The Commercial Weight-Loss Practices Act, which is codified in ss. 501.057-501.0581, F.S., is enforced by the Department of Agriculture and Consumer Services. The act defines the term “weight-loss program” to mean any plan or procedure offered to encourage weight-loss. The act requires weight-loss providers to give consumers specified disclosures including: a written itemized statement of the estimated cost of the recommended weight-loss program; the educational and professional experience of the provider’s staff; the name, address, and qualifications of the person who has reviewed and approved the weight-loss program; and post

and provide upon inquiry, the Weight-Loss Consumer Bill of Rights. The act does not apply to a person licensed as a medical physician, osteopathic physician, podiatric physician, chiropractic physician, naturopathic physician, optometrist, pharmacist, or physical therapist who may give weight-loss service which is incidental to the performance of his or her profession and which is not the primary activity of the person's practice. The Department of Agriculture and Consumer Services may bring a civil action in circuit court for temporary or permanent injunction to enforce the act and other appropriate civil relief.

Part X, ch. 468, F.S., provides for the regulation of dietetics and nutrition by the 5-member Dietetics and Nutrition Practice Council under the Board of Medicine within the Department of Health. Part X, ch. 468, F.S., authorizes the board to delegate regulatory powers and duties to the council to implement its provisions. The part defines "dietetics and nutrition practice" to mean the assessment of nutritional needs and status using appropriate data; the recommendation of appropriate dietary regimens, nutrition support, and nutrient intake; the improvement of health status through nutrition research, counseling, and education; and the implementation and management of nutritional care systems.

Part X, ch. 468, F.S., provides exemptions to the licensing requirements for dietetics and nutrition practice, including: licensed acupuncturists, medical physicians, osteopathic physicians, chiropractic physicians, podiatrists, naturopaths, optometrists, nurses, pharmacists, dentists, massage therapists, clinical social workers, marriage and family therapists, mental health counselors, and psychologists, and persons employed by and under the supervision of the licensed professional when providing services within the scope of the licensed professional's scope of practice; government employees; employed cooperative extension home economists; students pursuing a degree in dietetics and nutrition; dietitians or nutritionists from another state whose practice is incidental to a course of study or part of teaching a postgraduate course, if the dietitian or nutritionist is licensed or holds a faculty position at an accredited school; persons who market or distribute food, food materials, or dietary supplements or persons who explain the use and benefits of those products for no fee or who are employed in a pharmacy; educators performing duties that are part of their employment; persons who provide weight control services or related weight control products, if the program has been reviewed by, consultation is available from, and no program change can be initiated without prior approval by a Florida licensed dietitian/nutritionist, or a dietitian or nutritionist licensed in another state that has licensure requirements considered by the council to be at least as stringent as Florida's requirements; dietetic technicians; and employees of nursing facilities and hospitals which rely exclusively on spiritual means to heal, care, or treat persons. The part exempts persons employed by a licensed hospital, nursing home, assisted living facility, or continuing care facility, if the person employed is in compliance with the laws and rules adopted for the operation of the facility's dietetic department.

Section 191, ch. 97-264, L.O.F., created a fifteen-member task force within the Department of Health to review the exemptions to the licensing requirements for dietitians employed by a licensed hospital, nursing home, assisted living facility, or continuing care facility. The task force was established to assess the need for the exemptions and review the quality of dietetic and

nutrition services provided in the hospitals and facilities. A majority of the task force recommendations to the Legislature would require the exemptions to be repealed and the passage of legislation that would allow persons who currently work in an exempt facility to continue practicing in that facility without requiring licensure until the termination of the person's employment with that facility.

### III. Effect of Proposed Changes:

**Sections 1-7.** Transfers, renumbers, and amends ss. 501.057(468.821), 501.0571(468.822), 501.0573(468.823), 501.0575(468.824), 501.0577(468.825), 501.0579(468.826) and 501.0581(468.827) F.S., the Commercial Weight-Loss Practices Act, to require the Department of Health to regulate weight-loss programs.

The bill revises the definition of weight-loss program to mean:

[A] general program of instruction with food, supplements, food products, or a food plan designed for clients from one or more healthy population groups, in order that such clients may achieve or maintain a healthy weight. A weight-loss program is not based on an individual nutrition assessment and is not individualized to provide nutrition care services to manage, treat, or rehabilitate a medical condition, illness, or injury for a specific person or group.

A "weight-loss provider" for purposes of the regulation means:

[T]he owner of any business engaged in the offering of services to consumers to assist them in losing weight and making oral or written statements, visual descriptions, advertisements, or other representations that have the capacity, tendency, or effect of leading consumers to believe that participation in a weight-loss program will result in weight loss. A weight-loss provider does not include a person described in s. 468.505(1)(g), F.S.<sup>1</sup>

The regulation continues to require weight-loss providers to give consumers specified disclosures including: a written itemized statement of the estimated cost of the recommended weight-loss program; the educational and professional experience of the provider's staff; the name, address, and qualifications of the person who has reviewed and approved the weight-loss program; and post and provide upon inquiry, the Weight-Loss Consumer Bill of Rights.

The regulation does not apply to a person licensed as a medical physician, osteopathic physician, podiatric physician, chiropractic physician, naturopathic physician, optometrist, pharmacist, speech-language pathologist, audiologist, nursing home administrator, occupational therapist, occupational therapy aide, occupational therapy assistant, respiratory therapist, respiratory care practitioner, respiratory therapist, registered dietitian, nutritionist, nutrition counselor, athletic

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<sup>1</sup>Section 468.505(1)(g), F.S., provides that a person who markets or distributes food, food materials, or dietary supplements, or any person who engages in the explanation of the use and benefits of those products or the preparation of those products, if that person does not engage for a fee in dietetics and nutrition practice or nutrition counseling. . . .

trainer, orthotist, prosthetist, prosthetist-orthotist, pedorthotist, orthotic fitter, orthotic fitter assistant, or physical therapist who may give weight-loss service which is incidental to the performance of his or her profession and which is not the primary activity of the person's practice. Other conforming changes are also made.

It is unlawful and an unfair and deceptive trade practice under pt. II, ch. 501, F.S., to fail to comply with the provisions of the newly created Commercial Weight-Loss Practices Act. The Department of Health is authorized to enforce the Commercial Weight-Loss Practices Act through civil remedies.

**Section 8.** Creates s. 468.828, F.S., to provide that a weight-loss provider may not operate in Florida until such person has registered with the department. The department must prescribe the registration form to be used. A registration must be issued to each weight-loss provider who:

- Has completed the application form and remitted a nonrefundable application fee in an amount set by the department not to exceed \$300.
- Has identified the weight-loss provider by name, street and mailing addresses, and telephone number, and for business entities, the registered agent or other person to receive service of papers or other documents or perform other duties as specified by the department.
- Has identified the licensed or registered dietitian/nutritionist who approved the weight-loss program by name, street and mailing addresses, and telephone number.

A weight-loss provider registration is not transferable. A weight-loss provider must notify the department within 30 days after the change in ownership of the business. Each weight-loss program offered by a weight-loss provider must be reviewed and approved by:

- A Florida licensed dietitian/nutritionist;
- A registered dietitian; or
- A dietitian or nutritionist licensed in another state, provided that the licensure requirements of that state are substantially equivalent to or more stringent than those in Florida.

Each dietitian/nutritionist must review the provider's weight-loss program for compliance with specified standards which include: nutritional adequacy, based on government recommendations for healthy eating; mechanisms for screening out persons for whom weight loss is inappropriate; requiring medical permission for children under 10 years of age and recognizing that physician consultation is appropriate for anyone starting a weight-loss program; promoting a rate of weight loss in compliance with applicable regulation; providing a weight-loss program that helps sustain weight losses and is consistent with government standards for healthy eating; and providing participants with materials demonstrating the weight-loss program's compliance with applicable regulation.

Each weight-loss provider must comply with all requirements of the Florida Drug and Cosmetic Act, pt. I of ch. 499, F.S., the Commercial Weight-Loss Practices Act, and the Deceptive and Unfair Trade Practices Act, pt. II of ch. 501, F.S., the violation of which shall result in suspension

of the weight-loss provider's registration. Reinstatement of registration requires the demonstration of full compliance with applicable laws and payment of a reinstatement fee. Nothing in the Commercial Weight-Loss Practices Act may be construed to apply to licensed medical physicians, osteopathic physicians, physician assistants, or registered dietitians/nutritionists, or nutrition counselors.

Each weight-loss provider must submit to the department with his or her biennial renewal fee, the name, address, and phone number of the person who reviewed and approved the weight-loss program. The department must by rule set a biennial renewal fee no greater than \$300. Any weight-loss provider in business in Florida on October 1, 1998, must be held harmless for any claim that such provider has not obtained a weight-loss provider registration until October 1, 1999.

The bill grants the department with the authority to implement and enforce the provisions of the Commercial Weight-Loss Practices Act as it would regulate a health care professional. The criteria that dietitian/nutritionists must review to determine a weight-loss program's compliance with minimum safety standards for weight-loss programs specified in s. 468.828 (4), F.S., is self-executing.

**Section 9.** Creates s. 468.8281, F.S., to provide that any complaint or record maintained by the Department of Health pursuant to the discipline of a registered weight-loss provider and, after final action, any proceeding held by the department to discipline a registered weight-loss provider shall remain open and available to the public.

**Section 10.** Creates s. 468.829, F.S., to require each weight-loss provider to conspicuously display his registration in his or her office, place of business, or place of employment and when required, the provider must exhibit the registration to any member or authorized representative of the Department of Health. Each weight-loss provider holding a registration must include the number of the registration in advertisement of weight-loss services.

**Section 11.** Creates s. 468.519, F.S., to prohibit sexual misconduct in the practice of dietetics and nutrition. Defines "sexual misconduct" to mean the violation of the dietitian/nutritionist and nutrition counselor-client relationship in which the professional uses that relationship to induce or attempt to induce the patient to engage or attempt to engage the patient in sexual activity outside the scope of practice or the scope of generally accepted examination or treatment of the patient.

**Section 12.** Amends s. 455.604, F.S., to require dietitians/nutritionists to complete instruction on HIV/AIDS as part of their biennial relicensure or recertification.

**Section 13.** Provides for the creation with the department of a Task Force on Regulation of the Weight-Loss Industry. The department must staff the task force. The task force is to consist of not more than 9 members nominated by the associations and entities named and appointed by the secretary of the department. One representative from each of the following associations must be named, if all identified groups elect to participate:

- The Florida Dietetic Association.
- The Florida Medical Association.
- The Florida Osteopathic Medical Association.
- The Department of Health.
- The Dietetics and Nutrition Practice Council.
- The Board of Medicine, which representative must be a member of the board who is licensed under ch. 458, F.S.
- The Board of Osteopathic Medicine, which representative must be a member of the board who is licensed under ch. 459, F.S.
- The Agency for Health Care Administration.

Additionally, two representatives must be appointed from commercial weight-loss programs.

The task force must hold its first meeting no later than August 1, 1998. The task force must study and make recommendations to the Legislature regarding the appropriate level of regulation needed to enforce the Florida Commercial Weight-Loss Practices Act and must report its findings to the President of the Senate and the Speaker of the House, and chairs of substantive committees, not later than December 31, 1998. All task force meetings are required to be held in Tallahassee at the department to minimize costs. The task force is dissolved effective January 1, 1999.

**Section 14.** The act has an effective date of October 1, 1998.

#### **IV. Constitutional Issues:**

##### **A. Municipality/County Mandates Restrictions:**

The provisions of this bill have no impact on municipalities and the counties under the requirements of s. 18, Art. VII, State Constitution.

##### **B. Public Records/Open Meetings Issues:**

Section 24, Art. I, State Constitution, authorizes the Legislature to create exemptions to public records and meetings requirements. Such exemptions must be created in general law, must state with specificity the public necessity for the exemption, and must be no broader than necessary to accomplish the stated purpose. A law creating an exemption is permitted to contain only exemptions that are related to one subject, as well as enforcement mechanisms. Section 9 of the bill provides that any complaint or record maintained by the department pursuant to the discipline of a registered weight-loss provider and, *after final action*, any proceeding held by the department to discipline a registered weight-loss provider remains open and available to the public. In effect, the provision creates an exemption from public access for a period of time, i.e., the period *prior to* final action. Section 24, Art. I, State Constitution, requires exemptions to public records and meetings requirements to be created

in a separate bill with a statement of public necessity. The CS/CS/SB 2188 does not appear to comply with this requirement.

**C. Trust Funds Restrictions:**

The provisions of this bill have no impact on the trust fund restrictions under the requirements of s. 19(f), Art. III, State Constitution.

**V. Economic Impact and Fiscal Note:**

**A. Tax/Fee Issues:**

Under the bill, weight-loss providers will be subject to the following fees: application (no greater than \$300); and a biennial renewal (no greater than \$300).

**B. Private Sector Impact:**

Weight-loss providers will incur additional costs to comply with the bill's new regulatory requirements.

**C. Government Sector Impact:**

The Department of Health will incur costs to enforce the regulation of commercial weight-loss providers and estimates it will need 1 full-time position, \$28,015 in 1998-1999 and \$36,612 in 1999-2000. Estimated revenue from weight-loss providers was not provided by the department. The bill provides that any weight-loss provider in business in Florida on October 1, 1998, must be held harmless for any claim that such provider has not obtained a weight-loss provider registration until October 1, 1999.

**VI. Technical Deficiencies:**

None.

**VII. Related Issues:**

None.

**VIII. Amendments:**

None.