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DATE: January 15, 2002

**HOUSE OF REPRESENTATIVES
AS REVISED BY THE COMMITTEE ON
ELDER & LONG TERM CARE
ANALYSIS**

BILL #: HB 255
RELATING TO: Nursing Homes and Related Health Care Facilities
SPONSOR(S): Representative(s) Carassas & others
TIED BILL(S):

ORIGINATING COMMITTEE(S)/COUNCIL(S)/COMMITTEE(S) OF REFERENCE:

- (1) ELDER & LONG TERM CARE YEAS 10 NAYS 0
 - (2) FISCAL RESPONSIBILITY COUNCIL
 - (3) COUNCIL FOR HEALTHY COMMUNITIES
 - (4)
 - (5)
-

I. SUMMARY:

HB 255 revises the membership requirements and the terms of the appointees to the Governor's Panel on Excellence in Long Term Care (Panel).

The bill removes the statutory prohibition against payment of referral fees by assisted living facilities (ALFs). This appears to be in conflict with 817.505, F.S.

The fiscal impact is estimated to be \$27,750. This is an increase of \$4,000 over the current budget for the Panel.

II. SUBSTANTIVE ANALYSIS:

A. DOES THE BILL SUPPORT THE FOLLOWING PRINCIPLES:

- 1. Less Government Yes No N/A
- 2. Lower Taxes Yes No N/A
- 3. Individual Freedom Yes No N/A
- 4. Personal Responsibility Yes No N/A
- 5. Family Empowerment Yes No N/A

For any principle that received a "no" above, please explain:

B. PRESENT SITUATION:

The Gold Seal

The Panel on Excellence in Long Term Care was created by the 1999 Legislature as part of a major nursing home reform bill. The Panel was authorized to begin taking applications for the Gold Seal designation in January 1, 2000. In August, 2001, the Panel finalized in rule the criteria by which to accept and evaluate applications.

According to section 400.235(3)(a), Florida Statutes, the panel is presently composed of 13 members with appointment authority specified. The statute provides that vacancies on the panel shall be filled in the same manner as the original appointments.

Appointed by	#	Description
Governor	1	Consumer Advocate
Governor	2	Persons with expertise in quality management, public-sector accountability, or excellence in service delivery.
Secretary DOEA	3	Active member of Nursing Home Family & Resident Care Council; a member of the University Consortium on Aging, and the Ombudsman
Fl. Life Care Resident's Assoc.	1	One appointment
Secretary Health	1	One appointment
Secretary AHCA	2	Two appointments
Fl. Assoc. Homes for the Aging	1	One appointment
Fl. Health Care Assoc.	1	One appointment

Referral Fees and ALFs

The current law at section 400.4195, Florida Statutes, can be summarized in three points.

1. It prohibits any assisted living facility to contract or promise to pay or to receive any commission, bonus, kickback, or rebate or engage in any split-fee arrangement in any form whatsoever with any physician, surgeon, organization, agency, or person, either directly or indirectly, for referring residents.
2. It allows individuals to pay an agency that is operating independently of an ALF to provide placement or referral services.
3. It allows ALFs to employ or contract with persons to market the facility, provided that the employee or contract provider clearly indicates that he or she represents the facility.

Violation of this section is considered patient brokering and punishable as the law mandates in section 817.505, Florida Statutes.

Patient Brokering: section 817.505, F.S.

This statute makes it unlawful for any person, including any health care provider or health care facility, to:

- Offer or pay any commission, bonus, rebate, kickback, or bribe, directly or indirectly, in cash or in kind, or engage in any split-fee arrangement, in any form whatsoever, to induce the referral of patients or patronage from a health care provider or health care facility;
- Solicit or receive any commission, bonus, rebate, kickback, or bribe, directly or indirectly, in cash or in kind, or engage in any split-fee arrangement, in any form whatsoever, in return for referring patients or patronage to a health care provider or health care facility; or
- Aid, abet, advise, or otherwise participate in the conduct prohibited under paragraph (a) or paragraph (b).

For purposes of this section, the term "health care provider or health care facility" means any person or entity licensed, certified, or registered with AHCA. This would include all ALFs. This section also includes an exception for any "discount, payment, waiver of payment, or payment practice **not** prohibited by 42 U.S.C. s. 1320a-7b or regulations promulgated thereunder." 42 U.S.C. s. 1320a-7b is a federal law that prohibits patient brokering in facilities that receive Medicare or Medicaid reimbursement.

Generally, ALFs do not receive Medicaid or Medicare reimbursement. However, Florida is operating a Medicaid home and community-based waiver that provides an alternative to nursing home placement by serving persons in ALFs and reimbursing the ALF for additional needed services. Those participating ALFs are Medicaid providers and receive Medicaid reimbursement.

C. EFFECT OF PROPOSED CHANGES:

The bill will end the service of all the persons currently serving on the Panel effective September 30, 2003. It limits all appointees to serve one 4-year term. The bill will allow ALFs to contract or employ persons or agencies to "market" the facility and receive a fee or commission based on the

volume or value of referrals to the facility with certain limitations. The bill blurs the distinction implicit in the current statute between “marketing” the facility and providing referrals.

D. SECTION-BY-SECTION ANALYSIS:

Section 1. The terms of all panel members currently serving will expire on September 30, 2003, and the panel will then be composed of the following members:

Appointed by	#	Description	Term
Governor	1	A consumer advocate for senior citizens.	4
Governor	2	Persons with expertise in quality management, public-sector accountability, or excellence in service delivery.	3
Secretary DOEA	1	A consumer advocate for senior citizens	4
Secretary DOEA	1	An active member of a nursing facility’s family and resident care council.	1
Secretary DOEA	1	University Consortium on Aging	2
Secretary Health	1	A consumer advocate for senior citizens.	2
Secretary AHCA	1	A consumer advocate for senior citizens.	4
	1	Long Term Care Ombudsman	Indefinite
	1	Deputy Secretary for Medicaid	Indefinite
Fl. Life Care Resident’s Assoc.	1	A consumer advocate for senior citizens.	3
Fl. Assoc. Homes for the Aging	1	One person.	1
Fl Health Care Assoc.	1	One person.	2
Silver Haired Legislature	1	A member of the Silver Haired Legislature	1
Fl State Council of Senior Citizens	1	A member of the Florida State Council of Senior Citizens.	2

Panel members shall elect a chair at the first meeting, and no member may serve more than two 4-year terms. The bill defines “consumer advocate for senior citizens” as a person who receives no money from the nursing home industry including wages, gifts, or contributions and who has no relatives who receives wages, gifts, or contributions from the nursing home industry.

Section 2. This section amends s. 400.4195, Florida Statutes. The bill allows an ALF to market the facility for a fee or commission based on the volume or value of referrals to the facility and clarifies exceptions which will not be considered patient brokering by an assisted living facility, or person or agency employed by or under contract with the facility.

These exceptions include:

1. The facility is not subject to the provisions of 42 U.S.C. s. 1320a -7b pertaining to “Criminal penalties for acts involving Federal health care programs” that include making or causing to be made false statements or representations, illegal remunerations, false statements or

representations with respect to condition or operation of institutions, illegal patient admittance and retention practices, and violation of assignment terms;

2. Payment to the contract provider is made under a nonexclusive contract;
3. The contract provider represents multiple facilities with different owners;
4. The employee or contract provider clearly indicates to all clients prior to referral that he or she represents the facility, in addition to all other facilities represented by the person or agency; and,
5. The employee or contract provider also is not a health care practitioner in a position to make referrals to an assisted living facility or employed by a health care facility or any other organization or agency in a position to make referrals to an assisted living facility or does not have an ownership interest in an assisted living facility.

The bill clarifies in subsection (3) that "independent persons or agencies" includes persons "not under contract with a facility".

Section 3. The effective date of the proposed bill is upon becoming law.

III. FISCAL ANALYSIS & ECONOMIC IMPACT STATEMENT:

A. FISCAL IMPACT ON STATE GOVERNMENT:

1. Revenues:

None.

2. Expenditures:

The Agency for Health Care Administration estimates that the increase in Panel membership will increase the costs of operation by approximately \$4,000.

B. FISCAL IMPACT ON LOCAL GOVERNMENTS:

1. Revenues:

None.

2. Expenditures:

None.

C. DIRECT ECONOMIC IMPACT ON PRIVATE SECTOR:

Some ALF residents may experience an increase in their fees to cover the costs associated with the brokering and patient referral activities allowed under the bill.

D. FISCAL COMMENTS:

IV. CONSEQUENCES OF ARTICLE VII, SECTION 18 OF THE FLORIDA CONSTITUTION:

A. APPLICABILITY OF THE MANDATES PROVISION:

N/A

B. REDUCTION OF REVENUE RAISING AUTHORITY:

N/A

C. REDUCTION OF STATE TAX SHARED WITH COUNTIES AND MUNICIPALITIES:

N/A

V. COMMENTS:

A. CONSTITUTIONAL ISSUES:

None are identified.

B. RULE-MAKING AUTHORITY:

No rule making authority is granted.

C. OTHER COMMENTS:

There appears to be a conflict with section 817. 505, F.S.

VI. AMENDMENTS OR COMMITTEE SUBSTITUTE CHANGES:

There is a "strike everything" amendment traveling with HB 255 that makes technical changes to conform the House bill to SB 276. The amendment adds to s. 817.502(2) a new provision (j) that clarifies that services authorized in section 400.4195(2) are not considered patient brokering. The amendment adds language to the definition of "consumer advocate" to clarify that neither the appointee or any relatives may receive money in the form of wages, contributions, or gifts "from any attorney or law firm that derives 10 percent or more of its revenue representing nursing home facilities or nursing home residents or their representative in resident rights cases." Finally, the amendment provides that ALF employees and contractors involved in referral services must indicate to all clients prior to referral that he or she represents the facility "and is being compensated by" the facility.

VII. SIGNATURES:

COMMITTEE ON ELDER & LONG TERM CARE:

Prepared by:

Melanie Meyer

Staff Director:

Tom Batchelor, Ph.D.

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