

**STORAGE NAME:** h0255.frc.doc  
**DATE:** February 9, 2002

**HOUSE OF REPRESENTATIVES**  
**FISCAL RESPONSIBILITY COUNCIL**  
**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)

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**I. SUMMARY:**

HB 255 revises the Governor's Panel on Excellence in Long Term Care (Panel) described in section 400.235, Florida Statutes. The Panel is the entity responsible for developing and implementing the Gold Seal program. The Gold Seal Program is an award and recognition program for nursing facilities that demonstrate excellence in long-term care over a sustained period.

The bill places term limits on the Panel members. The bill also staggers the terms of the Panel members.

The bill limits the discretion granted to the party making the appointment of members to the Panel. The bill also increases the composition of the Panel from the current 13 members to 15 members. The Florida Silver Hair Legislature and the Florida State Council of Senior Citizens would appoint the two additional proposed members of the Panel.

The bill defines a consumer advocate for senior citizens.

The bill also revises section 400.4195, Florida Statutes, related to prohibition of referral fees for referrals to assisted living facilities, to clarify when the prohibition does not apply.

The current budget for the Panel is \$23,750. There is expected to be an increase of \$4,000 over the current budget as a result of the increased membership.

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 Panel

The Panel was created by the 1999 Legislature as part of a major nursing home reform bill. The Panel is the entity responsible for developing and implementing the Gold Seal program. The Gold Seal Program is an award and recognition program for nursing facilities that demonstrate excellence in long-term care over a sustained period.

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. However, the statute does not currently provide the duration of a members term on the Panel. The composition of the Panel is shown in the table below.

Appointed by	Description
Governor	Consumer advocate for senior citizens
Governor	Two members with expertise in quality management, service delivery excellence, or public-sector accountability.
Secretary of Elder Affairs	An active member of a nursing facility family and resident care council
Secretary of Elder Affairs	A member of the University Consortium on Aging
Secretary of Elder Affairs	Not described, presumed at Secretary's discretion
Secretary of Health	Not described, presumed at Secretary's discretion
Secretary of Health Care Administration	Two members not described, presumed at Secretary's discretion
Florida Association Homes for the Aging	Not described, presumed at discretion
Florida Health Care Association	Not described, presumed at discretion
Florida Life Care Residents Association	Not described, presumed at discretion
N/A	State Long-Term Care Ombudsman

Members of the Panel are prohibited from having any ownership interest in a nursing facility. Any member of the Panel who is employed by a nursing facility in any capacity is prohibited from participating in reviewing or voting on recommendations involving the facility by which the member is employed or any facility under common ownership with that facility.

### Referral Fees and Assisted Living Facilities

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

1. It prohibits any assisted living facility to contract with 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 a person or an agency that is operating independently of an assisted living facility to provide placement or referral services provided that fee is not paid by the assisted living facility.
3. It allows an assisted living facility 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 the Agency for Health Care Administration. This would include all assisted living facilities. 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, assisted living facilities 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 assisted living facilities and reimbursing the assisted living facilities for additional needed services. Those participating assisted living facilities are Medicaid providers and receive Medicaid reimbursement.

**C. EFFECT OF PROPOSED CHANGES:**

The bill will end the service of all the persons currently on the Panel effective September 30, 2003. Effective October 1, 2003, the new members would serve initial terms of staggered years. Each term thereafter would be for four years. No member could serve more than two consecutive four-year terms.

The bill will allow assisted living facilities to contract with 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.

**D. SECTION-BY-SECTION ANALYSIS:**

**Section 1.** The proposed new Panel will be composed of the following members serving staggered initial terms.

<b>Appointed by</b>	<b>Description</b>	<b>Initial Term</b>
Governor	Consumer advocate for senior citizens	4 years
Governor	Two members with expertise in quality management, service delivery excellence, or public-sector accountability.	3 years
Secretary of Elder Affairs	A consumer advocate for senior citizens	4 years
Secretary of Elder Affairs	An active member of a nursing facility family and resident care council	1 year
Secretary of Elder Affairs	A member of the University Consortium on Aging	2 years
Secretary Health	A consumer advocate for senior citizens.	2 years
Secretary of Health Care Administration	A consumer advocate for senior citizens.	4 years
Florida Life Care Residents Association	A consumer advocate for senior citizens.	3 years
Florida Association of Homes for the Aging	One person.	1 year
Florida Health Care Association	One person.	2 years
Florida Silver Hair Legislature	A member of the Florida Silver Hair Legislature	1 year
Florida State Council of Senior Citizens	A member of the Florida State Council of Senior Citizens.	2 years
N/A	State Long-Term Care Ombudsman	Indefinite
N/A	Deputy Secretary for Medicaid of the Agency for Health Care Administration	Indefinite

Members will serve four year terms after the initial term. Members are prohibited from serving more than two consecutive four year terms. Term limits do not apply to the Deputy Secretary for Medicaid, and the State Long Term Care Ombudsman. Members shall select the Panel chair by a majority vote at the Panel’s first meeting after all the members have been appointed.

The bill defines a consumer advocate for senior citizens as a person who:

- “a. Receives no money from the nursing home industry in the form of wages, contributions, or gifts and has no relatives who receive such wages, contributions, or gifts;
- b. Is not an employee of the Agency for Health Care Administration, the Department of Health, or the Department of Elderly Affairs; and
- c. Is either a member of an organized senior advocacy group or has had or currently has a relative in a nursing home.”

**Section 2.** This section amends s. 400.4195, Florida Statutes. The bill clarifies exceptions which will not be considered patient brokering by an assisted living facility, or a person or an agency employed by or under contract with the facility. The bill allows an assisted living facility to employ or contract with a person or organization to market the facility on a set fee or commission basis. The commission will be based on the volume or value of referrals to the facility. The marketing is allowed under the following conditions.

1. The facility is not subject to the provisions of 42 U.S.C. s. 1320a -7b.
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 also clarifies that an a party providing placement or referral service for a fee from individuals in return for assistance in finding an assisted living facility may not be under contract with an assisted living 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 assisted living facilities 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:

The bill appears to set up a conflict with section 817.505, Florida Statutes.

VI. AMENDMENTS OR COMMITTEE SUBSTITUTE CHANGES:

There is a "strike everything" amendment traveling with HB 255.

The amendment provides that the terms of all Panel members expire on September 30, 2002, and that the newly appointed members will begin their terms on October 1, 2002.

The amendment changes the definition of consumer advocate for senior citizens. The definition in the amendment is that a consumer advocate for senior citizens means a person who:

- a. Receives no money from the nursing home industry, or 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 representatives in resident rights cases, in the form of wages, contributions, or gifts and has no relatives who receive such wages, contributions, or gifts;
- b. Is not an employee of the Agency for Health Care Administration, the Department of Health, or the Department of Elderly Affairs; and
- c. Is either a member of an organized senior advocacy group or has had or currently has a relative in a nursing home."

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."

The amendment adds to s. 817.505(3), F.S., a new paragraph (j) that clarifies that services authorized in the proposed section 400.4195(2) are not considered patient brokering. This removes the potential conflict mentioned in the Comments Section above.

The amendment provides that assisted living facility 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

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Staff Director:

Tom Batchelor, Ph.D.

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**AS REVISED BY THE FISCAL RESPONSIBILITY COUNCIL:**

Prepared by:

William Speir

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Staff Director:

David Coburn

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