

HOUSE OF REPRESENTATIVES STAFF ANALYSIS

BILL #: HB 1437 Viatical Settlements

SPONSOR(S): Goodlette

TIED BILLS: IDEN./SIM. BILLS:

Table with 4 columns: REFERENCE, ACTION, ANALYST, STAFF DIRECTOR. Row 1: Insurance Committee, Tinney, Cooper. Row 2: State Administration Appropriations Committee. Row 3: Commerce Council. Row 4: (blank). Row 5: (blank).

SUMMARY ANALYSIS

A viatical settlement agreement typically includes an agreement on the part of the owner of a life insurance policy to sell the policy to another person or entity for less than the expected death benefit payable under the policy.

The purchaser of the viaticated policy, generally referred to as the "viatical settlement provider," may then sell all or a part of the policy to one or more investors; the investors are referred to as "viatical settlement purchasers".

Under current law adopted in 2004, codified at s. 626.99245(4), F.S., the Office of Insurance Regulation (OIR) is granted exclusive jurisdiction for the offer, sale, and purchase of viatical contracts, including sole regulatory authority of viatical settlement providers.

House Bill 1437 provides that viatical settlement investments are securities for purposes of regulation under the Florida Securities and Investor Protection Act (the Act), chapter 517, F.S. The effect of defining such investments as securities is the requirement that these investments be registered with either the Office of Financial Regulation (OFR) of the Department of Financial Services (DFS) or with the federal Securities and Exchange Commission (SEC).

The bill also makes the following changes:

- 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;
• clarifies 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 the same thing provided by a federal rule of the SEC, or any foreign buyer that satisfies the minimum financial requirements of such rule; and
• authorizes the Financial Services Commission (Commission) to adopt rules governing disclosures to purchasers of viatical settlement investments and recordkeeping requirements for sellers of such investments, among other similar provisions.

There does not appear to be a significant fiscal impact associated with the bill.

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

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FULL ANALYSIS

I. SUBSTANTIVE ANALYSIS

A. HOUSE PRINCIPLES ANALYSIS:

Provide Limited Government—Although the bill regulates the sale of viatical settlements, it only transfers from the Office of Insurance Regulation to the Office of Financial Regulation, the oversight of such transactions. No new licensure requirements or fees are imposed by the bill.

B. EFFECT OF PROPOSED CHANGES:

Background: Viatical Settlement Transactions

The word “viatical” is derived from the Latin word *viaticum*, meaning the payment of provisions given to travelers or soldiers before they embarked on a journey. In more modern times, the word *viaticum* has been associated with the Eucharist given to a dying person or one in danger of death.

During the 2003-04 legislative interim, the Senate Banking and Insurance Committee conducted a study of the viatical settlement industry in Florida. The final report, entitled *The Viatical Settlement Industry: Does the Current Law Adequately Protect Florida Consumers*, Interim Project Report 2004-111 is available at the web address:

http://www.flsenate.gov/data/Publications/2004/Senate/reports/interim_reports/pdf/2004-111bi.pdf

According to the 2004 Senate report, a viatical settlement agreement typically includes an agreement on the part of the owner of a life insurance policy, known as the “viator,” to sell the policy to another person or entity for less than the expected death benefit payable under the policy. The discounted amount paid to a viator is generally based upon the life expectancy of the insured, his or her general health, and other similar considerations.

The purchaser of the viaticated policy, generally referred to as the “viatical settlement provider,” may then sell all or a part of the policy to one or more investors; the investors are referred to as “viatical settlement purchasers”. There may be another party in a viatical settlement purchase, a “viatical settlement broker” who, for a fee, negotiates the viatical settlement arrangements. The viatical settlement provider then assumes responsibility for the premium payments and upon the death of the insured, receives the full amount of the death benefit from the policy.

Similarly, a viatical settlement provider may group together several viaticated policies and resell the policies in fractions to a single investor or a group of investors. In return for buying a viatical settlement, the investor pays the settlement provider a fee, then receives the death benefit, or a proportionate share of it, upon the passing of the insured/viator. This benefit is designed to return more capital to the investors, thus creating a favorable return on investment for the viatical settlement purchasers.

Generally, a viator or policyholder also is the individual whose life is insured by the policy. However, the policyholder also may be the spouse or a business partner of the insured, or the group insurance plan itself. The type of life insurance sold by a viator may be term, whole life, universal, or a group certificate. The purchase price due to a viator varies, depending upon the type, size, and cash value of the policy involved; the amount and nature of any loans collateralized by the policy; the premium amount necessary to maintain the coverage; and the rating and financial condition of the insurer.

Viatical settlements emerged as an investment instrument in the late 1970s and early 1980s; the settlements represented a way for a policyholder with a terminal illness or short life expectancy to sell or “viacate” his or her life insurance policy to a third party, generally a private or individual investor. This enabled the policyholder to obtain cash for medical expenses and other needs. In the late 1980s and through the 1990s, the market for viatical settlements expanded when companies began to purchase policies from younger policyholders, many of whom were AIDS patients needing cash for

medicines and other expenses related to their illness. In the mid to late 1980s, persons with AIDS were dying at a much faster rate than they do today. As a result, investors who purchased viaticated policies at that time experienced relatively high returns on their investments. According to OIR, the viatical industry has grown rapidly across the U.S.; it is estimated that in 2002, the viatical industry brokered policies for an amount estimated between \$2 and \$3 billion.

In the early 1990s, medicines available for the treatment of AIDS increased in number and efficacy. The Office of Insurance Regulation reports that as life insurance policies owned by persons with a terminal illness became harder to find, unscrupulous brokers began looking for alternative methods for making viaticated policies available to investors. Consequently, in 1996, Florida began regulating viatical settlements through the then-Department of Insurance, currently DFS. Regulation of viatical settlements was intended to protect the individual who owned the life insurance. As the number of viatical settlements declined in the late 1990s, transactions involving a healthy owner of a life insurance policy emerged. The latter are known as "life settlements," or "senior settlements," and these transactions do not consider the age and health of the policyholder in the manner as viatical settlements. Rather, a life or senior settlement typically involves the sale of unwanted or unneeded life insurance policies to a third party for a relatively small percentage of the face value. In 2000, the Legislature expanded Florida's regulation of viatical settlements to cover life and senior settlements, as well.

Regulation of Viatical Settlement Transactions

In Florida, two agencies share responsibility for regulation of viatical settlements: DFS and OIR. Chapter 626, F.S., governs insurance field representatives and operations; responsibilities for administering the provisions of ch. 626, F.S., are shared among DFS, the Chief Financial Officer (CFO), and OIR. Part X of ch. 626, F.S., many provisions of which were adopted in 1996, governs viatical settlements. A viatical settlement provider is required to pay OIR \$500 annually for a license and to deposit \$100,000 with OIR as a security deposit for customer protection. In lieu of a cash deposit of \$100,000, a viatical settlement provider may deposit \$25,000 cash along with a surety bond in the amount of \$75,000.

According to OIR, it has issued a certificate of authority or license to seven viatical settlement providers in Florida. Of the seven licensed providers, five of the companies (Coventry, Life Equity, Peachtree Life Settlements, Living Benefits, and Stone Street) represent themselves as institutionally funded. In this context, "institutionally funded" generally means each company has entered into an agreement with a finance company to purchase and hold viaticated policies until the original policyholder dies or until the policy otherwise matures. Coventry is the largest viatical settlement provider in the state with an estimated 45+ percent of the market. The remaining two viatical settlement providers, Life Settlements International and Lifeline, market policies to individual investors.

As part of its regulatory oversight, OIR screens viatical settlement applicants prior to licensure; approves provider contracts and other forms; and reviews each applicant's plan of operation. After a settlement provider is licensed, OIR investigates complaints against a provider, examines the books and records of licensees to ensure compliance with state law, and takes administrative action against a settlement provider if just cause is determined.

Viatical settlement brokers and life agents are licensed by DFS. In 2004, DFS reports there were 181 licensed viatical settlement brokers in Florida. For the same period, there were 101,466 resident life agents licensed by DFS in the state; a life agent as defined in s. 626.015, F.S., sells life insurances and annuities and otherwise carries out duties similar to those of licensed viatical settlement brokers.

Regulating Viatical Settlements as Securities

The Office of Financial Regulation (OFR) of DFS regulates securities transactions under chapter 517, F.S., the Florida Securities and Investor Protection Act. Under s. 517.07, F.S., a security must be registered, either with OFR or with the federal SEC; if a security is registered with the SEC, the law

(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 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 a security registered with the OFR from being sold 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. Also, the law (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. Chapter 517, F.S., also provides for suspension, revocation, or denial of the registration of a security and similar sanctions against dealers, investment advisers, and associated persons.

In 2004, through the enactment of ch. 2004-390, LOF, the Legislature amended s. 626.99245(4), F.S., to specify that the offer, sale, and purchase of viatical settlement contracts, and the regulation of viatical settlement providers, is within the exclusive jurisdiction of OIR. The effect of this legislation was to preclude any investigations of viatical settlement investments as securities by OFR.

Changes Proposed by the Bill

The definitions used throughout chapter 517, F.S., the Florida Securities and Investor Protection Act (the Act), are amended by the bill. Definitions relating to the sale of viatical settlements are added to the definitions in s. 517.021, F.S. The terms "qualified institutional buyer," and "viatical settlement investment" are defined for purposes of the Act and enforcement by OFR. Similarly, a viatical settlement investment is added as one of the descriptors under the definition of the word "security". A "viatical settlement investment" means an agreement for the purchase, sale, assignment, transfer, devise, or bequest of any legal or equitable interest in a viaticated policy. However, the term does not include:

- the transfer of an interest in a previously viaticated policy from a natural person who transfers no more than one such interest in a calendar year;
- the provision of stop-loss coverage to a viatical settlement provider, financing entity, or related provider trust, by an authorized or eligible insurer;
- the transfer or assignment of a viaticated policy from a licensed viatical settlement provider to another provider, a related provider trust, a financing entity, or a contingency insurer, if such transfer or assignment is not an attempt to violate or evade the Act;
- the transfer or assignment of a viaticated policy to a bank, trust company, savings institution, insurance company, dealer, or investment company, as defined by the Investment Company Act of 1940, a pension or profit-sharing trust, or qualified institutional buyer, as defined by Securities and Exchange Commission Rule 144A, 17 C.F.R. 230.144A(a), if the transfer or assignment is not for the direct or indirect promotion of a scheme or enterprise with the intent to violate the Act; or
- the transfer or assignment of a viaticated policy by a court-appointed conservator of a viatical settlement provider who transfers or assigns ownership of viaticated policies pursuant to a court order.

The bill creates s. 517.072, F.S., to provide that a viatical settlement investment is not an exempt security under section 517.051, F.S. Similarly, offering a viatical settlement investment is not an exempt transaction under s. 517.061, F.S., unless the offering is to a qualified institutional buyer. This provision

is intended to prevent a person who sells viaticated policies to individual investors from structuring the sale to avoid registration as a security.

Registration procedures provided by s. 517.081, F.S., also are amended. The bill grants rule authority to the Financial Services Commission (FSC) 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. These securities include equity securities, insurance company securities, real estate investment trusts (REITs), and other traditional investments. The bill also grants the FSC rule authority requiring disclosures to purchasers of viatical settlement investments and recordkeeping requirements for sellers of such investments.

Sections 517.1215 and 517.1217, F.S., are created by the bill to specify the requirements, rules of conduct, and prohibited business practices for investment advisers and their associates. The FSC is authorized to adopt rules specifying requirements for investment advisers with custody of client funds relating to safeguarding the funds; communications with clients and independent representatives; requirements for investment advisers who have custody of pooled investments; and exceptions to custody requirements. Under the bill, before adopting rules, the FSC is directed to consider general industry standards of the federal and self-regulatory agencies and regulatory associations, including the Securities and Exchange Commission, the National Association of Securities Dealers, and the North American Securities Administrators Association.

Chapter 624, a part of the Florida Insurance Code, relates to administration and the general provisions of the Insurance Code. The bill amends s. 624.501, F.S., which specifies fees, taxes, and funds associated with licensure by DFS, to authorize an agent to self-appoint. The bill also amends s. 626.331, F.S., to require an insurance agent to appoint himself or herself, including notification and payment of applicable fees to DFS, before acting as a viatical settlement broker.

Similar provisions authorizing self appointment are added by the bill to s. 626.9916, F.S. A viatical settlement broker who holds a license before July 1, 2005, is authorized by the bill to continue his or her self appointment if the broker becomes licensed as a life insurance agent before October 1, 2005. The bill also cancels all existing viatical settlement broker licenses October 1, 2005, unless the broker is licensed to sell life insurance. The bill clarifies that, notwithstanding how a broker is compensated, the broker is deemed by law to represent the viator and to owe a fiduciary duty to the viator. The bill prohibits a viatical settlement broker from sharing his or her compensation as a broker with anyone other than a licensed life insurance agent.

Chapter 626, F.S., a part of the Florida Insurance Code, governs insurance field representatives, i.e., agents, and field operations. Definitions in s. 626.015, F.S., are amended to clarify that a "life agent" may act as a viatical settlement provider. Section 626.112, F.S., relating to the licensure of agents, customer representatives, adjusters, agencies, service representatives, and managing general agents, also is amended by the bill. In the provisions authorizing activities of an insurance agency, an amendment authorizes offering or negotiating a viatical settlement contract to the list of activities in which a licensed agent may engage.

Section 626.611, F.S., specifies the circumstances under which DFS may refuse, suspend, or revoke an agent's license. The law is amended to specify the actions of a viatical settlement provider that may result in his or her license being refused, suspended, or revoked.

Part II of ch. 626, F.S., governs general lines insurance agents. The bill amends s. 626.777, F.S., which outlines the scope of a general lines license, to add the functions of a viatical settlement broker to the authorized activities of a general lines agent.

Life insurance agents are governed by Part III of ch. 626, F.S. Section 626.7845, F.S., prohibits the unlicensed transaction of life insurance. An agent is precluded from offering or attempting to negotiate a viatical settlement contract unless the agent is licensed to sell life insurance.

Part X of ch. 626, F.S., governs viatical settlements. The definitions used in Part X are amended at s. 626.9911, F.S., to add the terms "life expectancy" and "life expectancy provider". "Life expectancy" means an opinion relating to a person's expected demise; a life expectancy provider is a person who provides life expectancy information to a viatical settlement provider or broker. Several definitions that were added by the bill to s. 517.021, F.S., are deleted from s. 626.9911, F.S. Among the terms deleted from Part X of ch. 626, F.S., are "viatical settlement purchase agreement," "viatical settlement purchaser," and "viatical settlement sales agent".

Section 626.9913, F.S., outlines the licensure requirements a viatical settlement provider must follow in order to maintain his or her license, including submission of an annual report, fee payment, and deposit of funds with DFS. A viatical settlement provider is required by current law to deposit \$100,000 in trust with DFS or to provide a cash deposit of \$25,000 and a security bond for the remaining \$75,000. The law is amended to protect the security deposit of a viatical settlement provider from a judgment creditor or other claimant against the settlement provider.

Under the bill, a viatical settlement provider is required to report to DFS annually, in electronic format, a list of each viatical settlement contract entered into for the past year. Similarly, the settlement provider is required to submit specified information for each reported contract, including the age and life expectancy of the viator, the type of policy, the disease diagnosis code of the viator, whether the policy was a group or individual policy, the face amount of the policy, and other similar information. The annual report must also include similar information for each viatical settlement contract where death occurred during the past year and for each ongoing contract for which the viator is still alive.

Section 626.9914, F.S., provides the grounds for which DFS may refuse, suspend, or revoke the license of a viatical settlement provider. The law is amended to clarify that DFS also may deny a license.

Section 626.992, F.S., requires the use of licensed viatical settlement providers. The law is amended to clarify that only a licensed life agent who self appoints may sell, purchase, or administer viatical contracts. The bill also deletes obsolete references to a viatical settlement sales agent. The law prescribing forms to be used by a viatical settlement provider is amended at s. 626.9921, F.S., to delete obsolete references to a viatical settlement purchase agreement form.

Provisions governing the examination of records of viatical settlement providers are outlined in s. 626.9922, F.S., and are amended by the bill. The law is changed to clarify that OIR has regulatory authority over any viatical transaction that occurs before July 1, 2005. The bill directs OIR to report to the SEC or to OFR any provider who lacks the fiscal resources to pay its present or future obligations.

Section 626.99245, F.S., describes how a licensed viatical settlement provider should handle a viatical transaction in which the viator lives in a state other than Florida. The bill deletes obsolete language and repeals the provision adopted by the 2004 Legislature that makes viatical transactions the sole purview of OIR. Several additional sections of current law are amended to delete obsolete references to a viatical settlement purchase agreement. Similarly, the bill repeals several sections of current law that are no longer applicable to viatical settlement providers due the changes proposed by the bill.

Section 626.99275, F.S., outlines practices of a viatical provider that are prohibited and specifies the penalties for engaging in prohibited activities. The law is amended to specify illegal activities relating to issuing a life expectancy. Section 626.99278, F.S., requires each licensed viatical settlement provider to adopt and file with DFS an anti-fraud plan. The law is amended to require a viatical provider to include in his or her anti-fraud plan a process for reviewing the accuracy of life expectancies associated with each active viatical contract.

Section 626.99295, F.S., provided a grace period for viatical contracts that were not in effect before June 30, 2000. The law is amended by the bill to delete obsolete language and to require a viatical settlement provider to return any funds for a viatical settlement purchase agreement not in effect July 1, 2005. Funds must be returned to a viatical settlement purchaser by July 31, 2005.

C. SECTION DIRECTORY:

Section 1 amends the definitions in s. 517.021, F.S., to clarify that an investment in a viaticated policy is a security regulated under chapter 517, F.S.

Section 2 creates s. 517.072, F.S., to govern viatical settlement investments.

Section 3 amends s. 517.081, F.S., to grant the Financial Services Commission (the Commission) rule authority for regulating viatical investments.

Section 4 creates s. 517.1215, F.S., to grant the Commission rule authority relative to investment advisors.

Section 5 creates s. 517.1217, F.S., to grant the Commission rule authority relating to prohibited practices and the conduct of dealers and their associated persons, as it relates to investments in general.

Section 6 amends s. 624.501, F.S., to recognize the elimination of the requirement for a separate license for a viatical settlement broker.

Section 7 amends definitions in s. 626.015, F.S., to recognize the elimination of a separate license for a viatical settlement broker.

Section 8 amends s. 626.112, F.S., to accommodate the elimination of a separate license for a viatical settlement broker.

Section 9 amends s. 626.207, F.S., to conform cross-references.

Section 10 amends s. 626.331, F.S., to require a licensed life agent to self appoint as a viatical settlement broker.

Section 11 amends s. 626.611, F.S., to recognize the elimination of a separate license for a viatical settlement broker.

Section 12 amends s. 626.777, F.S., to recognize the elimination of a separate license for a viatical settlement broker.

Section 13 amends s. 626.7845, F.S., to recognize the elimination of a separate license for a viatical settlement broker.

Section 14 amends definitions in s. 626.9911, F.S., to conform with other changes in the bill.

Section 15 amends s. 626.9912, F.S., governing the license for a viatical settlement provider to conform with other changes in the bill.

Section 16 amends s. 626.9913, F.S., to specify requirements for a viatical settlement provider to maintain his or her state license.

Section 17 amends s. 626.9914, F.S., to clarify the authority of OIR to deny a license for a viatical settlement provider.

Section 18 amends s. 626.9916, F.S., to eliminates a separate viatical settlement broker license.

Section 19 amends s. 626.9919, F.S., to recognize the elimination of a separate license for a viatical settlement broker.

Section 20 amends s. 626.992, F.S., to recognize the elimination of a separate license for a viatical settlement broker.

Section 21 amends s. 626.9921, to delete obsolete references to forms relating to viatical settlements.

Section 22 amends s. 626.9922, F.S., to specify that OIR has regulatory authority for a viatical settlement purchase agreements entered before the effective date of this bill, July 1, 2005.

Section 23 amends s. 626.99245, F.S., to conform to other changes made by the bill.

Section 24 amends s. 626.9925, F.S., relating to rules of the Financial Service Commission to conform to other changes made by the bill.

Section 25 amends s. 626.9926, F.S., to delete an obsolete reference to a viatical settlement purchase agreement.

Section 26 amends s. 626.9927, F.S., to delete an obsolete reference to viatical settlement purchase agreements and to otherwise conform with the bill.

Section 27 amends s. 626.99275, F.S., to delete an obsolete reference to viatical settlement purchase agreements.

Section 28 amends s. 626.99278, F.S., to delete obsolete references and to otherwise conform with the bill.

Section 29 amends s. 626.9928, F.S., to delete a reference to a viatical settlement broker.

Section 30 amends s. 626.99285, F.S., to conform to other changes made by the bill.

Section 31 amends s. 626.99295, F.S., to specify the process by which providers are to handle in-process viatical settlement purchase agreements which will not be completed by July 1, 2005, the date the bill becomes effective.

Section 32 repeals ss. 626.9917, 626.9918, 626.99235, 626.99236, and 626.99277, F.S., to conform to other changes made by the bill.

Section 33 states the bill becomes effective July 1, 2005.

II. FISCAL ANALYSIS & ECONOMIC IMPACT STATEMENT

A. FISCAL IMPACT ON STATE GOVERNMENT:

1. Revenues:

None. Neither the Office of Insurance Regulation nor the Office of Financial Regulation anticipates the expenditure of funds to implement the bill.

2. Expenditures:

None.

B. FISCAL IMPACT ON LOCAL GOVERNMENTS:

1. Revenues:

None.

2. Expenditures:

None.

C. DIRECT ECONOMIC IMPACT ON PRIVATE SECTOR:

Indeterminate. Since viatical settlement purchases are currently regulated by OIR, it seems unlikely private-sector viatical settlement providers will experience a fiscal impact as a result of transferring oversight of their activities to OFR.

D. FISCAL COMMENTS:

None.

III. COMMENTS

A. CONSTITUTIONAL ISSUES:

1. Applicability of Municipality/County Mandates Provision:

None.

2. Other:

None.

B. RULE-MAKING AUTHORITY:

Throughout the bill, the Financial Services Commission is directed to adopt rules to implement the changes proposed by the bill.

C. DRAFTING ISSUES OR OTHER COMMENTS:

None.

IV. AMENDMENTS/COMMITTEE SUBSTITUTE & COMBINED BILL CHANGES

None.