

**The Florida Senate**  
**BILL ANALYSIS AND FISCAL IMPACT STATEMENT**

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

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Prepared By: The Professional Staff of the Banking and Insurance Committee

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BILL: SB 2214

INTRODUCER: Senator Aronberg

SUBJECT: Mortgage Rescue Fraud Act

DATE: March 14, 2008

REVISED: \_\_\_\_\_

	ANALYST	STAFF DIRECTOR	REFERENCE	ACTION
1.	Johnson	Deffenbaugh	BI	<b>Pre-meeting</b>
2.			CJ	
3.			JU	
4.			GA	
5.				
6.				

## **I. Summary:**

With the growing number of foreclosures in Florida and nationwide, schemes have appeared that are allegedly designed to rescue or save a homeowner from foreclosure. Unscrupulous businesses have targeted and defrauded homeowners of the equity in their homes. Often the specific details of these arrangements are not explained or adequately disclosed to the homeowner. The bill provides additional protections to such homeowners facing foreclosure.

The bill addresses foreclosure-rescue consultants and foreclosure purchasers, which are two types of activities that comprise the foundation for foreclosure rescue schemes. The bill:

- Defines the terms foreclosure consultants and foreclosure purchasers and provides exceptions. Defines the term “foreclosure-rescue consultant” as a person who directly or indirectly makes any solicitation, representation, or offer to any owner to perform for compensation, or who performs for compensation, certain services delineated in the act and provides exemptions. The term, “foreclosure purchaser,” is defined to mean any person who acquires any interest in fee in a residence at risk of loss while allowing the owner to possess, occupy, or retain any present or future interest in fee in the property or any person who participates in a joint venture or enterprise involving a foreclosure conveyance.
- Requires a foreclosure-consultants and foreclosure purchasers to have a written agreement with the owner. The agreement must be signed the foreclosure consultant or equity purchaser prior to the initiation of any services or conveyance of property. Certain disclosures are required to be in the agreement, such as the specific details of the service to be provided, terms of payment, total charges, and a notice of the right to cancel.

- Provides the owner with the right to cancel the foreclosure consultant contract at any time until after the foreclosure consultant has fully performed every service that the foreclosure consultant contracted to perform. The owner of a residence has until midnight of the 5<sup>th</sup> business day following the day on which the owner has signed a foreclosure conveyance contract to cancel, until 8 A.M. on the last day the owner has the right of redemption, or payment of property tax, whichever occurs first.
- Prohibits a foreclosure consultant is prohibited from charging or collecting a fee prior to completing or performing the agreed upon services.
- Provides that a violation of this act constitutes a violation of part II of ch. 501, F.S. (Florida Deceptive and Unfair Trade Practices Act). Violators are subject to the penalties and remedies provided in part II of chapter 501, F.S. Generally, this act provides a civil penalty of up to \$10,000 for each violation under s. 501.2075, F.S. Section 501.211, F.S., authorizes any person who has suffered a loss under this act to bring an action to recover actual damages, plus attorney's fees and court costs.
- Allows for consequential damages and appropriate equitable relief, including, but not limited to, the rescission of any deed, mortgage, or other instrument signed by the owner or foreclosure purchaser. In addition to any other damages available to an owner, the court is authorized to award damages up to 1.5 times the compensation charged by the foreclosure consultant if the court finds that the foreclosure consultant's conduct was in bad faith.
- Provides that any person intentionally violating any of the prohibited activities of the act commits a violation commits the offense of criminal mortgage rescue fraud, which is felony of the third degree.

This bill substantially creates an undesignated section of the Florida Statutes.

## **II. Present Situation:**

### **Background**

Prime loans are typically made to creditworthy borrowers while subprime loans are generally made to borrowers with impaired or limited credit. Foreclosure can begin after a borrower defaults on the mortgage loan. Default is generally defined as being 90 days delinquent, although some lenders may use another definition. Once in default, a lender must determine whether a workout solution would work, or whether to proceed with foreclosure, the process of recovering losses by repossessing and selling the property through a judicial foreclosure proceeding.

The average foreclosure rate for all subprime loans during 2006-2007 was 4.35 percent nationwide, while the average prime loan foreclosure rate was 0.48 percent.<sup>1</sup> Borrowers with financial or cash flow problems are likely to find it difficult to avoid foreclosure when they cannot quickly sell their homes for prices that would cover most or all of their mortgage. Due to the high costs associated with a foreclosure proceeding, lenders may want to try a loss mitigation

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<sup>1</sup> Congressional Research Service, Understanding Mortgage Foreclosure: Recent Events, the Process, and Costs, November 7, 2007.

or workout solution with defaulted borrowers.<sup>2</sup> The cost of foreclosure for a lender was estimated at \$58,759 per loan.

The National Delinquency Survey by the Mortgage Bankers Association provides two measures of foreclosures: (1) foreclosure starts, which are loans that entered the foreclosure process during the quarter and (2) foreclosure inventory, which represents the aggregate number of loans that were in the foreclosure process during the quarter (regardless of when they entered the process).<sup>3</sup> A review of the fourth quarter data, as of December 31, 2007, indicated the following:

- The delinquency rate (past due rate) for mortgage loans nationwide (on one-to-unit residential properties) was 6.31 percent of all outstanding loans. In Florida, 7.47 percent of the loans were delinquent.
- In Florida, 3.22 percent of loans were in foreclosure. The national average was 2.04 percent. Florida ranks fourth, behind Michigan, Ohio, and Indiana.
- The percent of Florida loans that started the foreclosure process during the period was 1.46 percent. In contrast, the national average was 0.88 percent.
- The rate of foreclosure starts in Florida more than tripled between the fourth quarter of 2006 and the fourth quarter of 2007.

With the increasing number of foreclosures in Florida and nationwide, schemes have appeared that are allegedly designed to rescue or save a homeowner from foreclosure. According to the National Consumer Law, a significant number of these scams involve fraud.<sup>4</sup>

Generally, homeowners who are seriously delinquent on the payment of mortgage payments are targeted by foreclosure consultants. These consultants find distressed homeowners through public foreclosure notices via government offices or commercial websites. The scheme is usually initiated by a telephone call from the consultant to the homeowner in which a resolution is offered. Absent the homeowner submitting documentation for the consultant to conduct a complete financial analysis, the homeowner is “qualified” over the phone for services, provided a fee “generally in the range of \$1200 to \$2000” is paid first. Moreover, during the telephone call, the fee is collected via debit or credit card, or check. Generally, the contractual terms and conditions are not discussed in detail. However, the written contract the homeowner ultimately receives from the consultant may contain numerous limitations to the services and to the homeowner’s refund and cancellation rights. In actuality, the foreclosure consultant may perform little or no services on behalf of the homeowner.

In exchange for the fee, the consultant, for example, makes inquiries to the lender regarding a plan for repayment that the lender will accept. These negotiations are done by the consultant without knowledge of the homeowner’s financial condition or ability to meet any repayment plan. The resulting repayment plan represents the consultant fulfilling his service obligations. Consequently, the homeowner could be further burdened with a predatory or

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<sup>2</sup> Amy Crews Cutts and Richard K. Green, Innovative Servicing Technology: Smart Enough to Keep People in Their House? Freddie Mac Working Paper #04—03 (July 2004).

<sup>3</sup> Mortgage Bankers Association, National Delinquency Survey, Fourth Quarter 2007, Data as of December 31, 2007.

<sup>4</sup> National Consumer Law Center, Dreams Foreclosed: The Rampant Theft of American’s Homes Through Equity-Stripping Foreclosure Rescue Scams., June 2005.

unrealistic repayment plan. The consultant has collected his fee, with no contractual obligation to return any portion of it, despite the homeowner's inability to comply with the new repayment plan.

Sometimes the homeowner will deed the property over to an unscrupulous equity purchaser and rent or lease the property back in anticipation the homeowner will be able to repurchase the residence in a few years. However, the provisions of these buyback agreements may not be financially viable for the homeowner. A lease/buy back is a foreclosure rescue scam in which the homeowner (usually unknowingly) deeds the house to the rescuer and leases it back with an option to repurchase, normally after a year. The rescuer pays arrearages (usually nothing more) in exchange for the deed. The buyback price is normally at fair market value, which usually nets the rescuer many times his initial or only investment. However, the homeowner may not be able to afford the rent, which exceeds the initial mortgage payment, and is evicted, forfeiting the right to repurchase. The rescuer then simply sells the house and keeps the equity.

According to the Attorney General's staff, currently, there are approximately 20 active investigations, and litigation is underway involving foreclosure-rescue consultants and equity purchasers. In recent months, The Office of the Attorney General has initiated actions related to foreclosure rescues under part II of ch. 501, the Florida Deceptive and Unfair Trade Practices Act. This act provides a civil penalty of up to \$10,000 for each violation under s. 501.2075, F.S. Section 501.211, F.S., authorizes any person who has suffered a loss under this act to bring an action to recover actual damages, plus attorney's fees and court costs. In addition, the Attorney General's office has prosecuted these types of fraudulent schemes under chs. 812 (theft, robbery, and related crimes), 817 (fraudulent practices), and 895 (offenses concerning racketeering and illegal debts).

Section 501.2078, F.S., which is also in part II of ch. 501, F.S., addresses violations involving homeowners during residential foreclosure proceedings. According to the Attorney General's office, this law is not generally used for prosecuting foreclosure due to its limited scope.

Currently, there are 12 states that have enacted laws that regulate foreclosure consultants. They are: California, Colorado, Georgia, Illinois, Indiana, Maryland, Minnesota, Missouri, Nevada, New Hampshire, New York, and Rhode Island.<sup>5</sup>

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<sup>5</sup> National Conference of State Legislators, State Foreclosure Solutions, January 2008.

**Judicial Sales Procedure**

Currently under the law, a lienholder or creditor must serve a complaint, a notice of *lis pendens*,<sup>6</sup> and a summons on the debtor in order to initiate foreclosure proceedings.

The procedure for the sale of real or personal property, otherwise known as a judicial sale, is provided for in s. 45.031, F.S. This section provides that a final judgment from a foreclosure proceeding must include a statement notifying the property owner and subordinate lienholders, if any, that there may be additional money from the foreclosure sale and notifying the property owner that he or she may claim such additional funds without representation by a lawyer or other person, if the subject property qualified for a homestead exemption in the most recent tax year.<sup>7</sup> The sale must be conducted at public auction at the time and place set forth in the final judgment.<sup>8</sup>

**Expedited Show-Cause Foreclosure Procedure**

Section 702.10, F.S., provides a fast track foreclosure process through an order to show cause, whereby a lender can obtain an *in rem* judgment. Upon filing a foreclosure complaint, the mortgagee can request an order to show cause for the entry of a final judgment. The judge must then read the complaint and verify that it states a cause of action.<sup>9</sup> If the complaint is verified, the judge will issue an order to the defendant to show cause why a final judgment should not be entered.<sup>10</sup> If a defendant waives the right to be heard, the judge shall promptly enter a final judgment of foreclosure.<sup>11</sup> Upon receipt of a final judgment, the procedures set out in s. 45.031, F.S., for a judicial sale should be followed.

**III. Effect of Proposed Changes:****Legislative findings and intent (Section 1)****Definitions (Section 2)**

Defines the term “foreclosure-rescue consultant” as a person who directly or indirectly makes any solicitation, representation, or offer to any owner to perform for compensation, or who performs for compensation, any services that the person represents will:

- Stop or postpone the foreclosure sale or the loss of the home due to nonpayment of taxes;
- Obtain any forbearance from any beneficiary or mortgagee or relief with respect to a tax sale of the property;

<sup>6</sup> The definition of “lis pendens,” as appropriate for this analysis, is “[a] notice, recorded in the chain of title to real property, required or permitted in some jurisdictions to warn all persons that certain property is the subject matter of litigation, and that any interests acquired during the pendency of the suit are subject to its outcome.” BLACK’S LAW DICTIONARY (8th ed. 2004). Essentially, “[t]he purpose of a notice of lis pendens is to alert creditors, prospective purchasers and others to the fact that the title to a particular piece of property is involved in litigation.” 35 FLA. JUR. 2D *Lis Pendens* § 3 (2008).

<sup>7</sup> Section 45.031(1)(a) and (b), F.S.

<sup>8</sup> Section 45.031(3), F.S.

<sup>9</sup> Section 702.10(1), F.S.

<sup>10</sup> *Id.*

<sup>11</sup> Section 702.10(1)(d), F.S.

- Assist the owner in exercising any right of reinstatement or right of redemption;
- Obtain any extension of the period for reinstate the owner's rights with respect to the property;
- Obtain any waiver of an acceleration clause contained in any promissory note or contract secured by a residential mortgage;
- Assist the owner during the foreclosure or loan default or a tax certificate redemption period in obtaining a loan or advance of funds;
- Mitigate the impairment of the owner's credit resulting from the foreclosure filing or the conduct of a foreclosure sale or tax sale; or
- Save the owner's residence from foreclosure or loss due to nonpayment of taxes.

The bill exempts certain persons from this definition, including: a person licensed to practice law in Florida when rendering foreclosure-related services during the course of practice as an attorney, a licensed mortgage broker or lender, acting the scope of a broker or lender under ch. 494, F.S., state and federally chartered financial institutions; a person licensed as a real-estate broker under ch. 474, F.S., acting within the course of a broker, a person acting under the authority of the U.S. Department of Housing and Urban Development, and a charitable, not-for-profit agency that offers counseling.

The bill defines the term, "foreclosure conveyance," to mean a transaction in which an owner of a residence at risk of loss transfers an interest in fee in the property, the acquirer of the property allows the owner of the property to occupy the property, and the acquirer conveys or promises to convey an interest in fee back to the owner or gives the owner an option to purchase the property at a later date. Additionally, the term, "foreclosure purchaser," is defined to mean any person who acquires any interest in fee in a residence at risk of loss while allowing the owner to possess, occupy, or retain any present or future interest in fee in the property or any person who participates in a joint venture or enterprise involving a foreclosure conveyance.

An owner is defined to mean the record owner of the residential real property in foreclosure at the time a notice of lis pendens was recorded or a summons and complaint was served, or if applicable, at the time the loan is more than 90 days delinquent or the owner is subject to loss of ownership due to nonpayment of taxes.

Residential real property for purposes of this bill consists of one to six family dwelling units, including condominiums at risk of loss of ownership due to nonpayment of taxes.

The term "foreclosure purchaser," means any person who acquires title to any residential real property as a result of a foreclosure--rescue transaction." Exceptions are provided in the bill for both definitions. The bill includes additional definitions for the terms: 1) foreclosure-rescue transaction, 2) homeowner, 3) residential real property, and 4) residential real property in foreclosure.

#### **Foreclosure Consultant Contract Requirements and Rescission of Contract (Sections 4 and 5)**

The bill requires several disclosures be incorporated into the contract as a means to enhance consumer protections. The contract must fully disclose the exact nature of the services and the

total amount and terms of compensation including how the foreclosure consultant will assist persons in avoiding or delaying foreclosure or curing or otherwise addressing a default.

The agreement must be printed in a minimum 14-point type. The contract must be written in the same language principally use by the foreclosure consultant to describe the services or to negotiate the contract, and must be dated and signed by the homeowner at risk of loss. The foreclosure consultant is required to provide the owner a copy of the contract and the attached notice or cancellation immediately upon execution of the contract.

A cancellation disclosure must be printed in bold 14-point type. The owner has the right to cancel the transaction at any time until after the foreclosure consultant has fully performed every service that the foreclosure consultant contracted to perform. A notice of cancellation form is required to be attached to the contract. The name and address of the foreclosure consultant must be provided on the first page of the contract and the notice of cancellation along with the date the owner signed the contract. In the event the owner wants to cancel the agreement, the owner is required to sign and date the notice, and mail or deliver the notice of cancellation. Notice of cancellation by mail is effective when deposited in the mail and properly addressed with postage paid.

Notice of cancellation given by the owner is not required to take the particular form, as provided in contract. Such notice is effective if the notice indicates the intention of the owner not be bound by the contract.

If the foreclosure consultant fails to substantially comply with the contract requirements, the contract is void and unenforceable and any documents signed by the owner are null and void.

#### **Foreclosure Conveyance Contracts/Cancellation (Sections 6 and 7)**

Each contract must be written in 14-font type and in the same language principally used by the owner to negotiate the sale of the residence at risk of loss, fully completed, signed, and dated by the owner and the foreclosure purchaser. Such contract must be notarized before the execution of any instrument of conveyance of the residence. The agreement must include:

- The name, business address, and telephone number of the foreclosure purchaser.
- The address of the residence at risk of loss.
- The total consideration to be given by the foreclosure purchaser in connection with or incident to the sale.
- A complete description of the terms of payment or other consideration.
- The time at which possession is to be transferred to the foreclosure purchaser.
- A complete description of the terms of any related agreement designed to allow the owner to remain in the residence.
- A notice of cancellation.
- A statement within the contract in close proximity to the signature line of the owner specifying the right of cancellation by the owner.
- .A notice providing that the foreclosure purchaser cannot require the owner to sign any deed or contract until the right to cancel, which is 5 business days following the date the owner signs the contract, has tolled or until 8:00 a.m. on the last day of the period during

which the owner has right of redemption under s. 45. 0315, F.S., or s. 197.472, F.S., relating to the payment of property, whichever occurs first.

The foreclosure purchaser is required to provide the owner with a copy of the contract and the notice of cancellation at the time the contract is executed by all parties. If the contract does not substantially comply with these provisions, the contract and any documents signed by the owner are null and void. However, the notice of cancellation given by the owner is not required to take the particular form, as provided in contract. Such notice is effective if the notice indicates the intention of the owner not be bound by the contract.

Within 10 days following receipt of a notice of cancellation, the foreclosure purchaser is required to refund without condition any original contract and any other documents signed by the owner of the residence of risk of loss.

### **Waivers**

Any waiver of the provisions of this act by an owner is void and unenforceable, except that such an owner may waive the 5-business-day right to cancel if the property is subject to foreclosure in within that period.

### **Prohibited Activities**

The bill delineates numerous prohibited acts designed to protect homeowners facing foreclosure. A foreclosure consultant is prohibited from charging or collecting any compensation until all of the contracted services have been fully performed. The fee or other compensation is capped at an amount not to exceed two monthly mortgage payments or the most recent tax installment on the residence. Wage assignment, liens on real or personal property, or other securities are prohibited. The bill prohibits a foreclosure consultant from taking any power of attorney from an owner, except to inspect documents as provided by law.

The bill prohibits the following acts by a foreclosure purchaser:

- Entering into a foreclosure conveyance with an owner of unless the owner has a reasonable ability to pay for the subsequent conveyance of an interest to the owner. There is a rebuttable presumption that the foreclosure purchaser has not verified the ability to pay if the foreclosure purchaser has not obtained documents other than a statement of assets, liabilities, and income of the owner.
- Completing a closing for any foreclosure conveyance in which the foreclosure purchaser obtains a deed or mortgage from an owner.
- Failing to comply with the requirements for disclosure, loan terms, and conduct in the federal Home Ownership Equity Protection Act.
- Failing to make a payment to the owner such that the owner has received consideration in amount of least 82 percent of the fair market value of the property within 150 days after the eviction or voluntary relinquishment of the possession of the dwelling by the owner.
- Representing that the foreclosure purchaser possesses certification, registration, or licensure that the foreclosure purchaser does not possess.
- Representing that the foreclosure purchaser is assisting the owner in saving the house, if the result of the transactions will that the owner does not complete redemption of the property.



- Engaging in other conduct or make any other statements that are false, deceptive, or misleading.

The foreclosure purchaser is also prohibited from accepting any instrument of conveyance of interest in the residence and recording any instrument of conveyance, signed by the owner until the period for cancellation by the owner has expired.

### **Civil Remedies**

A violation of this act constitutes a violation of part II of ch. 501, F.S. (Florida Deceptive and Unfair Trade Practices Act). Violators are subject to the penalties and remedies provided in part II of chapter 501, F.S. Generally, this act provides a civil penalty of up to \$10,000 for each violation under s. 501.2075, F.S. For violations involving senior citizens or disabled persons, s. 501.2077, F.S., authorizes civil penalties up to \$15,000 per violation. Section 501.211, F.S., authorizes any person who has suffered a loss under this act to bring an action to recover actual damages, plus attorney's fees and court costs.

In addition, the bill allows for consequential damages and appropriate equitable relief, including, but not limited to, the rescission of any deed, mortgage, or other instrument signed by the owner or foreclosure purchaser. In addition to any other damages available to an owner, the court is authorized to award damages up to 1.5 times the compensation charged by the foreclosure consultant if the court finds that the foreclosure consultant's conduct was in bad faith.

### **Criminal Mortgage Rescue Fraud Penalties (Section 14)**

The bill provides that any person intentionally violating any of the prohibited activities found in section 11 of the bill commits a violation commits the offense of criminal mortgage rescue fraud, which is felony of the third degree.

### **Liability (Section 15)**

The bill provides that any provision in a contract that attempts or purports to require arbitration of any dispute under this act is void at the option of the owner. This section applies to any foreclosure consultant contract or foreclosure conveyance contract entered into on or after October 1, 2008.

### **Severability Clause and Effective Date**

If any provision of this act is held invalid, the invalidity does not affect other provisions of this act. The act takes effect October 1, 2008.

## **IV. Constitutional Issues:**

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

None.

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

None.

C. Trust Funds Restrictions:

None.

**V. Fiscal Impact Statement:**

A. Tax/Fee Issues:

None.

B. Private Sector Impact:

The bill provides additional protections to homeowners facing foreclosure and using the services of a foreclosure consultant or foreclosure purchaser.

A violation of this act constitutes a violation of part II of ch. 501, F.S. (Florida Deceptive and Unfair Trade Practices Act). Violators are subject to the penalties and remedies provided in part II of chapter 501, F.S. Generally, this act provides a civil penalty of up to \$10,000 for each violation under s. 501.2075, F.S. For violations involving senior citizens or disabled persons, s. 501.2077, F.S., authorizes civil penalties up to \$15,000 per violation. Section 501.211, F.S., authorizes any person who has suffered a loss under this act to bring an action to recover actual damages, plus attorney's fees and court costs.

In addition, the bill allows for consequential damages and appropriate equitable relief, including, but not limited to, the rescission of any deed, mortgage, or other instrument signed by the owner or foreclosure purchaser. In addition to any other damages available to an owner, for certain violations of certain prohibited acts, the court is authorized to award damages up to 1.5 times the compensation charged by the foreclosure consultant if the court finds that the foreclosure consultant's conduct was in bad faith.

C. Government Sector Impact:

The bill provides creates an additional criminal enforcement authority to prosecute persons engaged in fraudulent foreclosure rescues or equity purchases schemes. A person intentionally violating the prohibited acts in this bill commits criminal mortgage rescue fraud, which is a felony of the third degree.

The amount of potential revenues the state will receive for penalties and remedies as provided in part II of chapter 501, F.S. is indeterminate at this time.

**VI. Technical Deficiencies:**

Under the prohibited acts section of the bill, a foreclosure purchaser is prohibited from making a payment to the owner of the residence at risk in an amount of less than 82 percent of the fair market value of the property within 150 days after the eviction or the voluntary relinquishment of the dwelling. Although this provision insures that the owner receives at least 82 of the fair market value, it guarantees at least an 18 percent return for the foreclosure purchaser. Due to the changes in the housing market, this valuation could fluctuate. This provision does not allow a

judge the discretion to determine whether 18 percent return is appropriate or possibly excessive and order a refund of the overage.

## **VII. Related Issues:**

The bill requires that contracts for foreclosure consultants must be written in the same language principally used by the foreclosure consultant to describe the services or to negotiate the contract. The foreclosure conveyance contract is required to be written in the same language principally used by the owner to negotiate the sale of the residence. Due to the wide array of languages and dialects used in Florida, it may be difficult to determine that such translations are accurate and complete and enforce these provisions.

The bill allows an owner the right to rescission until all services are provided by the foreclosure consultant. This could cause a chilling effect on costs incurred and services provided by legitimate foreclosure consultants since the foreclosure consultant is prohibited payment until all services required under the contract are performed. Since a foreclosure is a very time-sensitive event, it appears that time certain cancellation period would be appropriate.

The bill provides that a person commits criminal mortgage rescue fraud, which is a third degree felony, if the person intentionally violates the prohibited acts section of the act. Staff of the Attorney General's office has indicated that they have prosecuted these types of fraudulent schemes under chs. 812 (theft, robbery, and related crimes), 817 (fraudulent practices), and 895 (offenses concerning racketeering and illegal debts).

## **VIII. Additional Information:**

### **A. Committee Substitute – Statement of Substantial Changes:** (Summarizing differences between the Committee Substitute and the prior version of the bill.)

None.

### **B. Amendments:**

None.