

**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.)

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

BILL: SB 844

INTRODUCER: Senator Bennett

SUBJECT: Insurance

DATE: February 2, 2010      REVISED: \_\_\_\_\_

	ANALYST	STAFF DIRECTOR	REFERENCE	ACTION
1.	Messer	Burgess	BI	<b>Fav/1 amendment</b>
2.			CJ	
3.			WPSC	
4.				
5.				
6.				

**Please see Section VIII. for Additional Information:**

- |                              |                                     |   |
|------------------------------|-------------------------------------|---|
| A. COMMITTEE SUBSTITUTE..... | <input type="checkbox"/>            | Statement of Substantial Changes        |
| B. AMENDMENTS.....           | <input checked="" type="checkbox"/> | Technical amendments were recommended   |
|                              | <input type="checkbox"/>            | Amendments were recommended             |
|                              | <input type="checkbox"/>            | Significant amendments were recommended |

**I. Summary:**

An annuity is a contract sold by an insurance company designed to provide a stream of payments to the purchaser at specified intervals, typically after retirement. Because these contracts allow retirees protection against outliving their savings, these products have become extremely popular among Florida's increasingly large retirement-aged population.

The Department of Financial Services (DFS) is the state agency responsible for regulating the sale of annuities in Florida. Many annuities are complicated and difficult to understand; because of this, uninformed consumers are often targeted by unscrupulous agents employing deceptive sales practices to defraud investors. In the past five years DFS investigations regarding sales of annuities have increased by approximately 300 percent. These cases are revealing the fact that many of Florida's seniors are being sold deferred annuity contracts which are not suitable for their financial needs. Further, the producers of these unsuitable contracts are unethical agents who earn large commissions on the sale of these contracts.

This bill makes several changes in the insurance code to enhance penalties for unethical annuities sales practices as well as provide certain consumer protections for seniors who purchase annuities contracts. The act makes the following provisions:

- prohibits annuity sales agents from making a member of his/her family the beneficiary of an annuity if that annuity is sold to anyone other than another family member.
- strengthens DFS's ability to deny licensure to agents who have a history of financial misconduct involving seniors.
- requires more favorable annuity contract terms for seniors and requires sales agents to provide seniors with greater disclosures prior to the sale of an annuity contract.
- heightens criminal charges for deceptive annuity sales practices towards seniors and gives DFS the authority to order the selling agent to pay restitution to a senior who is harmed by a violation of this section.

This bill substantially amends sections 624.310, 626.025, 626.621, 626.641, 626.798, 626.9521, 626.99, 627.4554, and creates section 817.2351, of the Florida Statutes.

## **II. Present Situation:**

The DFS is the state agency responsible for regulating the sale of annuities in Florida. Many annuities are complicated and difficult to understand; because of this, uninformed consumers are often targeted by unscrupulous agents employing deceptive sales practices to defraud investors. In the past five years DFS investigations regarding sales of equity indexed annuities, fixed annuities and variable annuities to seniors have increased by approximately 300%. There are currently over 150 senior annuity cases under investigation at DFS. These cases are revealing the fact that many of Florida's seniors are being sold deferred annuity contracts which are not suitable for their financial needs. Further, the producers of these unsuitable contracts are unethical agents who earn large commissions on the sale of these contracts

### **Types of Annuities**

Annuities are available in two forms: immediate or deferred. An immediate annuity is an arrangement where the annuity company is given a lump sum premium payment in exchange for immediate and regular periodic payments to the annuity contract owner. Similarly, a deferred annuity is an arrangement where premiums are paid either in a lump sum or by a series of payments and are subject to a tax-deferred accumulation phase. Following the accumulation phase is the annuitization, or payout phase, during which the annuity provides a regular stream of periodic payments to the annuity contract owner.

Because they provide a guaranteed source of income for future years, annuities are most commonly used for retirement planning. Immediate annuities are often used by senior citizens as a means to supplement their retirement income, or as a method of planning for Medicaid nursing care. The main advantage of a deferred annuity as opposed to other investments is that the principal invested grows on a tax-deferred basis. However, this tax-deferred growth may in certain cases be overshadowed by the potentially high taxes upon payout. Unlike some other investments that are subject to the capital gains tax (maximum 15 percent), a deferred annuity is subject to the ordinary income tax rates of up to 35 percent upon payout. Both deferred and immediate annuities are long-term contracts that typically restrict the investor's ability to access money placed in the annuity. Due to this, deferred annuities may be unsuitable investments for many senior citizens.

There are three primary annuity types: fixed annuities, variable annuities, and equity indexed annuities. (1) *Fixed Annuities* – A fixed annuity guarantees fixed payments at a fixed interest rate to the annuitant. Fixed annuities are considered insurance products that may be sold by a licensed life insurance and annuity agent. (2) *Variable Annuities* - A variable annuity provides a rate of return that is not stable like a fixed annuity, but rather is derived from the success of an investment that underlies the annuity. Variable annuities are considered investment products and, as such, are under the regulatory jurisdiction of both securities regulators and state insurance departments.<sup>1</sup> Agents selling variable annuities must hold a variable annuity license from the state insurance regulator, a securities license, and an active securities registration with a broker/dealer. (3) *Equity Indexed Annuities* – An equity indexed annuity is a hybrid of a fixed and a variable annuity. Equity indexed annuities provide a “minimum guaranteed” interest rate in combination with an investment, or variable, component. The investment component is derived from changes in an equity index, such as the S&P 500 Composite Stock Price Index. Equity indexed annuities offer investors a return based on gains in the stock market, but generally at a lower rate than gains in the stock market. This lower rate of return is offset by the protection offered by the minimum guaranteed interest rate to make this an attractive annuity contract option for many investors. Despite the guaranteed minimum interest rate component, investors may still lose money through an equity indexed annuity contract if the rate is less than the premium payment. Equity indexed annuities are complex and sometimes contain detrimental features such as penalties, fees, and large multi-year surrender charges. These features may cause investors to lose principal in the event that they need to cancel an annuity in order to access funds prior to maturity.

### **Common Types of Annuity Sales Fraud Effectuated on Florida’s Seniors**

Because annuities are most commonly used for retirement planning, seniors are the most common target of annuity sales fraud. There are currently more than 2.9 million Floridians over the age of 65. The state’s senior population is projected to grow by as much as 30 percent in the near future, and many of these seniors will consider investing in annuities to protect against outliving their savings. The expected rise in the population, coupled with the fact that complaints from Florida seniors regarding annuities sales fraud has increased threefold in the past three years indicates that this problem is likely to increase if no action is taken.

The sale of unsuitable annuities to consumers commonly involves inappropriate conduct by the agent such as misrepresentations and material omissions designed to hide the fact that the product is not suitable to meet the consumer’s needs. Forgery is a common means for committing fraud in the sale of an annuity. Annuity or life insurance transactions involving misrepresentations or material omissions are prosecutable under the Unfair Insurance Trade Practices Act.<sup>2</sup> At an August 2009 DFS press conference, four Florida seniors were invited to share their personal stories dealing with such scams. The following is a summary of their stories:

- Bonnie Madden, 82, who at the advice of agent Randolph H. Kahl-Winter, liquidated her existing investments to purchase two annuities with 10- and 15-year surrender periods. The transactions generated \$52,355 in commissions for the agent, however, the premium on such

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<sup>1</sup> In Florida, the regulation of Insurance is shared by two state agencies: the Department of Financial Services (Agent and Agencies Division) and the Office of Insurance Regulation.

<sup>2</sup> Chapter 626, F.S.

an inflated policy made payments astronomical and it would have cost Madden nearly \$300,000 of her life savings if DFS had not intervened.

- Anne Ridings, Director of Guardianship with Lutheran Services Florida, who represented the late Joseph Seale. At the age of 85, Seale was sold three annuities that represented all of his liquid assets. Within three months of the sale, Seale was in the hospital twice and Lutheran Services Florida was appointed as his guardian by the courts. Lutheran Services notified DFS that Seale was being evicted from the nursing home because he had no funds. The DFS intervened and recovered his full investment totaling more than \$250,000.
- Robert and Marie St. Germaine were convinced by agent Randolph H. Kahl-Winter to take monies from their investment accounts and place them in a flexible premium deferred annuity, which had a surrender period. They ended up borrowing money from friends to make ends meet. Through actions taken by DFS they received a refund totaling \$201,000 plus interest.

Two common unfair insurance trade practices are “twisting” and “churning.” Twisting is statutorily defined as knowingly making misleading representations, or incomplete or fraudulent comparisons, or fraudulent material omissions regarding insurance policies or insurers in an attempt to induce a customer to take an action regarding his or her current insurance policy or take out an insurance policy with another insurer.<sup>3</sup> Churning is statutorily defined as the withdrawal from a product to fund another product issued by the same company for the purpose of generating a commission for the agent.<sup>4</sup> Agents’ commissions range between 9 and 12 percent for most annuity sales (thus, a \$100,000 annuity would yield a commission between \$9,000 and \$12,000). The DFS indicates that because these trade practices are only misdemeanors, state attorneys are reluctant to initiate criminal prosecutions of suspected violators who engage in twisting or churning.

### **Unfair Insurance Trade Practices Act**

The Unfair Insurance Trade Practices Act under s. 626.9541, F.S., specifies and prohibits practices by insurers and insurance agents that constitute unfair methods of competition and unfair or deceptive acts. Pursuant to this act, insurers, insurance agents, and any other person involved in the business of insurance can be fined for engaging in unfair or deceptive acts. The prescribed fines range from \$2,500 for each non-willful violation (up to an aggregate \$10,000), all the way to \$20,000 for each willful violation (up to an aggregate \$100,000). The OIR and DFS are authorized under s. 626.9581, F.S., to issue cease and desist orders against insurers and agents that violate this act; violation of any such order may result in a penalty of up to \$50,000. Section 624.15, F.S., makes a willful violation of this act a second-degree misdemeanor.

In 2008, the Legislature enacted enhanced penalties and created a new violation in s. 626.9521, F.S., which made willfully submitting a false signature to an insurer on behalf of an insured a third degree felony.<sup>5</sup> The administrative penalties for twisting, churning, or willfully submitting a false signature were increased to a maximum of \$5,000 for each non-willful violation, up to an

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<sup>3</sup> Section 626.9541(1)(l), F.S.

<sup>4</sup> Section 626.9541(1)(aa), F.S.

<sup>5</sup> Section 626.9521(3)(b), F.S.

aggregate \$50,000 fine; the fine for a willful violation was increased to a maximum \$40,000 per violation up to an aggregate \$250,000 fine.<sup>6</sup>

### III. Effect of Proposed Changes:

**Section 1** This act may be cited as the “Safeguard Our Seniors Act.”

**Section 2** amends s. 624.310(1)(a), F.S., to expand the definition of “affiliated party” to include any third-party marketer who aids or abets a licensee in a violation of the insurance code relating to the sale of an annuity to a person 65 years of age or older.

**Section 3** amends s. 626.025(13), F.S., to prohibit “family members” of the selling life agent from being added as a designated beneficiary to a life insurance policy sold to an individual, other than to a family member under s. 626.798, F.S. Current law prohibits only the agent from designating himself or herself as the beneficiary.

**Section 4** creates s. 626.621(13), F.S., to provide additional grounds for discretionary refusal, suspension or revocation of a licensee’s appointment when the licensee or applicant has had prior action taken against his/her license.

**Section 5** amends s. 626.641(3) (a) F.S., to prohibit an agents who has had their license revoked for violations involving seniors, from being eligible for licensure again.

**Section 6** amends s. 626.798, F.S., to provide that a “family member” of an agent placing life insurance coverage cannot be designated as beneficiary on a policy unless the life agent or family member has an insurable interest in the life of such person.

**Section 7** amends ss. 626.9521(3)(a) and 626.9521(3) (b), F.S., pertaining to the offenses known as “twisting” and “churning,” to apply only to a “natural person” thereby excluding corporations and trusts from the purview of the statute.

Subsection (4) is added to s. 626.9521, F.S., to provide that failure of the licensee to make all reasonable efforts to ascertain the consumer’s age at the time an insurance application is completed does not constitute a defense to a violation of “twisting” or “churning.”

Subsection (5) is added to s. 626.9521, F.S., to enable the victims, over the age of 65, to offer testimony at an administrative proceeding through a video deposition. This provision may aid in prosecution due to the fact that some senior victims are unable to appear at hearings due to failing health, physical limitations, or death.

**Section 8** amends s. 626.99(4), F.S., concerning the disclosures an insurer must provide a prospective purchaser of life insurance to require an insurer to:

- Provide a minimum 30-day unconditional refund period to an annuity purchaser who is at least 65 years old. For a fixed annuity contract, the refund includes premiums paid and any contract fees and charges. For a variable or market value annuity contract, the refund

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<sup>6</sup> s. 626.9521(3)(a) and (b), F.S.

includes the cash surrender value provided in the contract and any fees or charges deducted from premiums or imposed under the contract. The 30-day refund provision for a variable or market value annuity contract does not apply to a prospective owner or an accredited investor as defined in the Security and Exchange Commission's Regulation D.<sup>7</sup>

- Provide a contract summary and a DFS-developed buyer's guide on annuities to each prospective purchaser (regardless of the purchaser's age) prior to accepting any payment for an annuity contract.
- Attach a cover page to an annuity policy informing the purchaser (regardless of the purchaser's age) of the unconditional refund period, contact information for the issuing company, the DFS toll-free help line number, and other information required by DFS administrative rule. The cover page is part of the annuity contract and is subject to review by the OIR pursuant to s. 627.410, F.S.

**Section 9** amends s. 627.4554, F.S., relating to the standards and procedures for recommending annuity products to senior consumers. This section:

- Defines the term "accredited investor;" the definition is the same as the description of accredited investors who are natural persons in Regulation D adopted by the Securities and Exchange Commission.<sup>8</sup>
- Authorizes DFS to require an insurance agent to provide monetary restitution of penalties and fees incurred by a senior consumer who is harmed by a willful violation of s. 627.4554, F.S. (annuity investments by seniors).
- Requires DFS to order payment of restitution to a senior consumer who is deprived of money by an insurance agent's misappropriation, conversion, or unlawful withholding of a senior consumer's money in the course of an annuity transaction. Restitution is limited to the amount misappropriated, converted, or unlawfully withheld, and does not preclude the victim from seeking other legal remedies.
- Creates a new subsection (9) that prohibits an annuity contract issued to a senior consumer from including a surrender or deferred sales charge for withdrawal of money that exceeds 10 percent, which must be reduced by one percent each year to zero by the end of the tenth policy year.

**Section 10** creates s. 817.2351, F.S., to provide a new offense, prosecutable as a third degree felony. This new offense is committed when a natural person, in connection with rendering any advice or with the offer, sale, or purchase of any financial services product to a person who is 65 years of age or older, directly or indirectly:

- Employs any device, scheme, or artifice to defraud a person;
- Engages in any transaction, practice, or course of business that operates or would operate as a fraud or deceit upon a person;
- Knowingly and willfully falsifies, conceals, or covers up a material fact by any trick, scheme, or device;

<sup>7</sup> 17 C.F.R. § 230.501(a). This regulation defines the term "accredited investor" to include: (1) any natural person whose individual net worth, or joint net worth with his or her spouse, exceeds \$1,000,000 at the time of purchase; and (2) any natural person who had an individual income in excess of \$200,000 in each of the two most recent years or joint income with his or her spouse in excess of \$300,000 in each of those years, and has a reasonable expectation of reaching the same income level in the current year.

<sup>8</sup> *Id.*

- Makes any false, fictitious, or fraudulent statement or representation; or
- Makes or uses any false writing or document while knowing that the writing or document contains any false, fictitious, or fraudulent statement or entry.

**Section 11** provides for an effective date of July 1, 2010.

**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:

Insurers will be required to revise forms and make filings with the OIR to meet compliance. Insurers will also be required to provide seniors with information not currently provided prior to the sale of an annuity.

Seniors will be provided additional information and protections planning their retirement. Seniors who are harmed as a result of the agent misconduct may be able to collect restitution from the selling agent via an enforcement action from the DFS.

C. Government Sector Impact:

None.

**VI. Technical Deficiencies:**

**VII. Related Issues:**

As it is presently worded, the provision on lines 202-205 is potentially ambiguous. The DFS has indicated to the professional staff of the banking and insurance committee that the intent in this provision is to provide that a violation of this section is a strict liability offense with respect to the age of the consumer. The present wording in the bill, however, does not carry out that intent.

**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:**

**Barcode 707432 by Banking and Insurance on February 2, 2010:**

This amendment is technical and clarifies that a sales agent may not use as a defense to this statute the fact that he/she was unsuccessful in ascertaining the age of the consumer, despite any reasonable effort to do so.

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This Senate Bill Analysis does not reflect the intent or official position of the bill's introducer or the Florida Senate.

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