

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 Committee on Banking and Insurance

BILL: CS/SB 650

INTRODUCER: Banking and Insurance Committee and Senator Legg

SUBJECT: Viatical Settlements

DATE: January 27, 2016

REVISED: _____

	ANALYST	STAFF DIRECTOR	REFERENCE	ACTION
1.	Knudson	Knudson	BI	Fav/CS
2.			AGG	
3.			AP	

Please see Section IX. for Additional Information:

COMMITTEE SUBSTITUTE - Substantial Changes

I. Summary:

CS/SB 650 amends the Viatical Settlement Act, ss. 626.991 – 626.99295, F.S. A viatical settlement contract is a written agreement entered into between the owner of a life insurance policy, referred to as the viator, and a viatical settlement provider wherein the viator agrees to transfer ownership or change the beneficiary designation of a life insurance policy at a later date in exchange for compensation paid to the viator. The compensation paid to the viator is generally less than the expected death benefit under the policy. Rather than retaining the policy, the provider usually sells all or part of the policy to one or more investors. In return for providing funds, these investors receive the death benefit, or a proportionate share thereof, upon the passing of the insured.

The bill provides greater specificity regarding fraudulent, deceptive, and prohibited practices that are subject to administrative sanctions by the Office of Insurance Regulation (OIR) and felony criminal sanctions. The bill does this by defining actions that constitute “fraudulent viatical settlement acts;” and including their commission as prohibited practices under ss. 626.99275 and 626.9914, F.S.

The bill makes engaging in a stranger-originated life insurance (STOLI) practice a felony fraudulent viatical settlement act and makes STOLI contracts void and unenforceable. Stranger-originated life insurance is somewhat similar to a viatical transaction, with the key difference that the individual who obtains a life insurance policy does so for the express purpose of assigning the policy in exchange for compensation, thus violating Florida law requiring

beneficiaries to have an insurable interest in the life of the policyholder. In a proper viatical settlement, the insurance policy was originally purchased with the intent that benefits would be paid to persons or entities with an insurable interest – a reasonable expectation of a monetary benefit from the continued well-being of the life being insured.

The bill increases from \$2,500 to \$10,000 the maximum fines the OIR may impose for each nonwillful violation of the Viatical Settlement Act, and increases from \$10,000 to \$25,000 the maximum fine for each willful violation of the Act.

The bill increases the contestability period for viatical settlement agreements from 2 years to 5 years. Florida law prohibits the creation of a viatical settlement contract during the contestability period unless the viator certifies that he or she meets an exception that justifies viatication of the policy. The bill specifies that the viator must, to claim an exception, execute a sworn affidavit and document that an exception applies. Such exceptions include, but are not limited to, the viator is terminally or chronically ill, is retired, has a disability preventing full-time employment, experienced the divorce or death of a spouse, or the owner of the policy is not a natural person. The bill allows viatication after 2 years if prior to the issuance date of the policy: premiums were funded with unencumbered assets, no agreement to sell the policy was made, and the insured and the policy were not evaluated for settlement.

The bill also:

- Establishes new disclosure and annual reporting requirements and conflicts of interest prohibitions for viatical service providers;
- Requires viatical service providers to file their advertising and marketing materials with the OIR prior to entering into viatical contracts;
- Requires viatical service providers maintain documentation of compliance with their anti-fraud plans; and
- Requires viatical service providers to provide certain documentation to insurers for verification of coverage, prior to entering into a viatical settlement contract.
- Increases the deposit requirement for viatical settlement providers from \$100,000 to \$250,000.

The effective date of the bill is July 1, 2016.

II. Present Situation:

Life Insurance – Insurable Interests

A fundamental concept in life insurance is that the purchaser and beneficiary of an insurance policy must have an insurable interest—a reasonable expectation of a monetary benefit from the continued well-being of the life being insured. In the context of life insurance, the insurable interest prevents purchasing insurance as a form of gambling on the death of the insured, which creates a moral hazard for the purchaser who may be tempted create a situation where he or she will be able to collect on the policy.

The insurance interest requirement for life insurance can be found in the Florida Statutes at s. 627.404, F.S. Florida law prohibits the procurement of “an insurance contract on the life or

body of another individual unless the insurance contract benefits are payable to the insured, his or her personal representatives, a person having an insurable interest in the insured when the contract was made.¹ Persons with insurable interest include the insured, family members and loved ones of the insured, others if the insured's life and health is of greatest benefit to them, trusts and trustees in specified circumstances, charitable organizations, and business organizations in specified circumstances.

Viatical Settlement Contracts - Background

A viatical settlement contract is a written agreement entered into between the owner² of a life insurance policy, referred to as the viator, and a viatical settlement provider wherein the viator agrees to transfer ownership or change the beneficiary designation of a life insurance policy at a later date in exchange for compensation paid to the viator.³ The compensation paid to the viator is generally less than the expected death benefit under the policy. Rather than retaining the policy, the provider usually sells all or part of the policy to one or more investors. In return for providing funds, these investors receive the death benefit, or a proportionate share thereof, upon the passing of the insured.

Viatical settlements emerged during the HIV/AIDS epidemic in the 1980s, enabling terminally ill patients with short life expectancies who could no longer work and afford the policy premiums to sell their life insurance policies at a cash discount to pay for high medical care expenses. In the early days of the epidemic, AIDS patients generally died within months of their diagnoses, resulting in fairly quick, significant returns to investors,⁴ who in those days were typically senior individuals who risked their savings in what was represented as a safe investment and marketed as a compassionate way to help dying patients. However, innovations in AIDS treatment in the early 1990s significantly improved life expectancies of AIDS patients, sometimes even outliving their investors, which disrupted mortality assumptions and diminished investor returns.

Two consequences resulted from the insureds of viaticated policies exceeding their life expectancy. The first is that some viatical settlement providers stopped brokering new viatical settlements. The second, unfortunately, is that some viatical settlement providers engaged in fraudulent practices.⁵

An example cited by the Office of Insurance Regulation of such fraudulent activity was Mutual Benefits Corporation.⁶ In 2004, the OIR suspended MBC's license and the United States Securities and Exchange Commission (SEC) filed an action in federal court seeking an injunction and the appointment of a receiver. The court-appointed receiver reported that MBC had fraudulently procured insurance policies with a total face value of approximately \$1.4 billion. The SEC agreed to a \$25 million settlement and referred the case to prosecutors.

¹ The insurable interest need not exist after the inception date of coverage under the contract.

² Or certificateholder if a group policy.

³ s. 626.9911, F.S.

⁴ Kelly J. Bozanic, *An Investment to Die For: From Life Insurance to Death Bonds, the Evolution and Legality of the Life Settlement Industry*, 113 PENN. ST. L. REV. 229, 233-234 (2008).

⁵ Office of Insurance Regulation, *Secondary Life Insurance Market Report to the Florida Legislature* (Dec. 2013), p. 9.

⁶ See Office of Insurance Regulation, *supra* note 5, at pg. 10.

Federal prosecutors charged former company employees, most of whom have pled guilty and were sentenced to lengthy prison terms. A factual statement filed by an MBC employee described the scheme. Mutual Benefits Corporation would falsely promise investors a fixed rate of return but was unable to keep those promises because insureds lived longer than expected and their premiums had to be paid to keep the underlying policies in force. New investor sales were used to continue to pay premiums on the previously viaticated life insurance policies. The MBC experience and other fraudulent schemes led to the Legislature comprehensively reforming the regulation of the viatical settlement industry in 2005.

Today, the viatical settlement market is not limited to the purchase of the life insurance products of the terminally ill. Viatical settlement contracts are also entered into with non-terminally ill insureds that no longer want, need, or can afford their policies. These agreements, often referred to as life settlements, serve as an alternative to exercising a redemption or accelerated death benefit clause in life insurance policies.

Regulation of the Viatical Settlement Industry

Viatical settlement providers and viatical settlement brokers are required to obtain licensure from the Office of Insurance Regulation. The Viatical Settlement Act (Act)⁷ sets forth requirements for licensure, annual reporting, disclosures to viators, transactional procedures, adoption of anti-fraud plans, and administrative, civil, and criminal penalties. The Act also provides the OIR with examination and enforcement authority over viatical service providers and brokers; review and approval authority over the viatical settlement contracts and forms; rulemaking authority; and provided that a violation of the Act is an unfair trade practice under the Insurance Code. The Act does not authorize the OIR to regulate the rate or amount paid as consideration for a viatical settlement contract.⁸

In 2005, legislation was enacted that requires the investment transaction to be regulated as a security under ch. 517, F.S. These investments must be registered with either the Office of Financial Regulation (OFR) or the federal Securities and Exchange Commission. In addition, persons offering such investments must obtain licensure from the OFR and provide full and fair disclosures concerning viatical settlement investments to prospective investors. The 2005 legislation also provides that a person or firm who offers or attempts to negotiate a viatical settlement between an insured (viator) and a viatical service provider for compensation is a *viatical settlement broker* who must be licensed with the Department of Financial Services (DFS) as a life insurance agent with a proper appointment from a viatical service provider. Viatical settlement brokers owe a fiduciary duty to the viator.⁹

In 2013, the Legislature directed the OIR to review Florida law and regulations to determine whether there were adequate protections for purchasers of life insurance policies in the secondary life insurance market.¹⁰ Following a public hearing conducted by the OIR, in which both life insurers and institutional investors participated, the OIR published a report, concluding

⁷ Ch. 96-336, Laws of Fla.

⁸ s. 626.9926, F.S.

⁹ ss. 626.9911(9) and 626.9916, F.S.

¹⁰ Ch. 2013-40, s. 6, Laws of Fla. (2013 General Appropriations Act, p. 316).

that adequate protections for institutional purchasers in the secondary life insurance market existed and that their recommendations did not warrant legislative action at the time.¹¹

Stranger-Originated Life Insurance

Stranger-originated life insurance (STOLI) is somewhat similar to a viatical transaction, but with the key difference that the individual who obtains a life insurance policy does so for the express purpose of assigning the policy in exchange for compensation. In a typical STOLI transaction, an individual (usually a senior) is encouraged to take out insurance on his or her own life, sometimes in the millions of dollars, and then assigns the policy to an investor or group of investors (the “stranger”) who pay the individual a large cash settlement in exchange for the ownership rights to the policy, including the right to receive the proceeds upon the insured’s death.

Stranger-originated life insurance may appear similar to a viatical or life settlement. The critical difference is that in viatical or life settlements, an insured initially buys life insurance in a good-faith intent to protect valid insurable interests (i.e., to protect family members or a business from the risk of a premature death), but subsequently decides to sell the policy to a third party due to a change in circumstances that may not warrant the policy (such as divorce, death of an intended beneficiary, or the need for immediate cash due to illness or other loss). In a STOLI, the policy is intentionally purchased for the benefit of persons (usually investors) who lack an insurable interest at the time the life insurance contract is entered into. These investors ultimately receive the proceeds, directly or indirectly.¹² The Uniform Law Commission has noted that the beneficiaries of STOLI transactions argue that it is an appropriate use of life insurance consistent with applicable legal principles, including the free transferability of assets. Life insurers oppose the use of STOLI, arguing that it is a perversion of the concept of life insurance and leads to the moral hazard concerns that insurable interest doctrines are intended to mitigate.¹³

Transactions involving STOLI often use fraudulent means to procure life insurance on individuals, such as misrepresentation, falsification, or omission of material facts in the life insurance application. The fraud is conducted so that an assignment or sale of a policy functions as a subterfuge that circumvents the insurable interest requirement. STOLI transactions generally target senior citizens and are often financed through non-recourse “premium finance loans.” It is common for STOLI to be structured through the use of an irrevocable trust, which conceals from the life insurance company that the policy was sold. The insured pays premiums during the contestable period to prevent the insurer from discovering a possible violation of the insurable interest requirement.

¹¹ See Office of Insurance Regulation, *supra* fn. 5, pp. 50-51.

¹² AALU, NAIFA, and ACLI, *STOLI: The Problem and the Appropriate State Response*, p. 4, (on file with the Senate Committee on Banking and Insurance).

¹³ UNIFORM LAW COMMISSION, *Insurable Interest Amendment to the Uniform Trust Code Summary*, at <http://www.uniformlaws.org/ActSummary.aspx?title=Insurable%20Interests%20Amendment%20to%20the%20Uniform%20Trust%20Code> (last visited Jan. 13, 2016).

According to the OIR, STOLI impacts consumers (both individual investors and insureds) and insurers in a number of ways:¹⁴

- Seniors may exhaust their life insurance purchasing capability and not be able to protect their own family or business.
- The incentives, especially cash payments, used to lure seniors to participate in STOLI schemes are taxable as ordinary income.
- Seniors may subject themselves or their estates to potential liability in the event the life insurance policy is rescinded by an insurer who discovers fraud.
- Seniors may encounter unexpected tax liability from the sale of the life insurance policy.¹⁵
- The “free” insurance is not free and may be subject to tax based on the economic value of the coverage.
- Seniors have to give the purchaser, and subsequent purchasers, access to their medical records when they sell their life insurance policy in the secondary market so that investors know the health status of the insured. The investors want to know the “status” of their investment and how close they are to getting paid.
- STOLI may lead to an increase in life insurance rates for the over-65 population.
- If STOLI practices continue to proliferate, the U.S. Congress may remove the tax-free status of life insurance proceeds.

Over 30 states currently prohibit STOLI, generally through some combination of the NAIC and NCOIL model acts, in addition to common law or statutory insurable interest laws. STOLI has resulted in significant litigation, criminal and regulatory enforcement actions, both nationally and in Florida.¹⁶

The OIR may use several legal or regulatory remedies to address STOLI transactions. The Viatical Settlement Act authorizes the OIR to impose fines of up to \$2,500 for nonwillful violations and up to \$10,000 for willful violations, or to suspend, revoke, deny, or refuse to renew the license of any viatical settlement provider found to be engaging in certain acts, such as fraudulent or dishonest practices, dealing in bad faith with viators, or violating any provision of the Act or the Insurance Code. The OIR may also impose cease and desist orders and immediate final orders for violations of the Act.¹⁷

Currently, s. 627.409, F.S., provides that misrepresentation, omission, concealment of fact, or incorrect statements on an application for an insurance contract “may prevent recovery” in certain cases, however, there are no criminal penalties and an action for rescission by the life insurer is the only civil penalty available. Various provisions of the Insurance Code authorize the DFS to suspend or revoke the license or appointment of licensees, agencies, or appointees on various grounds, such as using fraudulent or dishonest practices in the conduct of business under

¹⁴ Office of Insurance Regulation, 2016 Agency Legislative Bill Analysis of SB 650, pg. 6 (Nov. 5, 2015); Additionally, s. 626.9923, F.S., requires viatical service providers to disclose certain risks to viators, such as tax and Medicaid eligibility consequences.

¹⁵ See IRS Rev. Ruls. 09-13 and 09-14, regarding taxation of proceeds from settlements as capital gains ordinary income and taxation on a post-settlement basis.

¹⁶ For a listing of OIR enforcement actions, see OIR, *Viatical Criminal, Civil and Regulatory Actions*, http://www.floir.com/sections/landh/viaticals/ccr_actions.aspx (last visited Jan. 23, 2016) and 2013 OIR Report, *Appendix C: Florida Regulatory and Enforcement Actions Pertaining to Viatical Settlement Providers*.

¹⁷ ss. 626.9914 and 626.99272, F.S.

the license.¹⁸ Finally, the Unfair Insurance Trade Practices Act in s. 626.9541, F.S., lists several unfair methods of competition and unfair or deceptive acts or practices. Each violation of this statute can result in fines ranging from \$5,000 to \$75,000, depending on the willfulness and particular violation. In addition, “twisting” and “churning” are first-degree misdemeanors, while willfully submitting false signatures on an application is a third-degree felony.¹⁹ The OIR believes that though viatical settlement providers are subject to this statute by way of s. 626.9927, F.S., and STOLI transactions do share some components of these practices, the statute was written for the initial sale of an insurance policy to an insured and not specifically for STOLI, making it difficult and unwieldy for the OIR to apply the provisions to secondary sales of life insurance policies.²⁰

Life insurers engage in insurable interest litigation to combat STOLI, usually relying on the insurable interest statute in s. 627.404, F.S., to rescind the policies transferred in a STOLI transaction for a lack of insurable interest when the policy was initially entered into. This argument is sometimes opposed with arguments seeking the application of the incontestability statute, s. 627.455, F.S., which requires life insurance policies to include a provision barring the insurer from challenging the policy after it is in force for 2 years.

In separate cases, the U.S. District Court for the Southern District of Florida reached different interpretations on the interplay of these statutes.²¹ These appeals were consolidated to the U.S. Court of Appeals for the Eleventh Circuit, which noted that there are no cases decided by Florida courts that specifically address whether a party can challenge an insurance policy as being void ab initio for lack of an insurable interest if the challenge is made after the 2-year contestability period, and if so, whether the individual with the required insurable interest must procure the policy in good faith. As a result, the Eleventh Circuit certified questions to the Florida Supreme Court last year for a determination of Florida law on the conflict between these two statutes.²²

Current law does not specifically define STOLI, nor does it have a specific regulatory prohibition on STOLI or life insurance policies lacking an insurable interest at inception.

III. Effect of Proposed Changes:

Fraudulent Viatical Settlement Acts – Definition; Criminal and Administrative Penalties

CS/SB 650 provides greater specificity regarding fraudulent, deceptive, and prohibited viatical settlement practices that are subject to administrative and felony criminal sanctions. The bill does this by defining actions that constitute “fraudulent viatical settlement acts;” and including their commission as prohibited practices under ss. 626.99275 and 626.9914, F.S. The bill specifically defines a stranger-originated life insurance (STOLI) practice as a fraudulent viatical settlement act and makes STOLI contracts void and unenforceable.

¹⁸ ss. 626.611, 626.6115, 626.6215, and 626.621, F.S.

¹⁹ s. 626.9541, F.S.

²⁰ OIR Agency Analysis, p. 2.

²¹ *Pruco Life Ins. V. Brasner*, 2011 WL 134056 (S.D. Fla. Jan. 7, 2011), and *Pruco Life Ins. Co. v. U.S. Bank*, 2013 WL 4496506 (S.D. Fla. Aug. 20, 2013).

²² *Pruco Life Ins. Co. v. Wells Fargo Bank, N.A.*, 780 F.3d 1327 at 1336 (11th Cir. C.A. 2015). The appeal, currently pending at the Florida Supreme Court (Case No. SC15-382), is scheduled for oral argument on March 10, 2016, and will go back to the Eleventh Circuit for final disposition.

Section 1 amends s. 626.9911, F.S., to define “fraudulent viatical settlement act” to mean an act or omission committed by a person who, knowingly or with the intent to defraud for the purpose of depriving another of property for pecuniary gain, commits or allows an employee or agent to commit the following acts:

- Presenting²³ false or concealed material information as part of, in support of, or concerning a fact material to a viatical settlement contract or insurance policy.
- Employing a plan, financial structure, device, scheme, or artifice to defraud related to viaticated policies.
- Engaging in a stranger originated life insurance practice.
- Failing to disclose upon request by an insurer that the prospective insured has undergone a life expectancy evaluation by a person other than the insurer or its authorized representatives in connection with the issuance of the policy.
- Perpetuating a fraud or preventing its detection.
- Embezzlement, theft, misappropriation, or conversion of moneys, funds, premiums, credits, or other property of a viatical settlement provider, insurer, insured, viator, insurance policyowner, or other person engaged in the business of viatical settlements or insurance.
- Recklessly entering into, negotiating, brokering or otherwise dealing in a viatical settlement contract, the subject of which is a life insurance policy that was obtained on false information intended to defraud. “Recklessly” means acting or failing to act in conscious disregard for relevant facts or risks, involving a gross deviation from acceptable standards of conduct.
- Facilitating the viator’s change of residency to avoid the provisions of the Act.
- Facilitating or causing the creation of a trust with a non-Florida situs or other nonresident entity for the purpose of owning a life insurance policy covering a Florida resident to avoid the Act.
- Facilitating or causing the transfer of the ownership of an insurance policy covering a Florida resident to a trust with a non-Florida situs or other nonresident entity to avoid the provisions of the Act.
- Applying for or obtaining a loan that is secured, directly or indirectly, by an interest in a life insurance policy.
- Violating s. 626.99273(1) or (2), F.S., which are created by the bill. The prohibited action under subsection (1) is knowingly soliciting an offer from, effectuating a viatical settlement with, or making a sale to any viatical settlement provider, financing entity, or related provider trust that is controlling, controlled by or under common control with the viatical settlement provider. The prohibited action under subsection (2) is knowingly entering into a viatical settlement with a viator if anything of value will be paid to a viatical settlement broker that controls, is controlled by, or under common control with the viatical settlement provider, financing entity, or related provider trust that is involved in the viatical settlement.
- Attempting to commit, assisting, aiding, or abetting in the commission of or conspiring to commit a fraudulent viatical settlement act.

Section 3 amends s. 626.9914, F.S., making viatical settlement providers that commit fraudulent settlement acts subject to license suspension, revocation, denial, or nonrenewal by the OIR. The

²³ Under the bill, presenting includes causing false information to be presented concerning material facts, or preparing false information concerning material facts with the knowledge or belief that the information will be presented to or by another person.

OIR also has authority to assess administrative fines in lieu of or in addition to a suspension or revocation, and also may place an existing licensee on probation for 2 years or less.

Section 9 amends s. 626.99275, F.S., making it unlawful to engage in a fraudulent viatical settlement act. Violations of s. 626.99275, F.S., are punishable as a third degree felony if the insurance policy involved is valued at less than \$20,000; a second degree felony if the insurance policy involved is valued at \$20,000 or more but less than \$100,000; or a first degree felony if the insurance policy involved is valued at \$100,000 or more.

Stranger-originated Life Insurance – Definition; Criminal and Administrative Penalties

The bill defines stranger-originated life insurance (STOLI) practices and makes void and unenforceable contracts and agreements for the furtherance or aid of a STOLI practice. STOLI practices are included as fraudulent viatical settlement acts by the bill and thus are punishable as felonies under s. 626.99275, F.S., and such practices subject viatical settlement providers that commit them to fines and either probation or license suspension, revocation, denial or nonrenewal under s. 626.9914, F.S.

Section 1 amends s. 626.9911, F.S., defining a “stranger-originated life insurance practice” (STOLI) to mean the initiation of a life insurance policy for the benefit of a third-party investor who has no insurable interest in the insured at the time of policy origination. Two examples of a STOLI practice are provided. The first is the purchase of a life insurance policy with resources or guarantees from a person who could not lawfully initiate the policy and the execution of an agreement to transfer ownership of the policy to a third party. The second example is the creation of a trust that appears to have insurable interest to initiate policies for investors that violates insurable interest laws and the prohibition against wagering on life.

Stranger-originated life insurance practices are included within the definition of “fraudulent viatical settlement acts” created in this section. Accordingly, **Section 9** provides that STOLI practices are punishable as felonies under s. 626.99275, F.S., and **Section 3** subjects viatical settlement providers that commit them to fines and either license probation or license suspension, revocation, denial or nonrenewal under s. 626.9914, F.S.

Section 13 creates s. 626.99289, F.S., making void and unenforceable contracts, agreements, arrangements, and transactions entered into verbally or in writing, for the furtherance or aid of a STOLI practice. Such contracts include, but are not limited to, financing agreements or other arrangements that facilitate a STOLI practice.

Section 9 includes as a felony prohibited practice knowingly issuing, soliciting, marketing, or promoting the purchase of a life insurance policy for the purpose of, or with an emphasis on, selling the policy.

Viatical Settlement Act – Grounds for Administrative Action against Licensee and Maximum Fines

Section 3 of the bill amends s. 626.9914(2), F.S., to increase from \$2,500 to \$10,000 the maximum fines the OIR may impose for each nonwillful violation of the Viatical Settlement Act,

and increases from \$10,000 to \$25,000 the maximum fine for each willful violation of the Act. The OIR continues to have authority to levy such fines in lieu of or in addition to any suspension or revocation of licensure, and to place a licensee on probation for not more than 2 years in lieu of suspension, revocation, or nonrenewal.

The section also specifies that it is grounds for license probation or suspension, revocation, denial or nonrenewal for licensee to contract with a person who materially influences the licensee's conduct and who fails to meet the requirements of the Act. This expands current law, which requires the OIR to take action against a licensee that employs a person who materially influences the licensee's conduct and fails to meet the requirements of the Act.

Viatical Settlement Provider Licensee Annual Statement

Section 2 amends s. 626.9913, F.S., to increase the deposit requirement for viatical settlement provider licensees from \$100,000 to \$250,000.

The bill also specifies disclosures that a viatical settlement provider must make in its annual statement. Current law requires each viatical settlement provider licensee to provide an annual statement to the Office and pay a \$500 license fee on or before March 1. The bill requires the annual statement to specify the total number of unsettled viatical settlement contracts and the corresponding total amount due to viators, categorized by the number of days since the viator signed the contract for transactions regulated by the state. The annual statement must also specify, for the most recent 5 years, the total number of policies purchased, the total gross amount paid for the purchased policies, and the total face value of such policies, allocated by state, territory, and jurisdiction. Finally, the annual statement must specify the total amount of proceeds or compensation paid to policyowners, allocated by state, territory, and jurisdiction.

The bill provides the OIR rulemaking authority to implement s. 626.9913, F.S.

Mandatory Disclosures to Viator

Section 5 creates s. 626.99185, F.S., which requires the viatical settlement provider to provide to the viator a written disclosure, in duplicate, which must be signed by the viator before, or concurrently with, the execution of a viatical settlement contract or an amendment to the contract. The disclosure must name each viatical settlement broker that receives compensation and the amount of compensation each receives. The disclosure must also contain a complete reconciliation of the gross offer or bid by the viatical settlement provider to the net proceeds or value to be received by the viator related to the transaction. The gross offer is the total amount offered by the viatical settlement provider for the purchase of an interest in one or more life insurance policies, including commissions, compensation or other proceeds being deducted from the gross offer.

If the contract is subsequently amended or a change in the gross offer, the net proceeds to be received by the viator, or a change in the information provided in the disclosure statement, an amended disclosure statement must be provided by the viatical settlement provider and signed and dated by the viator.

Disclosure documentation must be maintained by the viatical settlement provider and made available to the OIR upon reasonable notice to the provider.

Prohibited Conflicts of Interest; Prohibition against Representing that Insurance is Free; Submission of Advertising Material to the OIR

Section 8 creates s. 626.99273, F.S., which prohibits viatical settlement providers and brokers from engaging in specified practices and conflicts of interests.

The following are the prohibited conflicts of interest:

- A viatical settlement broker is prohibited from knowingly soliciting an offer, effectuating a viatical settlement, or making a sale to a viatical settlement provider, financing entity, or related provider trust that is controlling, controlled by, or under common control with the broker.
- A viatical provider may not knowingly enter into a viatical settlement with a viator if, in connection with the settlement, anything of value will be paid to a viatical settlement broker that is controlling, controlled by, or under common control with the settlement provider, financing entity, or related provider trust involved with the settlement.

The following are the prohibited acts:

- A viatical settlement provider may not enter into a viatical settlement contract unless the promotional, advertising, and marketing materials have been filed with the office. The materials may not cause a viator to reasonably believe that the life insurance is free for any period of time.
- A life insurance producer, insurer, viatical settlement broker or viatical settlement provider may not make a statement or representation to an applicant or policyholder in connection with the sale of a life insurance policy to the effect that the insurance is free for any period of time.

The bill provides rulemaking authority to the OIR to administer s. 626.99273, F.S.

Prohibited Practices

Section 9 amends s. 626.99275, F.S., to specify additional prohibited practices under the Act. Under current law and the bill, engaging in a practice prohibited by this section is a felony offense.

The bill prohibits knowingly entering into a viatical settlement contract in two circumstances. The first is entering into a viatical settlement before the application for, or issuance of, a life insurance policy. This is essentially a prohibition on STOLI transactions where the life insurance is purchased for the benefit of a person or entity without an insurable interest. The second prohibition is against entering into a viatical settlement contract during the 5-year contestability period unless the viator provides a sworn affidavit and accompanying documentation pursuant to s. 626.99287, F.S. (Section 12 of the bill increases the contestability period for viatical settlement agreements from 2 years from the issuance of the life insurance policy to 5 years from the issuance of the policy and requires documentation that the exception applies).

The bill also prohibits knowingly issuing, soliciting, marketing, or promoting the purchase of a life insurance policy for the purpose of or with an emphasis on selling the policy. This provision is intended to prohibit such practices where the emphasis is on the purchaser of the policy subsequently selling the policy, essentially encouraging a STOLI practice.

The bill also makes engaging in a fraudulent viatical settlement act a prohibited practice. Section 1 of the bill defines fraudulent viatical settlement acts. The various acts that constitute a viatical settlement act are discussed earlier in this analysis under the subheading “Fraudulent Viatical Settlement Acts – Definition; Criminal and Administrative Penalties.”

Extension of the Contestability Period during Which Viatical Contracts are Prohibited

Section 12 amends s. 626.99287, F.S., which contains the contestability requirements for viaticated life insurance contracts. Generally, a life insurance policy cannot be viaticated during the contestability period and such viatical settlement contracts are void and unenforceable. The bill expands the contestability period for viaticated life insurance contracts from 2 years to 5 years. A viatical settlement contract may be entered into during the contestability period, however, under various exemptions, one of which is the execution by the viator of a sworn affidavit certifying that certain conditions such as the diagnosis of a life threatening illness or the death of a spouse have occurred. The bill provides that in order for an exception to be claimed the viator must provide a sworn affidavit that one of the exemptions apply.

The bill also revises two of the existing exceptions. The exception for a life insurance policy issued upon the owner’s exercise of conversion rights arising out of a group or term policy is limited by the bill to instances when the total time covered under the prior policy is at least 60 months. Conversion occurs when the insured converts life insurance under a group policy to an individual policy, often because the insured has lost the group policy. The exception for illness is changed and under the bill requires the viator to be “terminally or chronically ill.” Currently this exception requires a diagnosis of an illness or condition that is catastrophic, life threatening, or requires a course of treatment of at least 3 years or home health care.

The bill retains the 2 year contestability period if three conditions are met. The first condition is that policy premiums were funded exclusively with unencumbered assets which may include an interest in the policy being financed but only to the extent of the net cash surrendered value provided by or full recourse liability incurred by the insured. The second condition is that during the 2 years, an agreement was not entered into to guarantee the insured’s full recourse liability or to purchase the policy. The third condition is that the insured and the policy were not evaluated for settlement.

Required Notification to the Insurer of Execution of Sworn Affidavit Allowing a Viatical Settlement Contract during the Contestability Period

Section 10 creates s. 626.99276, F.S., to require that a copy of the sworn affidavit and documentation required to viaticate a policy during a contestability period to be submitted to the insurer if:

- The a party entering into a viatical settlement contract with a viator submits a request to the insurer for verification of coverage or

- The viatical settlement provider submits a request to the insurer to transfer the policy to the provider.

A viatical settlement provider must also execute and provide a sworn affidavit that the copy of the viator's sworn affidavit is a true and correct copy. The bill prohibits the insurer from requiring as a condition of verifying coverage or transferring a contract the viator, insured or viatical settlement provider execute a signed disclosure, consent form, waiver form or other form that is not approved by the OIR for use in connection with viatical settlement contracts. The insurer must, within 30 days of receiving a properly completed request for change of ownership or beneficiary of coverage, respond in writing confirming the change or specifying why the requested change cannot be processed.

Documentation of Viatical Provider Anti-Fraud Plans and Procedures

Section 11 amends s. 626.99278, F.S., to require each licensed viatical settlement provider to maintain documentation of compliance with its anti-fraud plan and procedures, resolved and unresolved material inconsistencies between medical records and insurance applications, and mandatory reporting to the Division of Insurance Fraud of possible fraudulent acts and prohibited practices specified in s. 626.99275, F.S.

Definitions

Section 1 defines "business of viatical settlements" to include numerous activities involved in the acquisition of an interest in a life insurance policy by means of a viatical settlement contract. The activities include offering, soliciting, negotiating, procuring, effectuating, purchasing, investing, monitoring, tracking, underwriting, selling, transferring, assigning, pledging, or hypothecating, or acquiring in other manner, an interest in a life insurance policy via a viatical settlement contract. The definition broadly defines "business of viatical settlements" for the purpose of applying the requirements of the Viatical Settlement Act to a wide-array of business practices related to viatical settlements.

Clarifies that provisions regarding a "related form" apply to an insured, as well as the viator.

The term "viatical settlement contract" is amended to include the transfer for compensation or value of an ownership or beneficial interest in a trust or other entity that owns a life insurance policy if the trust or entity was formed or used for the principal purpose of acquiring life insurance contracts that insure the life of a Florida resident. The definition is revised to facilitate the application of the Viatical Settlement Act to trusts that engage in such actions. The bill also clarifies that the term does not include accelerated death provisions in life insurance policies, loans secured by the cash surrender value of a policy, or loans from the issuer of the policy to the policyholder.

The term "viatical settlement provider" is amended to include licensed lending institutions (other than banks, savings banks, savings and loan associations, or credit unions) that take an assignment of a life insurance policy as collateral for a loan.

The bill also defines "fraudulent viatical settlement act" and "stranger-originated life insurance practice." The definitions and their effect are discussed above.

Technical Revisions

Section 4 amends s. 626.99175, F.S., to clarify the registration requirement for life expectancy providers.

Section 6 amends s. 626.9924(7), F.S., which requires viatical settlement providers to provide notice to the insurer of the policy, during the contestability period, that the policy has or will become a viaticated policy. The bill provides proper cross references and eliminates a cross-reference to a statute deleted by the bill.

Section 7 amends s. 626.99245(2), F.S., to correct a cross-reference.

Effective Date

The act takes effect July 1, 2016.

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 increases the maximum administrative fine for each nonwillful violation of s. 626.9914, F.S., from \$2,500 to \$10,000 and increases the maximum administrative fine for each willful violation from \$10,000 to \$25,000. The bill also increases the deposit requirement for viatical settlement provider licensees from \$100,000 to \$250,000.

C. Government Sector Impact:

The bill increases the maximum fines for violations in s. 626.9914, F.S., which will increase the fines collected by the OIR unless the number of fines levied under the statute decline substantially.

The bill requires additional forms and advertising materials to be submitted to the OIR for review prior to their use. The OIR states that it cannot anticipate the volume of advertising materials it will receive, nor the staff time that will be required to review them.

The Department of Financial Services opined that because its investigations in the viatical settlement industry primarily result from STOLI transactions, prohibiting STOLI will significantly reduce its viatical-related investigative caseload.²⁴

The Office of Financial Regulation (OFR) reviewed the bill and determined that it does not have an effect on the OFR.²⁵

VI. Technical Deficiencies:

Line 591 incorrectly references s. 626.9987, F.S., a statute that does not exist and is not created by this bill. The appropriate reference is s. 626.99287, F.S.

VII. Related Issues:

None.

VIII. Statutes Affected:

This bill substantially amends the following sections of the Florida Statutes: 626.9911, 626.9913, 626.9914, 626.99175, 626.9924, 626.99245, 626.99275, 626.99278, and 626.99287.

This bill creates the following sections of the Florida Statutes: 626.99185, 626.99273, 626.99276, and 626.99289.

IX. Additional Information:

A. Committee Substitute – Statement of Changes:

(Summarizing differences between the Committee Substitute and the prior version of the bill.)

CS by Banking and Insurance on January 26, 2016

The CS increases the deposit requirement for viatical settlement provider licensees from \$100,000 to \$250,000. The CS also provides the OIR rulemaking authority to implement 626.9913, F.S., and 626.99273, F.S. The CS also makes technical and clarifying changes.

B. Amendments:

None.

²⁴ Department of Financial Services, *Agency Bill Analysis of SB 650*, pgs. 3-4 (Jan. 6, 2016)(on file with the Senate Committee on Banking and Insurance).

²⁵ Email from Meredith Hinshelwood, Deputy Director of Governmental Relations, Florida Office of Financial Regulation, to Jamie Mongiovi (Nov. 2, 2015)(on file with the Senate Committee on Banking and Insurance).

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