HOUSE OF REPRESENTATIVES STAFF FINAL BILL ANALYSIS

BILL #: CS/CS/HB 311 Securities
SPONSOR(S): Commerce Committee and Insurance & Banking Subcommittee, Barnaby and others
TIED BILLS: **IDEN./SIM. BILLS:** CS/CS/SB 532

FINAL HOUSE FLOOR ACTION: 113 **Y's** 0 **N's** **GOVERNOR'S ACTION:** Approved

SUMMARY ANALYSIS

CS/CS/HB 311 passed the House on March 5, 2024, as CS/CS/SB 532.

In Florida, the Securities and Investor Protection Act (the Act) regulates securities issued, offered, and sold in the state of Florida. The Office of Financial Regulation (OFR) regulates and registers the offer and sale of securities in, to, or from Florida by firms, branch offices, and individuals affiliated with these firms.

The Act currently prohibits dealers, associated persons, and issuers from offering or selling securities in this state unless registered with the OFR or specifically exempted. Additionally, all securities in Florida must be registered with the OFR unless they meet a statutory exemption or are federally covered (i.e., under the exclusive jurisdiction of the United States Securities Exchange Commission).

Revisions to the Act include:

- Amending the limited offering exemption and crowdfunding exemption;
- Adding an accredited investor exemption and a micro-offering exemption;
- Allowing for demo-day presentations in the pre-offering stage;
- Adding control person liability provisions;
- Expanding the current civil liability for aiders and abettors of a securities law violation;
- Eliminating the requirement for 5 years of annual reports and audited financial statements applicable to simplified securities offerings that use the Small Company Offering Registration;
- Reducing the number of clients of an investment adviser that triggers registration from 15 to 6 clients;
- Increasing the maximum civil and administrative penalties that can be assessed against a natural person in an action by the Attorney General from $10,000 to $20,000;
- Doubling maximum fines assessed in civil and administrative actions by the Attorney General for securities violations targeting seniors and vulnerable adults;
- Eliminating the requirement that an investor make searches and inquiries to ascertain the assets of a judgement debtor before the investor recovers from the Securities Guaranty Fund (Fund), and applies the changes to acts for which recovery is sought which occur on or after October 1, 2024. The prior law continues to apply to Fund claims for judgments entered prior to October 1, 2024;
- Increasing the amount an eligible person may recover from the Fund from $10,000 to $15,000, adding an exception allowing recovery of up to $25,000 if the person is a specified adult, and increasing the aggregate limit on claims from $100,000 to $250,000;
- Rewriting certain portions of the Act for clarification purposes; and
- Generally modernizing Florida's securities laws in accordance with recent developments in federal securities laws and securities laws in other states.

The bill has no impact on local government and an insignificant positive impact on the private sector. It has an insignificant negative impact on state government expenses and an indeterminable positive impact on state government revenues.

The bill was approved by the Governor on May 10, 2024, ch. 2024-168, L.O.F., and will become effective on October 1, 2024.

I. SUBSTANTIVE INFORMATION

A. EFFECT OF CHANGES:

Background

FLORIDA BAR BUSINESS LAW SECTION TASK FORCE

The Executive Council of the Business Law Section of The Florida Bar appointed a Task Force (BLS Task Force) in September of 2022 to consider amendments to ch. 517, F.S., the Florida Securities and Investor Protection Act (Act), which codifies Florida's securities laws.[1] The BLS Task Force has worked closely with the Office of Financial Regulation (OFR), the agency which regulates Florida's securities industry and determines compliance with the Act,[2] to reform the Act.[3]

OFR, with the BLS Task Force's assistance, presented to the 2023 legislative session proposed amendments[4] to the Act that were limited to administrative and clarification changes, as OFR was aware that the BLS Task Force was working on more substantive changes to the Act.[5] The 2023 bill was enacted,[6] and the BLS Task Force and OFR are now presenting their recommendations for substantive amendments to the Act with this bill.[7] In summary, this bill is a joint effort of the BLS Task Force and OFR to bring Florida's securities laws up to date with changes in federal securities laws and other states' securities laws.[8]

Securities Regulation

Background

FEDERAL SECURITIES REGULATION

The federal Securities Exchange Act of 1934 (1934 Act) requires registration of securities market participants like broker-dealers and exchanges.[9] Generally, any person acting as "broker" or "dealer" as defined in the 1934 Act must be registered with the United States Securities and Exchange Commission (SEC) and join a self-regulatory organization (SRO), like the Financial Industry Regulatory Authority (FINRA) or a national securities exchange.[10]

The 1934 Act broadly defines "broker" as "any person engaged in the business of effecting transactions in securities for the account of others," which the SEC has interpreted to include involvement in any of the key aspects of a securities transaction, including solicitation, negotiation, and execution.[11] A

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[1] The Florida Bar Business Law Section, *Report of the Chapter 517 Task Force: Recommendations and Analysis of Proposed Amendments to the Florida Securities and Investor Protection Act*, p. 2 (Nov. 2023).
[2] Office of Financial Regulation, *Division of Securities*, https://flofr.gov/sitePages/DivisionOfSecurities.htm (last visited Jan. 3, 2024).
[3] The Florida Bar Business Law Section, *supra* note 1.
[4] *See* 2023 Senate Bill 180, and 2023 House Bill 253.
[5] The Florida Bar Business Law Section, *supra* note 1.
[6] Ch. 2023-205, Laws of Fla.
[7] The Florida Bar Business Law Section, *supra* note 1.
[8] *Id.*
[9] 15 U.S.C. §§ 78c(a)(4) and 78o. U.S. Securities and Exchange Commission, *Guide to Broker-Dealer Registration*, http://www.sec.gov/divisions/marketreg/bdguide.htm#II (last visited Jan. 3, 2024).
[10] A "national securities exchange" is a securities exchange that has registered with the SEC under Section 6 of the 1934 Act. Examples of national securities exchanges registered with the SEC include the Nasdaq Stock Market, NYSE National Inc., and the New York Stock Exchange LLC. *See* U.S. Securities and Exchange Commission, *National Securities Exchanges*, https://www.sec.gov/fast-answers/divisionsmarketregmrexchangesshtml (last visited Jan. 8, 2024).
[11] *Id.*

"dealer" is "any person engaged in the business of buying and selling securities for such person's own account through a broker or otherwise.[12]

Certain entities in the securities industry are often referred to as "broker-dealers" because such entities are considered "brokers" when executing trades on behalf of customers, but are "dealers" when executing trades for their own account. In addition to being registered with the SEC, broker-dealers must comply with state registration requirements.

STATE SECURITIES REGULATION

State laws that protect the investing public from fraudulent sales practices and activities are known as "Blue Sky Laws."[13] Florida's laws relating to the regulation of securities issued, offered, and sold in the State of Florida are codified under the Act.

OFR's Division of Securities (Division) regulates and registers the offer and sale of securities in, to, or from Florida by firms, branch offices, and individuals affiliated with these firms in accordance with the Act and Rule Chapter 69W, Florida Administrative Code.[14] The Financial Services Commission, comprised of the Governor and Cabinet (the Commission), serves as OFR's agency head for purposes of rulemaking and appoints OFR's Commissioner, who serves as the agency head for purposes of final agency action for all areas within OFR's regulatory authority.[15]

As of September 30, 2023, the Division had total registrants in the following areas:

- Dealers: 2,427
- Investment advisers: 8,359
- Branch offices: 11,702
- Associated Persons: 378,435[16]

Additionally, as of September 2023, OFR has five registered offerings and zero crowdfunding offerings.[17]

The Act prohibits dealers and associated persons from offering or selling securities in Florida unless registered with OFR or specifically exempted.[18] Additionally, all securities in Florida must be registered with OFR unless they meet one of the exemptions under the Act,[19] or are federally covered (i.e., under the exclusive jurisdiction of the SEC).[20]

Failure to meet the precise requirements of these exemptions can subject the violator to civil, criminal, and administrative liability for the sale of unregistered securities, which is a third-degree felony.[21] Civil remedies under the Act include rescission and damages.[22]

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[12] 15 U.S.C. § 78c(a)(5).
[13] U.S. Securities and Exchange Commission, *Blue Sky Laws*, http://www.sec.gov/answers/bluesky.htm (last visited Jan. 3, 2024).
[14] Office of Financial Regulation, *Division of Securities*, https://flofr.gov/sitePages/DivisionOfSecurities.htm (last visited Jan. 3, 2024).
[15] S. 20.121(3), F.S.
[16] Office of Financial Regulation, Agency Analysis of 2024 House Bill 311, p. 2 (Nov. 1, 2023).
[17] *Id.*
[18] S. 517.12, F.S.
[19] *See* ss. 517.051 or 517.061, F.S.
[20] S. 517.07, F.S. If a security is registered with the SEC, s. 517.082, F.S., requires the broker or issuer to notify OFR that the security is registered with the SEC.
[21] S. 517.302(1), F.S.
[22] S. 517.211, F.S.

Party Registration Requirements

The Act requires the following individuals or businesses to be registered with OFR before selling or offering to sell any securities in or from offices in this state, or selling securities to persons in this state from offices outside this state:[23]

- Dealers, which is defined as any person, other than an associated person of a dealer, that engages, for all or part of the person's time, directly or indirectly, as agent or principal in the business of offering, buying, selling, or otherwise dealing or trading in securities issued by another person.
    - The term does not include a licensed practicing attorney, bank authorized to do business in Florida, wholesaler selling exclusively to dealers, person buying and selling for the person's own account exclusively through a registered dealer or stock exchange, issuer, or natural person representing an issuer under certain conditions[24]
- Investment advisers, which is defined as any person that receives compensation, directly or indirectly, and engages for all or part of the person's time, directly or indirectly, in the business of advising others as to the value of securities or as to the advisability of investments in, purchasing of, or selling of securities.
    - The term contains similar exclusions as the exclusions for "dealers" in addition to a federal covered adviser, a person that does not hold itself out to the general public as an investment adviser and has no more than 15 clients within 12 consecutive months in this state, and a few other exclusions.[25]
- Associated persons, which is defined by a party's relation to a dealer or to an investment adviser:
    - With respect to a dealer, an associated person is an individual who is employed, appointed, or authorized by a dealer and who represents the dealer in effecting the purchase or sale of a security.
        - The term does not include a dealer or a partner, officer, or director of a dealer unless such person is specified in the group above. The term also does not include a dealer's employee whose function is only clerical or ministerial.
    - With respect to an investment adviser, an associated person is an individual, including, but not limited to, a partner, officer, director, or branch manager who is employed by or associated with, or is subject to the supervision or control of an investment adviser registered under the Act, and
        - Such person:
            - Makes recommendations or otherwise gives investment advice regarding securities;
            - Manages client accounts or portfolios;
            - Determines which recommendations regarding securities should be given;
            - Receives compensation to solicit, offer, or negotiate for the sale of investment advisory services; or
            - Supervises employees who perform a function outlined above.
        - The term does not include an investment adviser or an employee whose function is only clerical or ministerial.[26]

Effect of the Bill

The bill amends the following definitions:

- Accredited investor is amended to clarify the term is defined by rule of the Commission in accordance with SEC Rule 501, 17 C.F.R. s. 230.501, as amended.

[23] S. 517.12, F.S.
[24] S. 517.021(8), F.S.
[25] S. 517.021(14), F.S.
[26] S. 517.021(3), F.S.

- Boiler room is amended to mean an enterprise in which two or more persons in a common scheme or enterprise solicit potential investors through telephone calls, electronic mail, text messages, social media, chat rooms, or other electronic means.
- Dealer is restructured into subparagraphs for clarification.
- Federal covered adviser is amended to update cross-references.
- Investment adviser is amended as follows:
    - Reduces the threshold number of clients triggering registration from 15 clients to 6.
    - Deletes the exclusion applicable to a person whose transactions in this state are limited to those transactions described in s. 222(d) of the Investment Advisers Act of 1940.
    - Provides an exclusion for the U.S., a state, a political subdivision of a state, or an agency, authority, or instrumentality of one or more of the foregoing, or a business entity that is wholly owned by one or more of the foregoing, or an officer, agent, or employee of any of the foregoing acting as such in the course of his or her official duty.[27]

The bill adds the following definitions:

- Angel investor group[28] means a group of accredited investors[29] that holds regular meetings and has defined processes and procedures for making investment decisions, individually or among the membership of the group, and that is not an associated person, affiliate, or an agent of a dealer or investment adviser.
- Business entity[30] means a corporation, partnership, limited partnership, limited liability company, proprietorship, firm, enterprise, franchise, association, self-employed individual, or trust, whether fictitiously named or not, doing business in this state.

Exempt Securities

Background

It is unlawful and a violation of the Act for any person to sell or offer to sell an unregistered security within Florida unless the security is exempt under s. 517.051, F.S., or such sale or offering is otherwise exempt from the registration requirements of the Act.[31]

The exempt securities provided in the Act are self-executing and do not require any filing with OFR prior to claiming an exemption.[32] A person who claims entitlement to any of the exempt securities bears the burden of proving such entitlement in any proceeding brought under the Act.[33]

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[27] An example of this type of entity is the State Board of Administration of Florida (SBA), which is an asset management organization primarily responsible for investing state and local government assets. *See* Office of Program Policy Analysis and Government Accountability, *State Board of Administration of Florida*, https://oppaga.fl.gov/ProgramSummary/ProgramDetail?programNumber=4040 (last visited Jan. 8, 2024).

[28] This definition has been added for purposes of the newly created s. 517.0615, F.S., relating to solicitation of interest.

[29] An accredited investor is an individual or a business entity that is allowed to trade securities that may not be registered with financial authorities. They are entitled to this privileged access by satisfying at least one requirement regarding their income, net worth, asset size, governance status, or professional experience. The term is used by the SEC under Regulation D to refer to investors who are financially sophisticated and have a reduced need for the protection provided by regulatory disclosure filings." Adam Hayes, *Accredited Investor Defined: Understand the Requirements*, https://www.investopedia.com/terms/a/accreditedinvestor.asp (last visited Jan. 8, 2024).

[30] This definition has been added to expand the scope of entities subject to the provisions of the Act.

[31] S. 517.07, F.S.

[32] S. 517.051(1), F.S.

[33] *Id.*

Effect of the Bill

The bill clarifies that the antifraud enforcement provisions of s. 517.301, F.S., still apply to all securities exempt from registration under the Act.

Securities Issued by the U.S., a U.S. Territory, a State, etc.

Currently, a security issued or guaranteed by the U.S. or any territory or insular possession of the U.S., by the District of Columbia, or by any state of the U.S. or by any political subdivision or agency or other instrumentality thereof, is exempt from registration.[34]

The bill clarifies that a person may not directly or indirectly offer or sell securities, other than general obligation bonds if the issuer or guarantor is in default or has been in default any time after December 31, 1975, as to principal or interest (with respect to an obligation issued by the issuer or successor of the issuer; or with respect to an obligation guaranteed by the guarantor or successor of the guarantor), except by an offering circular containing a full and fair disclosure as prescribed by Commission rule.

Further, the bill provides that the foregoing does not apply to a security that is an industrial or commercial development bond, unless payments are made or unconditionally guaranteed by a person whose securities are exempt from registration under s. 18(b)(1) of the Securities Act of 1933, as amended (1933 Act).

Securities Issued by and Representative of an Interest in Certain Institutions

Currently, a security that is issued or guaranteed by a national bank, a federally chartered savings and loan association, or a federally chartered savings bank; any federal land bank, joint-stock land bank, or national farm loan association under the provisions of the Federal Farm Loan Act of July 17, 1916; an international bank of which the U.S. is a member; or a corporation created and acting as an instrumentality of the U.S. government is exempt.[35]

The bill removes this exemption in its entirety. In its place, the bill provides an exemption for a security that is issued by and represents, or will represent, an interest in or a direct obligation of, or that is guaranteed by:

- An international bank of which the U.S. is a member;
- A bank organized under the laws of the U.S.;
- A member bank of the Federal Reserve System; or
- A depository institution for which a substantial portion of the business consists or will consist of receiving deposits or share accounts that are insured to the maximum amount authorized by statute by the FDIC or the National Credit Union Share Insurance Fund.

Securities Issued by a Business Entity Owning a Railroad, Common Carrier, Etc.

Currently, a security issued or guaranteed, as to principal, interest, or dividend, by a corporation owning or operating a railroad, other common carrier, or any other public service utility (provided certain circumstances are met) is exempt from registration.[36] The bill replaces the term "corporation" with the term "business entity" to expand the scope of entities subject to the exemption.

Shares of a Residential Cooperative

The bill clarifies that shares or other equity interests of a business entity which represent ownership, or entitle the holders of such shares or other equity interests to possession and occupancy, of specific

[34] S. 517.051(1), F.S.
[35] S. 517.051(3), F.S.
[36] S. 517.051(4), F.S.

apartment units in property owned by such business entity and organized and operated on a cooperative basis, solely for residential purposes, is exempt from registration requirements.[37]

Interest in a Not-for-Profit Membership Entity Operated as a Cooperative

The bill also establishes a new exemption for a member's or owner's interest in a not-for-profit membership entity operated either as a cooperative under the cooperative laws of a state or in accordance with the applicable provisions of the IRC. However, the exemption only applies to a member's or owner's interest or like security sold or transferred to a bona fide member of the not-for-profit membership entity or a person who becomes a bona fide member of the not-for-profit membership entity at the time of or in connection with the sale or transfer.

Note, Draft, Bill of Exchange, or Banker's Acceptance Meeting Certain Requirements

Currently, a note, draft, bill of exchange, or banker's acceptance having a unit amount of $25,000 or more which arises out of a transaction, or the proceeds of which have been used for current transactions, and which has a maturity period at the time of issuance not exceeding 9 months exclusive of days of grace, or any renewal thereof which has a maturity period likewise limited, is exempt.[38] This applies only to prime quality negotiable commercial paper of a type not ordinarily purchased by the general public (i.e., paper issued to facilitate well-recognized types of current operational business requirements and of a type eligible for discounting by Federal Reserve banks).[39]

The bill removes this exemption in its entirety, subjecting the type of security described therein to registration, unless exempted otherwise.

Securities Issued by an Entity Organized for Religious, Educational or Similar Purpose

Currently, a security issued by a corporation organized and operated exclusively for religious, educational, benevolent, fraternal, charitable, or reformatory purposes and not for pecuniary profit, no part of the net earnings of which inures to the benefit of any private stockholder or individual, or any security of a fund that is excluded from the definition of an investment company under s. 3(c)(10)(B) of the Investment Company Act of 1940, is exempt from registration.[40]

The bill replaces the term "corporation" with "business entity" to expand the scope of entities subject to the exemption. Additionally, the bill amends the reference to the Investment Company Act of 1940 to include the phrase "as amended" to incorporate by reference any amendments to the Act as of the effective date of the bill.

Exempt Transactions

Background

It is unlawful and a violation of the Act for any person to sell or offer to sell a security within Florida unless the security is exempt under the Act, or such sale or offering is otherwise exempt from the registration requirements of s. 517.061, F.S.[41]

[37] The residential cooperative exemption is currently a transaction exemption in s. 517.061(14), F.S. The bill moves the exemption to the section of the Act relating to exempt securities, rather than exempt transactions, for clarification purposes. *See* The Florida Bar Business Law Section, *supra* note 1, at p. 12-13.
[38] S. 517.051(8), F.S.
[39] *Id.*
[40] S. 517.051(9), F.S.
[41] S. 517.071, F.S.

Current law provides over twenty transactions that are exempt from the registration requirements of the Act.[42] Examples include:

- Securities issued in exchange for one or more outstanding securities, claims, or property interests at any judicial, executor's, administrator's, guardian's, or conservator's sale, or at any sale by a receiver or trustee in insolvency or bankruptcy;[43]
- Certain isolated sales or offers for sale of securities when made by or on behalf of a vendor not the issuer or underwriter of the securities who, being the bona fide owner of such securities, disposes of his or her own property for his or her own account;[44]
- The distribution by a corporation, trust, or partnership, actively engaged in the business authorized by its charter, or other organizational articles or agreement, of securities to its stockholders or other equity security holders, partners, or beneficiaries as a stock dividend or other distribution out of earnings or surplus;[45]
- The distribution of the securities of an issuer exclusively among its own security holders, when no commission or other remuneration is paid or given in connection with the sale or distribution of such additional securities;[46]
- The offer or sale of securities from one corporation to another corporation provided that the sale price of the securities is $500,000 or more and the buyer and seller corporations each have assets of $500,000 or more;[47] and
- The offer or sale of securities under a bona fide employer-sponsored stock option, stock purchase, pension, profit-sharing, savings, or other benefit plan when offered only to employees of the sponsoring organization or to employees of its controlled subsidiaries.[48]

These exemptions are self-executing and do not require any filing with OFR prior to claiming an exemption.[49] A person who claims entitlement to such an exemption bears the burden of proving such entitlement in any proceeding brought under the Act.[50]

NASAA ACCREDITED INVESTOR EXEMPTION

The North American Securities Administrators Association (NASAA) is a voluntary, international, association whose membership consists of 67 state, provincial, and territorial securities administrators.[51] Formed in 1919, NASAA is the "oldest international organization devoted to investor protection."[52] NASAA advocates on behalf of state securities agencies in the United States that are responsible for capital formation and investor protection.[53] NASAA also coordinates training and education seminars for securities agency staff[54] and creates model rules for implementation amongst its members.[55]

On April 27, 1997, NASAA members voted to approve a "Model Accredited Investor Exemption," which exempts the offer or sale of a security by an issuer from the security registration process in a transaction meeting certain requirements.[56] Specifically, the exemption limits the sale of securities to

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[42] S. 517.061, F.S.
[43] S. 517.061(1), F.S.
[44] S. 517.061(3), F.S.
[45] S. 517.061(4), F.S.
[46] S. 517.061(6), F.S.
[47] S. 517.061(7), F.S.
[48] S. 517.061(15), F.S.
[49] S. 517.061(1), F.S.
[50] *Id.*
[51] NASAA, *Welcome to NASAA*, https://www.nasaa.org/about-us/ (last visited Jan. 2, 2024).
[52] *Id.*
[53] *Id.*
[54] *Id.*
[55] *See* NASAA, *NASAA Model Rule on Investment Adviser Representative Continuing Education (Model Rule 2002-411(h) or 1956-204(B)(6)-CE)*, https://www.nasaa.org/wp-content/uploads/2020/10/NASAA-IAR-CE-Model-Rule.pdf (last visited Jan. 2, 2024).
[56] Office of Financial Regulation, *supra* note 16, at p. 17.

accredited investors and the issuer must not be subject to disqualification.[57] The exemption also requires that an issuer file a notice of transaction, a consent to service of process, and a copy of the general announcement with the regulatory authority within 15 days after the first sale in the state.[58] The majority of states have adopted this accredited investor exemption.[59]

UNIFORM SECURITIES ACT

The Uniform Securities Act (USA) is a model act developed by the Uniform Law Commissioners.[60] The USA was first created in 1956 and was later amended in 1985 and again in 2002.[61] Most states' securities laws are based, to some degree, on the three variations of the USA (i.e., most states have either adopted one of these variations or used one variation as the basis for their statutes).[62]

Effect of the Bill

The bill reorganizes the portion of the Act relating to exempt transactions to group like transactions together and to generally modernize the type of transactions exempt thereunder in accordance with developments in federal securities laws and other states' securities laws.

Specifically, the bill adds an exemption for sales of securities effected through assignments for the benefit of creditors. The bill also creates a new exemption for a transaction involving a security issued in exchange, except in a case under Title 11 of the United States Code, for one or more bona fide outstanding securities, or property interests, or partly in such exchange and partly for cash, if the terms and conditions are approved by certain governmental entities after a hearing upon the fairness of such terms and conditions and at which all parties to the exchange have a right to appear.

The bill also:

- Expands the current exemption[63] related to a transaction involving the distribution of securities among an issuer's own security holders to include persons that at the date of the transaction are holders of options and all types of warrants;
- Replaces the terms "corporation, trust, or partnership" with the more expansive term "business entity" throughout for consistency;
- Requires, under the current exemption related to the offer or sale of securities from one corporation to another pursuant to a vote,[64] that the issuer is parties to the reorganization, and eliminates the requirement that the security holders consent to the sale of such securities;[65]
- Expands the current exemption relating to employer-sponsored stock option plans[66] to include any securities, plan interests, and guarantees issued under a compensatory benefit plan or compensation contract, and requires that the employee benefit plan be contained in a record established by the issuer, its parents, its majority-owned subsidiaries, or the majority-owned subsidiaries of the issuer's parent for the participation of their employees;
- Eliminates the requirement, under the exemption relating to the offer or sale of securities to a financial institution,[67] that the Commission define "institutional buyer," and makes the current caveat on the exemption that the offers or sales of securities cannot be for the direct or indirect

[57] *Id.*
[58] *Id.*
[59] *Id.*
[60] NASAA, *Uniform Securities Acts*, https://www.nasaa.org/industry-resources/uniform-securities-acts/ (last visited Jan. 8, 2024).
[61] *Id.*
[62] *Id.*
[63] S. 517.061(6), F.S.
[64] S. 517.061(9), F.S.
[65] This requirement is not eliminated entirely. The requirement for security holders' consent is a matter of corporate law and already covered under Florida's corporate laws, and therefore unnecessary to include it in the Act.
[66] S. 517.061(15), F.S.
[67] S. 517.061(11)(a), F.S.

promotion of any scheme or enterprise with the intent of violating or evading the Act generally applicable to all exemptions, not just this one; and
- Removes the provision prohibiting the payment of a commission or compensation for the sale of the securities in certain circumstances relating to the offer or sale, by or on behalf of an issuer, of its own securities, where there are no more than 35 purchasers, as the Act already prohibits any commission payment except to a registered dealer.

The bill also incorporates NASAA's model accredited investor exemption. Sales of securities may only be made to persons who are, or the issuer reasonably believes are, accredited investors. The exemption is not available to an issuer that is in the development stage and that has no specific business plan or purpose, or has indicated that its business plan is to engage in a merger or acquisition with an unidentified company or other entity or person.[68]

Additionally, the bill:
- Adds a secured party[69] to those eligible to participate in exempt transactions related to liquidation of a debt secured by a security;
- Creates an exemption for nonissuer transactions with a covered adviser, managing investments in excess of $100 million, acting in the exercise of discretionary authority in a signed record for the accounts of others; and
- Allows the Commission to recognize by rule clearinghouses able to clear option transactions for purposes of the exemption described above; requires that the underlying security is purchased or sold on a recognized security exchange registered under the 1934 Act and to eliminate the possibility that the underlying security instead be quoted on the National Association of Securities Dealers Automated Quotation System.[70]

The bill also creates an exemption for certain transactions based on the USA. Nonissuer transactions in an outstanding security by or through a dealer registered or exempt from registration are exempt if two conditions are met. First, the issuer must be a reporting issuer in Canada or in a foreign jurisdiction designated by Commission rule and the issuer has been subject to continuous reporting requirements for not less than 180 days before the transaction; and second, the security is listed on The Toronto Stock Exchange, Inc. or on a foreign jurisdiction's securities exchange that has been designated by Commission rule, or is a security of the same issuer that is of senior or substantially equal rank to the listed security or is a warrant or right to purchase or subscribe to any of the foregoing. The bill provides that OFR may revoke any designation of a securities exchange if OFR finds that revocation is necessary or appropriate in the public interest and for the protection of investors.[71]

Intrastate Crowdfunding

Background

Florida's intrastate crowdfunding exemption currently provides that an offer or sale of a security that is conducted in accordance with certain statutory requirements is an exempt transaction under the Act.[72] However, this exemption may not be used in conjunction with any other exemption under the Act.[73]

[68] *Id.* at 20.
[69] S. 517.061(2), F.S.
[70] *Id.* at 20-21.
[71] *Id.* at 21.
[72] S. 517.0611(2), F.S.
[73] *Id.*

The exemption requires that the offer or sale of securities be conducted in accordance with the requirements of the federal exemption for intrastate offerings in s. 3(a)(11) of the 1933 Act and SEC Rule 147.[74] Further, the exemption requires that an issuer:

- Be a for-profit business entity formed under the laws of the state, be registered with the Secretary of State, maintain its principal place of business in the state, and derive its revenues primarily from operations in the state;
- Conduct transactions for the offering through a dealer or intermediary registered with OFR;
- Not be, either before or as a result of the offering, an investment company or subject to the reporting requirements of s. 13 or s. 15(d) of the 1934 Act;
- Not be a company with an undefined business operation, a company that lacks a business plan, a company that lacks a stated investment goal for the funds being raised, or a company that plans to engage in a merger or acquisition with an unspecified business entity;
- Not be subject to a disqualification established by the Commission or OFR or a disqualification described in s. 517.1611, F.S., or SEC Rule 506(d). Each director, officer, person occupying a similar status or performing a similar function, or person holding more than 20% of the shares of the issuer, is subject to this requirement;
- Execute an escrow agreement with a federally insured financial institution authorized to do business in the state for the deposit of investor funds, and ensure that all offering proceeds are provided to the issuer only when the aggregate capital raised from all investors is equal to or greater than the target offering amount; and
- Allow investors to cancel a commitment to invest within 3 business days before the offering deadline, as stated in the disclosure statement, and issue refunds to all investors if the target offering amount is not reached by the offering deadline.[75]

Under this exemption, an issuer must provide investors and the dealer or intermediary, along with a copy to OFR at the time that the notice is filed, and make available to potential investors through the dealer or intermediary, a disclosure statement containing material information about the issuer and the offering, which must include certain specified information.[76]

The issuer must also provide OFR with a copy of the escrow agreement with a financial institution authorized to conduct business in this state.[77] All investor funds must be deposited in the escrow account.[78] The escrow agreement must require that all offering proceeds be released to the issuer only when the aggregate capital raised from all investors is equal to or greater than the minimum target offering amount specified in the disclosure statement as necessary to implement the business plan, and that all investors will receive a full return of their investment commitment if that target offering amount is not raised by the date stated in the disclosure statement.[79]

Currently, offerings are limited to $1 million, and offers or sales to a person owning 20% or more of the outstanding shares of any class or classes of securities or to an officer, director, partner, or trustee, or a person occupying a similar status, do not count toward this limitation.[80] Moreover, sales of securities to non-accredited investors in a 12-month period may not exceed:

- The greater of $2,000 or 5% of the annual income or net worth of such investor, if the annual income or the net worth of the investor is less than $100,000; or
- 10% of the annual income or net worth of such investor, not to exceed a maximum aggregate amount sold of $100,000, if either the annual income or net worth of the investor is equal to or exceeds $100,000.[81]

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[74] S. 517.0611(3), F.S.
[75] S. 517.0611(4), F.S.
[76] S. 517.0611(7), F.S.
[77] S. 517.0611(8), F.S.
[78] *Id.*
[79] *Id.*
[80] S. 517.0611(9), F.S.
[81] S. 517.0611(10), F.S.

OFR may summarily suspend a notice filing if the payment for the filing is dishonored by the financial institution upon with which the funds are drawn or if the issuer made a material false statement in the issuer's notice-filing.[82] A material false statement made in the issuer's notice-filing results in a final order by OFR revoking the notice-filing, issuing a fine and permanent bar to the issuer and all owners, officers, directors, and control persons, or any person occupying a similar status or performing a similar function of the issuer.[83]

The Act also provides certain requirements for intermediaries,[84] as well as prohibited activities for intermediaries.[85]

INVEST GEORGIA EXEMPTION

The Invest Georgia Exemption (IGE) was created in 2011 by the Georgia's Commissioner of Securities.[86] IGE allows for-profit businesses formed under Georgia law or properly registered to transact business in Georgia to raise up to $5 million in a single offering.[87] IGE filers can sell up to $10,000 in securities to non-accredited Georgia investors, and can sell up to the offering limit to accredited Georgia investors.[88]

Businesses qualify for the IGE program if 80% of gross revenues are derived from Georgia; 80% of assets are held in Georgia; 80% of the offering's proceeds are used in Georgia; or a majority of the issuer's employees are based in Georgia.[89]

Qualifying businesses are able to send out general solicitations to potential investors but can only offer and sell to Georgia residents.[90] Further, IGE does not set limitations on the securities offered; rather, IGE gives the issuer the freedom to set their own valuation for issuing equity or convertible notes, loans, etc.[91]

According to Georgia's Division of Securities, IGE has been successfully used by breweries, medical technology firms, real estate firms, manufacturers, restaurants, entertainment, and other businesses.[92] Over 100 companies have used IGE since its inception in 2011.[93]

Effect of the Bill

The bill renames the "Florida Intrastate Crowdfunding Exemption" to "The Florida Limited Offering Exemption," allows the exemption to be used in conjunction another exemption, and allows any for-profit business entity that is principally located in and gets its primary revenue within Florida, rather than only Florida corporations so located and funded, to use the exemption.

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[82] S. 517.0611(12)(a), F.S.
[83] S. 517.0611(12)(b), F.S.
[84] *See* S. 517.0611(13), F.S.
[85] *See* S. 517.0611(14), F.S.
[86] Georgia Secretary of State Securities Division, *Invest Georgia Exemption*, https://sos.ga.gov/sites/default/files/2023-05/IGE%20pamplet-web.pdf (last visited Jan. 10, 2024).
[87] *Id.*
[88] *Id.*
[89] *Id.*
[90] *Id.*
[91] *Id.*
[92] *Id.*
[93] *Id.*

The bill:

- Allows issuers conducting an offering of $2.5 million or less to conduct transactions without a dealer or intermediary registered with OFR, and requires that issuers conducting an offering of $2.5 million or more use a dealer or intermediary;
- Increases the offering limit under this exemption from $1 million to $5 million;
- Adds managers, managing members, or general partners to the list of those persons that do not count toward the offering limitation; and
- Replaces the term "shares" with "equity interests."

The bill eliminates the requirement to execute a third-party escrow agreement. It also requires that investor funds be deposited in an account in a federally insured financial institution and maintained in the account until the target offering amount has been reached, the offering has been terminated, or the offering has expired, and requires the issuer to refund all funds to investors within 10 business days if the target offering amount is not reached or the offering is terminated or expires.

The bill also:

- Eliminates a required attestation that the issuer and certain other related persons are not currently and have not been within the past 10 years the subject of regulatory or criminal actions involving fraud or deceit;
- Reduces the number of days in which an issuer must amend the notice it submitted to OFR from 30 days after any information becomes inaccurate to 10 business days after any material information becomes inaccurate;
- Allows the issuer to engage in general advertising and general solicitation of the offer to prospective investors, provided certain conditions are met; and
- Requires that the issuer provide the names of managers, managing members, and general partners and the ownership percentage of each person holding more than 20% of the issuer's equity interests.

It limits the amount of securities that can be sold by an issuer to an unaccredited investor to $10,000, rather than an amount that is a computation based on personal income or net worth. This bill also eliminates a required annual report to investors and OFR.

The bill retains the current substantive disclosure obligations of issuers to prospective investors. However, because of the change in maximum offering amounts and universal revisions to include control persons of certain entities, the financial disclosure obligations have been revised for differing offering amounts, clarified as to the required types of financial statements, and updated to conform with technical changes in federal securities laws.

Further, it allows a purchaser to void any sale made pursuant to this section by notifying the issuer that the purchaser expressly voids the purchase within 3 days after the first tender of consideration is made by such purchaser to the issuer. The purchaser's notice must be sent by email, certified mail, or overnight delivery service with proof of delivery.

Florida Invest Local Exemption

Effect of the Bill

The bill creates a new intrastate offering exemption, based in part on Georgia's IGE program. The offering is limited to $500,000 and any one investor may not invest more than $10,000 unless the investor is accredited, a specified employee, or a 10% or more shareholder. Under this exemption, an offer or sale of security by an issuer is exempt from the Act if the following conditions are met:

- An issuer must be a for-profit business entity registered with the Department of State with its principal place of business in this state.
- The issuer may not be, before or as a result of the offering:

    - An investment company;
    - Subject to the reporting requirements of the 1934 Act;
    - A business entity with an undefined business plan, that lacks a business plan, that lacks a stated investment goal for the funds being raised, or that plans to engage in a merger or acquisition with an unspecified business entity; or
    - Disqualified pursuant to s. 517.0616, F.S.[94]
- Further, the transaction must meet the requirements of the federal exemption for intrastate offerings in s. 3(a)(11) of the 1933 Act and SEC Rule 147 or SEC Rule 147A.

An issuer may engage in general advertising and general solicitation. However, any general advertising or general announcement must state that the offer is limited and open only to residents of this state and is subject to the enforcement provisions of the Act.

A purchaser must receive, at least 3 business days before any binding commitment to purchase or consideration paid, a disclosure document that provides material information of the issuer, which includes, but is not limited to, certain specified information under the exemption. All funds received from investors must be deposited into a bank or depository institution authorized to do business in this state and funds may not be withdrawn until the target offering amount has been received.[95]
The issuer must file a notice of the offering and the disclosure document with OFR on a form prescribed by Commission rule no less than 5 business days before the offering commences. A purchaser may void any sale made pursuant to this section by notifying the issuer that the purchaser expressly voids the purchase within 3 days after the first tender of consideration is made by such purchaser to the issuer. The purchaser's notice must be sent by email, hand delivery, courier service, or other method with proof of delivery.

Demo Day Presentations and "Testing the Waters"

Background

On November 2, 2020, the SEC adopted amendments to facilitate capital formation and increase opportunities for investors by expanding access to capital for small and medium-sized businesses and entrepreneurs across the United States.[96] The amendments affected various rules and requirements, including adding SEC Rule 148, relating to "demo day" communications and SEC Rule 241, relating to an issuer's ability to "test the waters" to determine whether there is any interest in a contemplated offering.[97]

SEC RULE 148

New SEC Rule 148[98] provides that certain "demo day" communications[99] will not be deemed a general solicitation or general advertising.[100] Under this rule, an issuer will not be deemed to have engaged in general solicitation if the communications are made in connection with an event sponsored by a college, university, or other institution of higher education, a state or local government or instrumentality thereof, a nonprofit organization, or an angel investor group. However, certain conditions must be

[94] Created by the bill, proposed s. 517.0616, F.S., provides that certain registration exemptions are not available to an issuer that would be disqualified under SEC Rule 506(d) at the time the issuer makes an offer for the sale of a security.
[95] *Id.* at p. 25.
[96] U.S. Securities and Exchange Commission, *Facilitating Capital Formation and Expanding Investment Opportunities by Improving Access to Capital in Private Markets*, https://www.sec.gov/corpfin/facilitating-capital-formation-secg (last visited Jan. 8, 2024).
[97] *Id.*
[98] 17 C.F.R. 230.148.
[99] For purposes of SEC Rule 148, "communications" mean communications made in connection with an event sponsored by a group or entity that invites issuers to present their businesses to potential investors with the aim of securing investment. *See* U.S. Securities and Exchange Commission, *supra* note 96.
[100] *Id.*

satisfied, such as limits on the sponsor's activities, a requirement that the advertising for the event not reference any specific offering of securities by the issuer, and limits on the information conveyed at the event regarding the offering of securities by or on behalf of the issuer.[101]

SEC RULE 241

SEC Rule 241[102] permits an issuer, or any person authorized to act on behalf of an issuer, to communicate orally or in writing to determine whether there is any interest in a contemplated exempt offering prior to deciding on the exemption it plans to use.[103] The new rule requires such generic "testing the waters" materials, also known as solicitations of interest, to state that:

- The issuer is considering an offering of securities exempt from registration under the 1933 Act, but has not determined a specific exemption from registration the issuer intends to rely on for the subsequent offer and sale of the securities;
- No money or other consideration is being solicited, and if sent in response, will not be accepted;
- No offer to buy the securities can be accepted and no part of the purchase price can be received until the issuer determines the exemption under which the offering is intended to be conducted and, where applicable, the filing, disclosure, or qualification requirements of such exemption are met; and
- A person's indication of interest involves no obligation or commitment of any kind.[104]

The communication may include a means for a person to indicate interest in a potential offering and an issuer may require such indication to include the person's name, address, telephone number, and email address.[105] SEC Rule 241 also requires that the generic solicitation materials be made publicly available as an exhibit to the offering materials filed with the SEC if a Regulation A[106] or Regulation Crowdfunding[107] offering is commenced within 30 days of the generic solicitation, and that an issuer provide purchasers with the materials if the issuer sells securities under Rule 506(b) within 30 days of the generic solicitation of interest to any purchaser that is not an accredited investor.[108]

Effect of the Bill

The bill allows issuers to engage in solicitation of potential investors under specified limited conditions. In doing so, the bill adopts SEC Rule 148 that provides for issuer presentation at a specified form of a "demo day" meeting that is sponsored by one of the specified organizations. The bill also adopts SEC Rule 241, allowing issuers to "test the waters" before making any offering to determine whether the time, energy, and expense of a possible offering would be worthwhile. Both provisions allow a potential issuer to evaluate the viability of an offering and accordingly avoid unnecessary time and expense. All communications made under these provisions are subject to the anti-fraud provisions of the Act.[109]

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[101] *Id.*
[102] 17 C.F.R. 230.241.
[103] U.S. Securities and Exchange Commission, supra note 96.
[104] *Id.*
[105] *Id.*
[106] SEC Regulation A establishes two tiers of offerings that are exempt from registration under the 1933 Act. *See* U.S. Securities and Exchange Commission, *supra* note 96.
[107] The SEC Regulation Crowdfunding provides an exemption from registration for certain securities offerings that solicit relatively small individual investments or contributions from a large number of investors. *Id.*
[108] U.S. Securities and Exchange Commission, *supra* note 96.
[109] The Florida Bar Business Law Section, *supra* note 1, at p. 56.

Registration Procedures

Background

All securities required by the Act to be registered before being sold in Florida and not entitled to registration by notification must be registered in the manner provided by Act.[110] OFR receives and reviews the applications for securities to be registered, and the Commission may prescribe forms on which such applications are to be submitted.[111] Applications must be signed by the applicant, sworn to by any person having knowledge of the facts, and filed with OFR.[112]

OFR may require the applicant to submit to the following information concerning the issuer and such other relevant information as OFR may need to ascertain whether such securities shall be registered under the Act:

- The names and addresses of:
  - All the directors, trustees, and officers, if the issuer is a corporation, association, or trust.
  - All the managers or managing members, if the issuer is a limited liability company.
  - All the partners, if the issuer is a partnership.
  - The issuer, if the issuer is a sole proprietorship or natural person.
- The location of the issuer's principal business office and of its principal office in this state, if any.
- The general character of the business actually to be transacted by the issuer and the purposes of the proposed issue.
- A statement of the capitalization of the issuer.
- A balance sheet showing the amount and general character of its assets and liabilities on a day not more than 90 days prior to the date of filing such balance sheet or such longer period of time, not exceeding 6 months, as OFR may permit at the written request of the issuer on a showing of good cause therefor.
- A detailed statement of the plan upon which the issuer proposes to transact business.
- A statement of the amount of the issuer's income, expenses, and fixed charges during the last fiscal year or, if in actual business less than 1 year, then for such time as the issuer has been in actual business.
- A statement of the issuer's cash sources and application during the last fiscal year or, if in actual business less than 1 year, then for such time as the issuer has been in actual business.
- A statement showing the maximum price at which such security is proposed to be sold, together with the maximum amount of commission, including expenses, or other form of remuneration to be paid in cash or otherwise, directly or indirectly, for or in connection with the sale or offering for sale of such securities.
- A copy of the opinion or opinions of counsel concerning the legality of the issue or other matters which OFR may determine to be relevant to the issue.
- A detailed statement showing the items of cash, property, services, patents, good will, and any other consideration in payment for which such securities have been or are to be issued.
- The amount of securities to be set aside and disposed of and a statement of all securities issued from time to time for promotional purposes.[113]

OFR may also require the applicant to submit a copy of the securities certificate, if applicable, and a copy of any circular, prospectus, advertisement, or other description of such securities.[114] The Commission shall adopt a form for a simplified offering circular to register securities that are sold in offerings in which the aggregate offering price in any consecutive 12-month period does not exceed $5

[110] S. 517.081(1), F.S.
[111] S. 517.081(2), F.S.
[112] S. 517.081(2), F.S.
[113] S. 517.081(3), F.S.
[114] S. 517.081(3)(g)1., F.S.

million.[115] This is synonymous with a Small Company Offering Registration (SCOR) under the 1933 Act.[116] To qualify for use of the simplified offering circular, the issuer must:

- Agree to provide OFR with an annual financial report containing a balance sheet as of the end of the issuer's fiscal year and a statement of income for such year (and if the issuer has more than 100 security holders at the end of a fiscal year, the financial statements must be audited); and
- Annual financial reports must be filed with OFR within 90 days after the close of the issuer's fiscal year for each of the first 5 years following the effective date of the registration.[117]

Further, if the issuer is a corporation, a copy of its articles of incorporation with all amendments and of its existing bylaws, if not already on file, must be filed with OFR. If the issuer is a limited liability company, a copy of the articles of organization with all the amendments and a copy of the company's operating agreement as may be amended, if not already on file, must be filed with OFR. If the issuer is a trustee, a copy of all instruments by which the trust is created or declared and in which it is accepted and acknowledged must be filed with OFR. If the issuer is a partnership, unincorporated association, joint-stock company, or any other form of organization whatsoever, a copy of its articles of partnership or association and all other papers pertaining to its organization, if not already on file, must be filed with OFR.[118]

An issuer filing an application must, at the time of filing, pay OFR a nonreturnable fee of $1,000 per application for each offering that exceeds $5 million, or $200 per application for each offering that does not exceed $5 million.[119]

If upon examination of an application OFR finds that the sale of the security would not be fraudulent, that the terms of the sale of such securities would be fair, just, and equitable, and that the enterprise or business of the issuer is not based upon unsound business principles, OFR must record the registration of such security in the register of securities.[120] Thereafter, such registered security may be sold by any registered dealer, subject, however, to the further order of OFR.[121]
The OFR must consider a filed application abandoned if the issuer or any person acting on behalf of the issuer has failed to timely complete an application specified by Commission rule.[122]

Effect of the Bill

The bill:

- Consolidates the provisions of the Act relating to the Commission's rule-making authority for registration procedures;
- Eliminates the requirement for 5 years of annual reports and audited financial statements applicable to simplified securities offerings that use the SCOR registration method; and
- Eliminates the prohibition against a person using the SCOR registration method for the resale of securities, which will allow non-control persons to resell securities through a Florida-based registration process.[123]

[115] S. 517.081(3)(g)2., F.S.
[116] The Florida Bar Business Law Section, *supra* note 1, at p. 59.
[117] S. 517.081(3)(g)2., F.S.
[118] S. 517.081(3)(n), F.S.
[119] S. 517.081(6), F.S.
[120] S. 517.081(7), F.S.
[121] S. 517.081(7), F.S.
[122] S. 517.081(8), F.S.
[123]

Consent to Service

Background

The Act requires an issuer, upon any initial application for registration under the Act or upon request of OFR, to file with such application the irrevocable written consent to service.[124] The written consent must be authenticated by the seal of said issuer (if it has a seal), and by the acknowledged signature of a member of the co-partnership or company, or by the acknowledged signature of any officer of the incorporated or unincorporated association, and such consent to service must be duly authorized by resolution of the board of directors, trustees, or managers of the corporation or association (and such resolutions must be filed as a certified copy with the written consent to service).[125]

Effect of the Bill

The bill expands the type of persons who are eligible to sign the written consent on behalf of a business entity to include directors, managers, managing members, general partners, trustees, or officers of the issuer. The bill also expands the persons who can authorize the signer to execute the written consent to include the issuer's general partners and managing members.

Securities Guaranty Fund

Background

The Act establishes Florida's Securities Guaranty Fund (SGF).[126] The SGF provides financial assistance to persons who are adjudged by a court to have suffered monetary damages as a result of a violation of ss. 517.07 or 517.301, F.S., committed by a dealer, investment adviser, or associated person who was licensed under the Act at the time the violation occurred.[127] The SGF is funded by a percentage of revenues received as assessment fees by OFR.[128]

For a person to be eligible to receive payment from the SGF, the following requirements must be met:

- The act for which recovery is sought occurred on or after January 1, 1979;
- The person has received final judgement from a court that a violation of ss. 517.07 or 517.301, F.S., occurred for which monetary damages are awarded;
- The person has made all reasonable searches and inquiries to ascertain whether the violator possesses assets that can be sold in satisfaction of the damages awarded, and in such search has discovered no or insufficient assets; and
- The person has applied any amounts recovered from the violator, or from any other source, to the damages awarded by the court.[129]

PAYMENT FROM THE FUND

Any person who meets all the requirements outlined above may apply to OFR for payment to be made to such person from the SGF in the amount equal to the unsatisfied portion of such person's judgement

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[124] S. 517.101, F.S.
[125] S. 517.101(1), F.S.
[126] S. 517.101, F.S.
[127] S. 517.131(1)(a), F.S. See also, Office of Financial Regulation, *Statute Review: Biennial Report December 2022* (https://flofr.gov/sitePages/documents/OFR-Statute-Review-Report-2022.pdf), p. 21-22 (last visited Jan 4, 2024).
[128] S. 517.131(1)(a), F.S. Specifically, a maximum of 20% of all revenues received as assessment fees pursuant to ss. 517.12(9) and (10), F.S., for dealers and investment advisers (or s. 517.1201 for federal covered advisers), and a maximum of 10% of all revenues received as assessment fees pursuant to ss. 517.12(9) and (10), F.S., for associated persons must be part of the regular registration fee and must be transferred to the SGF.
[129] S. 517.131(2), F.S.

or $10,000, whichever is less, but only to the extent and amount reflected in the judgement as being actual or compensatory damages, excluding post-judgement interest, costs, and attorney's fees.[130]

Among other things, the Act also establishes that:[131]

- Regardless of the number of claims involved, payments for claims shall be limited in the aggregate to $100,000 against any one dealer, investment adviser, or associated person.
    - If the total claims exceed the aggregate limit of $100,000, OFR shall prorate the payment to each claimant based upon the ration that the person's claim bears to the total claims filed.
- If the final judgement that gave rise to the claim is overturned in any appeal or any collateral proceeding, the claimant must reimburse the SGF all amounts paid from the SGF.
    - The claimant shall reimburse the SGF all amounts paid from the SGF following any satisfaction of the final judgement.
    - Such reimbursement must be paid to OFR within 60 days after the final resolution of the appellate or collateral proceedings or the satisfaction of judgement, with the 60-day period commencing on the date the final order or decision is entered in such proceedings.
- OFR may institute legal proceedings to enforce compliance with the section and with s. 517.131, F.S., to recover money owed to the SGF, and is entitled to recover interest, costs, and fees in any action brought pursuant to the section in which OFR prevails.

Moreover, the Act requires a claimant to wait a minimum of two years after filing a claim with OFR before a payment determination can be made.[132]

Effect of the Bill

These sections are substantially reorganized and amended to improve usability and clarity. Additionally, the term "license" is replaced with "registration" for accuracy and the term "Fund" is replaced with "Securities Guaranty Fund" for consistency throughout ss. 517.131 and 517.141, F.S.

SECURITIES GUARANTY FUND

The bill:

- Specifies that the purpose of the SGF is to provide monetary relief to victims of securities violations under the Act who are entitled to monetary damages or restitution and cannot recover the full amount of such monetary damages or restitution from the violator.
- Defines the term "final judgment" as also including an arbitration award confirmed by a court of competent jurisdiction.
- Requires that a person meet the following conditions to be eligible for payment from the SGF for acts that occur on or after October 1, 2024:
    - The person holds an unsatisfied final judgment entered on or after October 1, 2024, in which a violator was found to have violated s. 517.07, F.S. or s. 517.301, F.S.
    - The person has applied any amounts recovered from the judgment debtor, or from any other source, to the damages awarded by the court or arbitrator.
    - The person is a natural person who was a resident of this state or is a business entity that was domiciled in this state at the time of the violation giving rise to the claim.
    - In making the above changes, the bill eliminates the ability of OFR to waive certain requirements under the section, and the requirement that the claimant make all reasonable searches and inquiries to ascertain whether the judgment debtor possesses real or personal property or other assets subject to being sold or applied in satisfaction of the judgment.

[130] S. 517.131, F.S.
[131] S. 517.141, F.S.
[132] S. 517.141(3), F.S.

- Prohibits a person from being eligible for payment from the Fund if the person has:
  - Participated or assisted in a violation of the Act;
  - Attempted to commit or committed a violation of the Act; or
  - Profited from a violation of the Act

The bill requires that an eligible person, or a receiver on behalf of an eligible person, seeking payment from the SGF to file a written application. The application must be filed with OFR within 1 year after the date of the final judgment, the date on which restitution order has been ripe for execution, or the date of any appellate decision thereon, and the application must contain such information as OFR may require.

Each eligible person or receiver, within 90 days after OFR's receipt of a complete application, must be given written notice, personally or by mail, that OFR intends to approve or deny, or has approved or denied, the application for payment from the SGF. In making this change, the bill eliminates the current two-year waiting period.

The bill requires an eligible person or receiver to assign all right, title, and interest in the final judgment or order of restitution, to the extent of such payment to OFR upon receipt of the notice indicating OFR's intent to approve an application for payment from the SGF and before any disbursement, rather than upon receipt of payment. Further, the bill requires OFR to deem an application abandoned if the eligible person fails to timely complete the application as prescribed by Commission rule.[133]

PAYMENT FROM THE FUND

The bill increases the amount that an eligible person may recover from the SGF from $10,000 to $15,000, adds an exception allowing recovery of up to $25,000 if the person is a specified adult.[134] The aggregate limit on claims is also increased from $100,000 to $250,000.

Further, the bill requires:

- OFR to submit authorization for payment to the Chief Financial Officer within 30 days after the approval of an eligible person for payment from the SGF, and allow the Chief Financial Officer's designee, to make payments or disbursements from the SGF;
- Reimbursements to the SGF be paid to the Department of Financial Services (DFS), rather than OFR; and
- A claimant who knowingly and willfully files (or causes to be filed) an application or any supporting documentation that contains false, incomplete, or misleading information in any material aspect forfeits all payments from the SGF. (The bill also specifies that filing such false documentation is unlawful and a violation of the Act and punishable as provided therein.)

In connection with the above referenced changes, the bill allows DFS, instead of OFR, to institute legal proceedings to enforce compliance with s. 517.131, F.S., and to recover money owed to the SGF, and to recover interest, costs, and attorney's fees in any action brought pursuant to this section in which DFS prevails. The bill also eliminates the two-year waiting period.

[133] Office of Financial Regulation, *supra* note 16, at p. 29.

[134] The Act defines "specified adult" as a natural person 65 years of age or older, or a natural person 18 years of age or older whose ability to perform the normal activities of daily living or to provide for his or her own care or protection is impaired due to a mental, emotional, sensory, long-term physical, or developmental disability or dysfunction, or brain damage, or the infirmities of aging. *See* s. 517.34(1)(b), and s. 415.102(28), F.S.

Enforcement by OFR and the Attorney General; Civil Penalties for Violations

Background

When it appears to OFR, whether upon complaint or otherwise, that a person has engaged in any act constituting a violation of the Act or a rule or order thereunder, OFR may investigate and, if the evidence is sufficient, may bring an action on behalf of the state against such person.[135]

Additionally, OFR may also apply to the court for an order directing the defendant to make restitution of those sums shown by OFR to have been obtained in violation of the Act.[136] OFR may also petition the court to impose a civil penalty against the defendant in an amount not to exceed:

- $10,000 for a natural person or $25,000 for any other person, or the gross amount of pecuniary gain to such defendant for each such violation, other than a violation of s. 517.301, F.S.;
- Plus $50,000 for a natural person or $250,000 for any other person, or the gross amount of pecuniary gain to such defendant for each violation of s. 517.301, F.S.[137]

All civil penalties collected pursuant to the above-referenced statutory guidelines must be deposited into the Anti-Fraud Trust Fund.[138]

In addition to the authority granted to OFR, the section also provides that when the Attorney General, whether upon complaint or otherwise, has reason to believe that a person has engaged or is about to engage in a practice constituting a violation of ss. 517.275, 517.301, 517.311, or s. 517.312, F.S., the Attorney General may investigate and bring an action to enforce certain provisions of the Act after receiving written approval from OFR.[139]

The Act does not limit the authority of OFR to bring an administrative action against any person that is the subject of a civil action brought pursuant to the Act or limit the authority of OFR to engage in investigations or enforcement actions with the Attorney General.[140] However, a person may not be subject to both a civil penalty described above and an administrative fine under s. 517.221(3), F.S., as a result of the same facts.[141]

An enforcement action must be brought within 6 years after the facts giving rise to the cause of action were discovered or should have been discovered with the exercise of due diligence, but not more than 8 years after the date such violation occurred.[142]

Effect of the Bill

The bill:

- Increases the civil penalty imposable upon a natural person from $10,000 to $20,000;
- Allows OFR to recover any costs and attorney fees related to its investigation or enforcement of the section, which must also be deposited into the Anti-Fraud Trust Fund;
- Provides that in the event a specified adult[143] is a victim of a violation of the section, twice the amount of the civil penalty that would otherwise be imposed, which is $50,000 for a natural person or $250,000 for a business entity;

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[135] S. 517.191, F.S.
[136] S. 517.191(3), F.S.
[137] S. 517.191(4), F.S.
[138] *Id.*
[139] S. 517.191(5), F.S.
[140] S. 517.191(6), F.S.
[141] *Id.*
[142] S. 517.191(7), F.S.
[143] The Act defines "specified adult" as a natural person 65 years of age or older, or a natural person 18 years of age or older whose ability to perform the normal activities of daily living or to provide for his or her own care or protection is

- Establishes joint and several liability for any control person who is found to have violated any provision of the Act;
- Provides that a person who knowingly and recklessly provides substantial assistance to another person in violation of a provision of the Act is deemed to violate the provision to the same extent as the person to whom such assistance was provided;
- Allows OFR to issue and serve upon a person a cease and desist order if OFR has reason to believe the person violates any provision of the Act, as well as an emergency cease and desist order under certain circumstances; and
- Grants OFR the authority to impose and collect an administrative fine against any person found to have violated any provision of the Act, which must also be deposited into the Anti-Fraud Trust Fund.

Remedies Available in Cases of Unlawful Sale

Background

The Act provides that every sale made in violation of either ss. 517.07[144] or 517.12(1),[145] (3),[146] (4),[147] (8),[148] (10),[149] (12),[150] (15),[151] or (17),[152] F.S., may be rescinded at the election of the purchaser, except a sale made in violation of the provisions relating to a renewal of a branch office notification and a sale made in violation of the provisions relating to filing a change of address amendment is not subject to rescission.

Moreover, each person making the sale and every agent of the seller, if the agent has personally participated or aided in making the sale, is jointly and severally liable to the purchaser in an action for rescission, if the purchaser still owns the security, or for damages, if the purchaser has sold the security.[153] Additionally, any person purchasing or selling a security in violation of s. 517.301, F.S.,[154] and every agent of such person, if the agent has personally participated or aided in making the sale or purchase, is jointly and severally liable to the person selling the security to or purchasing the security from such person in an action for rescission, if the plaintiff still owns the security, or for damages, if the plaintiff has sold the security.[155]

impaired due to a mental, emotional, sensory, long-term physical, or developmental disability or dysfunction, or brain damage, or the infirmities of aging. *See* s. 517.34(1)(b), and s. 415.102(28), F.S.

[144] S. 517.07, F.S., relates to viatical settlement investments.

[145] S. 517.12(1), F.S., relates to a general prohibition against dealers and associated persons from selling or offering to sale any securities in or from offices in Florida to persons in Florida unless the person is registered with OFR.

[146] S. 517.12(3), F.S., relates to the registration and notice-filings of investment advisers, associated persons of investment advisers, and federal covered advisers with OFR.

[147] S. 517.12(4), F.S., relates to a general prohibition against dealers and investment advisers conducting business from a branch office in Florida unless the branch office is registered has notice-filed with OFR pursuant to the Act.

[148] S. 517.12(8), F.S., relates to a requirement that all dealers comply with the net capital and ratio requirements imposed pursuant to the 1934 Act.

[149] S. 517.12(10), F.S., relates to a general requirement that OFR register an applicant upon a finding that the applicant has complied with the applicable registration provisions of the Act.

[150] S. 517.12(12), F.S., relates to registration procedures when changes in personnel of a partnership or in the principals, copartners, officers, or directors of a dealer or investment adviser occurs.

[151] S. 517.12(15), F.S., relates to a general requirement that every applicant for initial or renewal registration as a securities dealer and every person so registered must be registered as a broker or dealer with the SEC.

[152] S. 517.12(17), F.S., relates to a requirement that every dealer and associated person registered or required to be registered with OFR must satisfy any continuing education requirements established by rule.

[153] S. 517.211(1), F.S.

[154] S. 517.301, F.S., relates to fraudulent transactions and the falsification or concealment of facts.

[155] S. 517.211(2), F.S.

The Act further provides that:

- In an action for rescission:
  - A purchaser may recover the consideration paid for the security, plus interest thereon at the legal rate, less the amount of any income received by the purchaser on the security upon tender of the security.
  - A seller may recover the security upon tender of the consideration paid for the security, plus interest at the legal rate, less the amount of any income received by the defendant on the security.[156]
- In an action for damages brought by a purchaser of a security or investment, the plaintiff shall recover an amount equal to the difference between:
  - The consideration paid for the security, plus interest thereon at the legal rate from the date of purchase; and
  - The value of the security at the time it was disposed of by the plaintiff, plus the amount of any income received on the security by the plaintiff.[157]
- In an action for damages brought by a seller of a security, the plaintiff shall recover an amount equal to the difference between:
  - The value of the security at the time of the complaint, plus the amount of any income received by the defendant on the security; and
  - The consideration received for the security, plus interest at the legal rate from the date of sale.[158]

In any such action, including an appeal, the court shall award reasonable attorneys' fees to the prevailing party unless the court finds that doing so would be unjust.[159]

Effect of the Bill

The bill establishes that, for purposes of any action brought regarding an unlawful sale, a control person who controls any person found to have violated any provision specified in s. 517.211(1), F.S., is also jointly and severally liable with such controlled person, unless the control person can establish by a preponderance of the evidence that they acted in good faith and did not induce the act that constituted the violation.[160]

Fraudulent Transactions; Falsification or Concealment of Facts; Boiler Rooms

Background

The Act defines the term "investment" for purposes of ss. 517.311[161] and 517.312, F.S.,[162] as any commitment of money or property principally induced by a representation that an economic benefit may be derived from such commitment, except that the term does not include a commitment of money or property for:

- The purchase of a business opportunity, business enterprise, or real property through a person licensed under ch. 475, F.S.,[163] or registered under former ch. 498, F.S.;[164] or
- The purchase of tangible personal property through a person not engaged in telephone solicitation, where said property is offered and sold in accordance with the following conditions:
  - There are no specific representations or guarantees made by the offeror or seller as to the economic benefit to be derived from the purchase;

[156] S. 517.211(3), F.S.
[157] S. 517.211(4), F.S.
[158] S. 517.211(5), F.S.
[159] S. 517.211(6), F.S.
[160] Office of Financial Regulation, *supra* note 16, at p. 31.
[161] S. 517.311, F.S., relates to false representations, deceptive words, and enforcement.
[162] S. 517.312, F.S., relates to securities, investments, boiler rooms; prohibited practices; and remedies.
[163] Chapter 475, F.S., relates to, among other things, the licensure and regulation of real estate brokers.
[164] The former chapter 498, F.S., related to, among other things, the licensure and regulation of land sales practices.

- The tangible property is delivered to the purchaser within 30 days after sale, except that such 30-day period may be extended by the office if market conditions so warrant; and
- The seller has offered the purchaser a full refund policy in writing, exercisable by the purchaser within 10 days of the date of delivery of such tangible personal property, except that the amount of such refund may not exceed the bid price in effect at the time the property is returned to the seller.

It is unlawful and a violation of the Act for a person, in connection with the rendering of any investment advice or in connection with the offer, sale, or purchase of any security, including any security exempted under the provisions of the Act and including any security sold in a transaction exempted under the Act, directly or indirectly:

- To employ any device, scheme, or artifice to defraud;
- To obtain money or property by means of any untrue statement of a material fact or any omission to of a material fact necessary to make the statements made not misleading; or
- To engage in any transaction, practice, or course of business which operates or would operate as a fraud or deceit upon a person.
- To publish or circulate any communication which describes such security for a consideration received or to be received directly or indirectly from an issuer, underwriter, or dealer, or from an agent or employee of such individual, without fully disclosing the receipt of such consideration and the amount of the consideration.
- To knowingly and willfully falsify, conceal, or cover up, by any trick, scheme, or device, a material fact, make any false or fraudulent statement or representation, or make or use any false document, knowing the same to contain any false or fraudulent statement.[165]

Further, it is also unlawful and a violation of the Act for any person to directly or indirectly manage, supervise, control, or own, either alone or in association with others, any boiler room[166] in Florida which sells or offers for sale any security or investment in violation of the above described prohibitions. [167]

Effect of the Bill

The bill amends the definition of "investment" for purposes of this provision of the Act to read as follows: any commitment of money or property principally induced by a representation that an economic benefit may be derived from such commitment, except that the term does not include a commitment of money or property for the purchase of a business opportunity, business enterprise, or real property through a person licensed under ch. 475, F.S.,[168] or registered under former ch. 498, F.S.[169]

The bill also consolidates the current provisions of the Act relating to false representations, boiler rooms, and prohibited practices into a single provision. The consolidated version of these provisions does not eliminate any of the liability provisions existing in current law.

[165] S. 517.301, F.S.

[166] The Financial Industry Regulatory Authority describes "boiler rooms" as follows: "Typically run as outbound call centers, boiler rooms are characterized by high pressure sales pitches from promoters targeting retail investors with highly speculative—oftentimes fraudulent—investments." *See* FINRA, *Boiler Rooms: An Old Stock Scam Gets a Technology Makeover*, https://www.finra.org/investors/insights/boiler-rooms-an-old-stock-gets-a-technology-makeover (last visited Jan. 8, 2024).

[167] S. 517.312, F.S.

[168] Chapter 475, F.S., relates to, among other things, the licensure and regulation of real estate brokers.

[169] The former chapter 498, F.S., related to, among other things, the licensure and regulation of land sales practices.

Miscellaneous

Pursuant to the changes made by the bill, the bill relocates the following sections of the Act and, where applicable, consolidates the provisions elsewhere:

- S. 517.221, F.S., relating to cease and desist orders.
- S. 517.241, F.S., relating to remedies.
- S. 517.311, F.S., relating to false representations; deceptive words; enforcement.
- S. 517.312, F.S., relating to securities, investments, boiler rooms; prohibited practices; remedies.

Overall, the bill modifies various provisions of the Act to incorporate recent amendments to federal securities laws since their passage and up to the effective date of the bill.

II. FISCAL ANALYSIS & ECONOMIC IMPACT STATEMENT

A. FISCAL IMPACT ON STATE GOVERNMENT:

1. Revenues:

   The bill has an indeterminable positive impact on state government revenues because the bill increases penalties that can be assessed against certain violators of the Act.

2. Expenditures:

   The bill requires issuers conducting an offering under the accredited investor exemption to file a notice of transaction, a consent to service of process, and a copy of the general announcement with OFR. OFR will then review the materials filed. The bill does not provide additional funds for OFR personnel to conduct such review. Although it is unknown how many filings OFR will receive, OFR does not anticipate needing additional personnel in fiscal year 2024/2025 to conduct such reviews.[170]

   The bill also requires issuers conducting an offering under the Florida Invest Local Exemption to file a notice of the offering and a copy of the disclosure document with OFR. OFR will then review the materials filed. The bill does not provide additional funds for OFR personnel to conduct such review. Although it is unknown how many filings OFR will receive, OFR does not anticipate needing additional personnel in fiscal year 2024/2025 to conduct such reviews.[171]

B. FISCAL IMPACT ON LOCAL GOVERNMENTS:

1. Revenues:

   None.

2. Expenditures:

   None.

C. DIRECT ECONOMIC IMPACT ON PRIVATE SECTOR:

The bill likely has a minimal positive impact on the private sector, as the bill modernizes Florida's securities laws to align with recent development in federal securities laws and securities laws in other states.

[170] Office of Financial Regulation, *supra* note 16, at p. 35.
[171] Office of Financial Regulation, *supra* note 16, at p. 33.

D. FISCAL COMMENTS:

None.