The Florida Senate

COMMITTEE MEETING EXPANDED AGENDA

BANKING AND INSURANCE
Senator Richter, Chair
Senator Smith, Vice Chair

MEETING DATE: Tuesday, March 22, 2011
TIME: 1:15 —3:15 p.m.
PLACE: *Pat Thomas Committee Room,* 412 Knott Building

MEMBERS: Senator Richter, Chair; Senator Smith, Vice Chair; Senators Alexander, Bennett, Bogdanoff, Fasano, Hays, Margolis, Negron, Oelrich, and Sobel

TAB	BILL NO. and INTRODUCER	BILL DESCRIPTION and SENATE COMMITTEE ACTIONS	COMMITTEE ACTION
1	**SB 1414** Wise (Similar CS/H 97)	Health Insurance; Prohibits certain health insurance policies and health maintenance contracts from providing coverage for abortions. Provides exceptions. Defines the term "state." Provides that certain restrictions on coverage for abortions apply to certain group health insurance policies issued or delivered outside the state which provide coverage to residents of the state. HR 03/14/2011 Favorable BI 03/22/2011 BC	
2	**SB 978** Flores (Identical H 469)	Individual Retirement Accounts; Clarifies the exemption of inherited individual retirement accounts from legal processes. Provides intent. Provides for retroactive application. BI 03/22/2011 JU BC	
3	**SB 1328** Hays (Similar H 677)	Public Records/Office of Financial Regulation; Provides a public records exemption for certain information provided to the Office of Financial Regulation on a confidential basis or developed as part of a multiagency investigation. Provides for future repeal and legislative review of the exemption under the Open Government Sunset Review Act. Provides a statement of public necessity. BI 03/22/2011 CJ GO	

TAB	BILL NO. and INTRODUCER	BILL DESCRIPTION and SENATE COMMITTEE ACTIONS	COMMITTEE ACTION
4	**SB 648** Joyner (Compare CS/H 325)	Estates; Revises provisions relating to the intestate share of a surviving spouse. Provides a right to reform the terms of a will to correct mistakes. Provides for a court to award fees and costs in reformation and modification proceedings either against a party's share in the estate or in the form of a personal judgment against a party individually. Clarifies that a revocation of a will is subject to challenge on the grounds of fraud, duress, mistake, or undue influence, etc. JU 03/09/2011 Favorable BI 03/22/2011 RC	
5	**SB 1568** Montford (Similar H 1007)	Insurer Insolvency; Provides for State Risk Management Trust Fund coverage for specified officers, employees, agents, and other representatives of the Department of Financial Services for liability under specified federal laws relating to receiverships. Provides that a covered claim for purposes of specified guaranty provisions does not include a claim rejected by another state's guaranty fund or liquidation law on the basis that it constitutes a claim under a policy issued by an insolvent insurer which is within a deductible or self-insured retention, etc. BI 03/22/2011 BC	
6	**SB 1754** Garcia (Identical H 1193)	Health Insurance; Prohibits a person from being compelled to purchase health insurance except under specified conditions. Specifies that the act does not prohibit the collection of certain debts. BI 03/22/2011 HR RC	
7	**SB 1286** Bennett (Identical H 723)	State Reciprocity in Workers' Compensation Claims; Provides extraterritorial coverage. Exempts certain employees working in this state and the employers of such employees from the Workers' Compensation Law of this state under certain conditions. Provides requirements for the establishment of prima facie evidence that the employer carries certain workers' compensation insurance. Requires courts to take judicial notice of the construction of certain laws. Authorizes the Division of Workers' Compensation to enter into agreements with the workers' compensation agencies of other states for certain purposes, etc. BI 03/22/2011 BC	

TAB	BILL NO. and INTRODUCER	BILL DESCRIPTION and SENATE COMMITTEE ACTIONS	COMMITTEE ACTION
8	**SB 1816** Fasano (Identical H 1227)	Surplus Lines Insurance; Requires a surplus lines agent to file quarterly on or before a specified time an affidavit stating that all surplus lines insurance transacted during the preceding quarter has been submitted to the Florida Surplus Lines Service Office. Authorizes the Department of Financial Services and the Office of Insurance Regulation to enter into a specified type of agreement with other states pursuant to federal law for the collection and allocation of certain nonadmitted insurance taxes, etc. BI 03/22/2011 BC	
9	**SB 1316** Detert (Identical H 823)	Loan Processing; Prohibits acting as an in-house loan processor without a specified license. Provides for licensing of in-house loan processors. Prohibits issuance of licenses to applicants who have had certain licenses revoked in other jurisdictions. Clarifies provisions concerning operation of mortgage brokers. Requires that in order to renew a mortgage lender license a mortgage lender must authorize the Nationwide Mortgage Licensing System and Registry to obtain an independent credit report on each of the mortgage lender's control persons, etc. BI 03/22/2011 BC	

144910

LEGISLATIVE ACTION

Senate . House

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The Committee on Banking and Insurance (Fasano) recommended the following:

Senate Amendment

Delete lines 19 - 20
and insert:
(1) A health insurance policy under which coverage is purchased in whole or in part

Delete lines 29 - 30
and insert:
applied toward the health insurance policy.

407026

LEGISLATIVE ACTION

Senate . House

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The Committee on Banking and Insurance (Sobel) recommended the following:

Senate Amendment

Delete lines 26 - 27
and insert:
life or health of the mother, if the pregnancy is the result of an act of rape or incest, or in cases of fetal impairment. Coverage is deemed to be purchased with state

Delete lines 48 - 49
and insert:
that an abortion is necessary to save the life or health of the mother, if the pregnancy is the result of an act of rape or incest, or in cases of fetal impairment.

Delete lines 70 - 71

and insert:

necessary to save the life or health of the mother, if the pregnancy is the result of an act of rape or incest, or in cases of fetal impairment. Coverage is deemed to be

923802

LEGISLATIVE ACTION

Senate . House

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The Committee on Banking and Insurance (Fasano) recommended the following:

Senate Amendment

Delete lines 31 - 35
and insert:
(2) This section does not prohibit a health insurance policy from offering separate coverage for an abortion if such coverage is not purchased in whole or in part with state or federal funds.

Delete lines 53 - 57
and insert:
(2) This section does not prohibit a group, franchise, or

923802

blanket health insurance policy from offering separate coverage for an abortion if such coverage is not purchased in whole or in part with state or federal funds.

Delete lines 75 - 78

and insert:

(2) This section does not prohibit a health maintenance contract from offering separate coverage for an abortion if such coverage is not purchased in whole or in part with state or federal funds.

368524

LEGISLATIVE ACTION

Senate . House

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The Committee on Banking and Insurance (Fasano) recommended the following:

Senate Amendment

Delete lines 90 - 91
and insert:
627.66122, 627.6613, 627.667, 627.6675, 627.6691, and 627.66911, and complies with the requirements of 627.66995.

312096

LEGISLATIVE ACTION

Senate . House

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The Committee on Banking and Insurance (Fasano) recommended the following:

Senate Amendment (with title amendment)

Between lines 91 and 92
insert:

Section 5. Present subsection (17) of section 627.6699, Florida Statutes, is renumbered as subsection (18), and a new subsection (17) is added to that section, to read:

627.6699 Employee Health Care Access Act.—

(17) RESTRICTIONS ON COVERAGE.—

(a) A plan under which coverage is purchased in whole or in part with any state or federal funds through an exchange created pursuant to the federal Patient Protection and Affordable Care

312096

Act, Pub. L. No. 111-148, may not provide coverage for an abortion, as defined in s. 390.011(1), unless the physician certifies in writing that an abortion is necessary to save the life of the mother or if the pregnancy is the result of an act of rape or incest. Coverage is deemed to be purchased with state or federal funds if any tax credit or cost-sharing credit is applied toward the plan.

(b) This subsection does not prohibit a plan from providing any person or entity with separate coverage for an abortion if such coverage is not purchased in whole or in part with state or federal funds.

(c) As used in this section, the term "state" means this state or any political subdivision of the state.

========== T I T L E A M E N D M E N T ==========

And the title is amended as follows:

Delete line 11

and insert:

residents of the state; amending s. 627.6699, F.S.; providing that certain restrictions on coverage for abortions apply to plans under the Employee Health Care Access Act; providing an effective date.

The Florida Senate

BILL ANALYSIS AND FISCAL IMPACT STATEMENT

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

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

BILL:	SB 1414
INTRODUCER:	Senator Wise
SUBJECT:	Health Insurance
DATE:	March 17, 2011
REVISED:	

	ANALYST	STAFF DIRECTOR	REFERENCE	ACTION
1.	Brown	Stovall	HR	**Favorable**
2.	Johnson	Burgess	BI	**Pre-meeting**
3.			BC	
4.				
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I. Summary:

On March 23, 2010, President Obama signed into law the Patient Protection and Affordable Care Act, (PPACA), P.L. 111-148, as amended by the Reconciliation Act, P.L. 111-152. The PPACA establishes new requirements on individuals, employers, and health plans; creates exchanges for obtaining public and private coverage; sets minimum standards for health coverage offered in the exchanges; and provides premium tax credits and cost-sharing subsidies for eligible individuals that obtain coverage through exchanges.

The bill would prohibit any health insurance policy purchased with state or federal funds through an exchange from providing coverage for an abortion unless the pregnancy is the result of an act of rape or incest or a physician certifies in writing that an abortion is necessary to save the life of the mother.

The bill provides that such coverage is deemed to be purchased with state or federal funds if any tax credit or cost-sharing credit is applied to the policy. The bill authorizes plans to provide separate coverage for an abortion if that separate coverage is not purchased with any state or federal funds. The bill defines "state" to mean the state of Florida or any political subdivision of the state.

This bill creates the following sections of the Florida Statutes: 627.64995, 627.66995, and 641.31099.

The bill substantially amends the following section of the Florida Statutes: 627.6515.

II. Present Situation:

The Federal Patient Protection and Affordable Care Act

On March 23, 2010, President Obama signed into law the Patient Protection and Affordable Care Act, "PPACA," P.L. 111-148, as amended by the Reconciliation Act, P.L. 111-152. The PPACA is a broad-based, national approach to reform various aspects of the health care system.

The PPACA requires most U.S. citizens and legal residents to obtain health insurance by January 1, 2014. Those without coverage pay a tax penalty of the greater of $695 per year up to a maximum of three times that amount ($2,085) per family or 2.5 percent of household income.

The PPACA also establishes new requirements on employers and health plans; restructures the private health insurance market; and creates exchanges for individuals and employers to obtain coverage. An exchange is not an insurer; however, it would provide eligible individuals and businesses with access to insurers' plans.

If a state decides to establish an exchange, such exchange must be a governmental agency or nonprofit entity. A state may establish a single exchange or multiple subsidiary exchanges if each serves a distinct geographic area. Exchanges may contract with entities in the individual and small group markets and in benefits coverage if the entity is not an insurer, or with the state Medicaid agency. By 2015, exchanges must be self-sufficient and may charge assessments or user fees. If the U.S. Health and Human Services (HHS) determines by January 1, 2013, that a state has opted out of operating an exchange or that it will not have an exchange operational by January 1, 2014, the HHS shall operate an exchange, either directly or through agreement with a non-profit entity.

Effective January 1, 2014, individual coverage will be available through an "American Health Benefit Exchange" and small businesses with 100 or fewer employees can purchase coverage through a "Small Business Health Options Program" (SHOP) exchange. However, a state may merge the individual and small business exchanges into a single exchange. Businesses with more than 100 employees can purchase coverage in an exchange beginning in 2017.

The PPACA contains a number of measures that attempt to make coverage more affordable and accessible. The PPACA provides premium tax credits and cost-sharing subsidies to make exchange coverage more affordable. Details include:

- Plans in exchanges will be required to offer specified essential benefits. Insurers will offer four levels of coverage that vary based on premiums, out-of-pocket costs, and benefits beyond the minimum required, plus a catastrophic coverage plan.
- Premium subsidies will be provided to families with incomes between 100-400 percent of the federal poverty level ($29,327 to $88,200 for a family of four in 2009) to help them purchase insurance through the exchanges. These subsidies will be offered on a sliding scale basis and will limit the cost of the premium to between 2 percent of income for those up to 133 percent of the poverty level and 9.5 percent of income for those between 300-400 percent of the poverty level.
- Cost-sharing subsidies will also be available to individuals with incomes between 100-400 percent of the federal poverty level to limit out-of-pocket spending. Additional cost-sharing subsidies (i.e., reductions in copayments and deductibles) if

necessary, will be provided to ensure that a plan covers a specified percentage of allowed health care expenses.

Abortion Coverage under PPACA Exchanges

The PPACA contains specific provisions permitting states to prohibit plans participating in an exchange from providing coverage for abortions.[1] The PPACA requires exchange plans that choose to offer coverage for abortions beyond coverage for which federal funds are permitted (to save the life of the woman and in cases of rape or incest). In states that allow such coverage, to create funding accounts for segregating premium payments for coverage of abortion services from premium payments for coverage for all other services to ensure that no federal premium or cost-sharing subsidies are used to pay for the abortion coverage. Plans must also estimate the actuarial value of covering abortions by taking into account the cost of the abortion benefit (valued at no less than $1 per enrollee per month) and cannot take into account any savings that might be realized because of abortions. The PPACA prohibits exchange plans from discriminating against any provider because of unwillingness to provide, pay for, provide coverage of, or refer for abortions.

Abortion in Florida Law

Section 390.011, F.S., defines the term, "abortion," to mean the termination of human pregnancy with an intention other than to produce a live birth or to remove a dead fetus. "Viability" means that stage of fetal development when the life of the unborn child may, with a reasonable degree of medical probability, be continued indefinitely outside the womb.[2] Induced abortion can be elective (performed for nonmedical indications) or therapeutic (performed for medical indications). Abortion can be performed by surgical or medical means (medicines that induce a miscarriage).[3] An abortion in Florida must be performed by a physician licensed to practice medicine or osteopathic medicine who is licensed under ch. 458, F.S., ch. 459, F.S., or a physician practicing medicine or osteopathic medicine in the employment of the United States.[4] No person who is a member of, or associated with, the staff of a hospital, or any employee of a hospital or physician in which, or by whom, the termination of a pregnancy has been authorized or performed, who states an objection to the procedure on moral or religious grounds is required to participate in the procedure. The refusal to participate may not form the basis for any disciplinary or other recriminatory action.[5]

The Hyde Amendment

The Hyde Amendment is the common name for a provision in the annual federal appropriations act for the U.S. Departments of Labor, Health and Human Services (HHS), and Education, which prevents Medicaid and any other programs under these departments from funding abortions, except in the following limited situations:

- If the pregnancy is the result of an act of rape or incest; or

[1] 42 U.S.C. s. 18023.
[2] Section 390.0111, F.S.
[3] Suzanne R. Trupin, M.D., *Elective Abortion*, December 21, 2010, available at: http://www.emedicine.com/med/TOPIC3312.HTM (Last visited on March 11, 2011).
[4] Section 390.0111(2), F.S.
[5] Section 390.0111(8), F.S.

- In the case where a woman suffers from a physical disorder, physical injury, or physical illness, including a life endangering physical condition caused by or arising from the pregnancy itself that would, as certified by a physician place the woman in danger of death unless an abortion is performed.[6]

The Hyde Amendment is not perpetually effective. By the nature of appropriations acts, which expire with each federal fiscal year unless extended temporarily, the provisions of the Hyde language must be reenacted with each annual federal budget in order to remain in effect. The Hyde Amendment has been enacted into law in various forms since 1976, during both Democratic and Republican administrations.

In 1980, the U.S. Supreme Court affirmed the constitutionality of the Hyde Amendment in *Harris v. McRae*.[7] In *Harris*, the Court determined that funding restrictions created by the Hyde Amendment did not violate the U.S. Constitution's Fifth Amendment, and therefore, did not contravene the liberty or equal protection guarantees of the Due Process Clause of the Fifth Amendment. The court opined that although government may not place obstacles in the path of a woman's exercise of her freedom of choice, it need not remove those obstacles that are not created by the government (in this case indigence). The court further opined that although Congress has opted to subsidize medically necessary services generally, but not certain medically necessary abortions, the Hyde Amendment leaves an indigent woman with at least the same range of choice in deciding whether to obtain a medically necessary abortion as she would have had if Congress had chosen to subsidize no health care costs at all.[8]

In Florida, based on the Hyde Amendment, Medicaid reimburses for abortions for one of the following reasons:

- The woman suffers from a physical disorder, physical injury, or physical illness, including a life-endangering physical condition caused or arising from the pregnancy itself, that would place the woman in danger of death unless an abortion is performed;
- When the pregnancy is the result of rape (sexual battery) as defined in s. 794.011, F.S.; or
- When the pregnancy is the result of incest as defined in s. 826.04, F.S.[9]

In such cases, the state Medicaid program requires an Abortion Certification Form to be completed and signed by the physician who performed the abortion. The form must be submitted with the facility claim, the physician's claim, and the anesthesiologist's claim. The physician must record the reason for the abortion in the physician's medical records for the recipient.[10]

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[6] Sections 507 and 508 of P.L. 111-8.
[7] 448 U.S. 297 (1980). *See also Rust v. Sullivani*, 500 U.S. 173 (1991) and *Webster v. Reproductive Health Services*, 492 U.S. 490 (1989), upholding *Harris v. McRae*.
[8] *Harris*, 448 U.S. at 316-317.
[9] Agency for Health Care Administration, *Florida Medicaid: Ambulatory Surgery Center Services Coverage and Limitations Handbook*, January 2005, available at: http://www.baccinc.org/medi/CD_April_2005/Provider_Handbooks/Medicaid_Coverage_and_Limitations_Handbooks/Ambulatory_Surgical_Center_Updated_January_2005.pdf (Last visited on March 11, 2011).
[10] *Id.*

III. Effect of Proposed Changes:

Sections 1, 2, and 3 create s. 627.64995, F.S., s. 627.66995, F.S., and s. 641.31099, F.S., respectively, relating to individual health insurance policies, group health insurance policies, and health maintenance organization contracts, respectively, to prevent coverage issued under those sections that is purchased with any state or federal funds through an exchange created under the PPACA from providing coverage for an abortion unless the pregnancy is the result of an act of rape or incest or a physician certifies in writing that an abortion is necessary to save the life of the mother. The bill deems coverage to be purchased with state or federal funds if any tax credit or cost-sharing credit is applied to the policy.

The bill provides that such policies are allowed to provide separate coverage for an abortion if that separate coverage is not purchased with any state or federal funds.

The bill defines "state" to mean the state of Florida or any political subdivision of the state.

Section 4 amends s. 627.6515, F.S., relating to out-of-state policies, to provide that part VII of ch. 627, F.S., relating to group, blanket, and franchise health insurance policies, does not apply to a group health insurance policy issued or delivered outside of Florida under which a Florida resident is provided coverage if the policy provides specified benefits. The bill adds s. 627.66995, F.S., to that list, indicating that if an out-of-state group policy provides separate coverage for abortion that is not purchased with any state or federal funds, then part VII of ch. 627, F.S., would not apply to that policy.

Section 5 provides that the bill is effective July 1, 2011.

IV. Constitutional Issues:

A. Municipality/County Mandates Restrictions:

The provisions of this bill have no impact on municipalities and the counties under the requirements of Article VII, Section 18 of the Florida Constitution.

B. Public Records/Open Meetings Issues:

The provisions of the bill have no impact on public records or open meetings issues under the requirements of Article I, Section 24(a) and (b) of the Florida Constitution.

C. Trust Funds Restrictions:

The provisions of this bill have no impact on the trust fund restrictions under the requirements of Article III, Subsection 19(f) of the Florida Constitution.

V. Fiscal Impact Statement:

A. Tax/Fee Issues:

None.

B. Private Sector Impact:

If health plans offers coverage through a PPACA exchange and those plans operate a separate account for coverage paid for with any state or federal funds and coverage not paid for with any state or federal funds, the health plans could incur some indeterminate amount of additional administrative cost.

C. Government Sector Impact:

None.

VI. Technical Deficiencies:

In section 1 of the bill, the language created in s. 627.64995, F.S., relating to individual health insurance policies, includes group health insurance policies." However, s. 627.601(2), F.S., specifically excludes application of provisions within part VI of ch. 627, F.S., to group policies within part VII.

VII. Related Issues:

If section 2 of the bill is intended to apply to small group policies under s. 627.6699, F.S., the bill should be amended to apply to that section of statute. The provisions of s. 627.6699(16), F.S., could prevent the application of the provisions of s. 627.66995, F.S., which is created by the bill, from applying to small group policies under s. 627.6699, F.S.

VIII. Additional Information:

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

None.

B. Amendments:

None.

The Florida Senate

BILL ANALYSIS AND FISCAL IMPACT STATEMENT

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

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

BILL:	SB 978
INTRODUCER:	Senator Flores
SUBJECT:	Individual Retirement Accounts
DATE:	March 17, 2011
REVISED:	

	ANALYST	STAFF DIRECTOR	REFERENCE	ACTION
1.	Matiyow	Burgess	BI	**Pre-meeting**
2.			JU	
3.			BC	
4.				
5.				
6.				

I. Summary:

The bill amends s. 222.21(2)(c), F.S., to provide that an Individual Retirement Account (IRA) exempt from creditors under s. 222.21(2)(a), F.S., would continue to be exempt if the original IRA were transferred into an Inherited IRA.

The bill takes effect upon becoming law and applies retroactively to all Inherited IRAs regardless of when the Inherited IRA was created.

II. Present Situation:

An Individual Retirement Account (IRA) is a retirement savings account that provides tax benefits to the owner.[1] These accounts are primarily used as a means of saving for the owner's retirement. When the owner of an IRA becomes deceased the IRA may be transferred to a named beneficiary or rolled over to a spouse.[2] The benefactor of an IRA has two options: withdraw all of the funds from the original IRA within 5 years of the original owner's death; or transfer the funds to an Inherited IRA and receive annual distributions over the remaining lifespan of the beneficiary.[3] The beneficiary of an Inherited IRA may not make contributions to the account, must make minimum withdrawals regardless of his or her age and, unlike the original IRA, there is no penalty for making early withdrawals from the account.[4]

[1] IRS Publication 590 (2010), Individual Retirement Accounts (IRAs)
[2] Id.
[3] Id.
[4] Id.

Section 222.21(2)(a), F.S., provides protection from creditors for various assets including traditional IRAs. These protections also extend to bankruptcy proceedings.

In 2009 the Second District Court of Appeal in its decision of *Robertson v. Deeb*, ruled that an Inherited IRA was not afforded the same protections as a traditional IRA due to the changes in tax status and structure when the original IRA was transferred into the benefactor's Inherited Account.[5]

In *Robertson*, a creditor had obtained a judgment against Robertson and served a writ of garnishment on the trustee of Robertson's Inherited IRA, as he was the named beneficiary of his late father's IRA. Upon his father's death, Robertson was given the option of keeping the IRA in his father's name and withdrawing all the proceeds over the next 5 years, or transferring the funds into an Inherited IRA and taking mandatory annual withdrawals for the remainder of his life expectancy. Robertson chose the latter. Robertson claimed that his beneficial interest in the IRA was exempt from garnishment pursuant to s. 222.21(2)(a), F.S., "because he is a 'beneficiary' of the 'fund or account' that qualified as an IRA when his father was alive."[6] The court ruled that section 222.21(2)(a), F.S., does not apply to Inherited IRAs,

> ...because the plain language of that section references only the original 'fund or account' and the tax consequences of Inherited IRAs render them completely separate funds or accounts.[7]

The Court reasoned that since the Inherited IRA was a brand new account different from the original IRA and an Inherited IRA's tax status and structure is different from a traditional IRA, the exceptions in s. 222.21(2)(a), F.S., did not apply. The decision in *Robertson* has been further applied in Federal bankruptcy court in *In re: Ard*.[8] In the *Ard* case, the debtor had an Inherited IRA similar to that in *Robertson*. The court noted the outcomes involving inherited IRAs "turned on the particular language of each state's law applicable to the exemption of IRAs."[9] The bankruptcy court, pursuant to the decision in *Robertson*, ruled that s. 222.21(2)(a), F.S., did not apply to an Inherited IRA and thus was not exempt in Federal bankruptcy proceedings.[10] The debtor was therefore required to turn the IRA over to the bankruptcy trustee.

III. Effect of Proposed Changes:

The bill contains "whereas" clauses to express the Legislature's intent that an Inherited IRA, as defined in Internal Revenue Code of 1986, was intended to be exempt from the claims of creditors and that the decisions in *Robertson* and *In re: Ard* are contrary to the Legislature's intent in 2005.[11]

The bill amends s. 222.21(2)(c), F.S., to provide that an IRA exempt from creditors under

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[5] *Robertson v. Deeb*, 16 So.3d 936 (Fla. 2nd DCA 2009).
[6] Id. at 938.
[7] Id. at 938.
[8] In re: *Ard*, at 719.
[9] Id. at 722.
[10] Id. at 722.
[11] Ch. 2005-101

s. 222.21(2)(a), F.S., would continue to be exempt if the original IRA were transferred into an Inherited IRA. Under the proposed changes, when an owner of an IRA passes away, his or her named beneficiary would continue to enjoy the protection from creditors that the original owner enjoyed under s. 222.21(2)(a), F.S. This protection would most likely extend to protection in bankruptcy proceedings, as well.

The bill contains language indicating the provisions are clarifying and shall apply retroactively to all Inherited IRA's regardless of when an Inherited IRA was created.

The bill takes effect upon becoming a law.

Other Potential Implications:

IV. Constitutional Issues:

A. Municipality/County Mandates Restrictions:

None.

B. Public Records/Open Meetings Issues:

None.

C. Trust Funds Restrictions:

None.

D. Other Constitutional Issues:

Cases currently in litigation could be affected by the retroactive application of the bill.

V. Fiscal Impact Statement:

A. Tax/Fee Issues:

None.

B. Private Sector Impact:

The bill removes a source for creditors to collect to satisfy a debt owed.

C. Government Sector Impact:

None

VI. Technical Deficiencies:

None.

VII. Related Issues:

None.

VIII. Additional Information:

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

None.

B. Amendments:

None.

The Florida Senate

BILL ANALYSIS AND FISCAL IMPACT STATEMENT

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

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

BILL:	SB 1328
INTRODUCER:	Senator Hays
SUBJECT:	Public Records/Office of Financial Regulation
DATE:	March 17, 2011 REVISED:

	ANALYST	STAFF DIRECTOR	REFERENCE	ACTION
1.	Arzillo	Burgess	BI	**Pre-meeting**
2.			CJ	
3.			GO	
4.				
5.				
6.				

I. Summary:

The Office of Financial Regulation (Office) is the regulatory body in charge of oversight of state financial institutions. The Office charters and routinely examines financial institutions in order to ensure they are complying with regulatory requirements. Many financial institutions federally chartered or chartered in other states operate within Florida or in multiple states, making interstate cooperation essential for performing the Office's duties. At times, however, the acquisition of information from federal or out-of-state regulatory agencies is impractical because the information is not exempt from the public records requirements. Therefore, this bill institutes certain exemptions from public records requirements including information developed by out-of-state or federal regulatory agencies and information made available to the Office on a restricted basis or in connection with a multiagency investigation.

This bill substantially amends the following section of the Florida Statutes: 119.0712.

II. Present Situation:

Florida's Public-Records Laws

Florida has a long history of providing public access to the records of governmental and other public entities. In 1992, Florida voters approved an amendment to the State Constitution which raised the statutory right of access to public records to a constitutional level.[1] Article I, s. 24(a), of the Florida Constitution, provides that:

[1] FLA CONST. Art. I, Section 24.

> Every person[2] has the right to inspect or copy any public record made or received in connection with the official business of any public body, officer, or employee of the state, or persons acting on their behalf, except with respect to records exempted pursuant to this section or specifically made confidential by this Constitution.

The Public Records Act[3] specifies conditions under which access must be provided to agency[4] records. Unless specifically exempted, all agency records are available for public inspection. The term "public record" is broadly defined to mean:

> …all documents, papers, letters, maps, books, tapes, photographs, films, sound recordings, data processing software, or other material, regardless of the physical form, characteristics, or means of transmission, made or received pursuant to law or ordinance or in connection with the transaction of official business by any agency.[5]

The Florida Supreme Court has interpreted this definition to encompass all materials prepared in connection with official agency business which are intended to perpetuate, communicate, or formalize knowledge.[6] Such materials, regardless of whether they are in final form, are open for public inspection unless specifically exempted.[7] Exemptions can only be created by the Legislature,[8] and must be created in general law, state the public necessity justifying it, and may not be broader than necessary to meet that public necessity.[9]

There is a difference between records that the Legislature has made exempt from public inspection and those that are *confidential* and exempt. If the Legislature makes a record confidential and exempt, such information may not be released by an agency to anyone other than to the persons or entities designated in the statute.[10] If a record is simply made exempt from disclosure requirements, an agency is not prohibited from disclosing the record in all circumstances.[11]

Open Government Sunset Review Act

The Open Government Sunset Review Act[12] sets forth a legislative review process for newly created or substantially amended public record or public meeting exemptions. It requires an

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[2] Section 1.01(3) F.S., defines "person" to include individuals, children, firms, associations, joint adventures, partnerships, estates, trusts, business trusts, syndicates, fiduciaries, corporations, and all other groups or combinations.
[3] Chapter 119, F.S.
[4] The word "agency" is defined in s. 119.011(2), to mean "…any state, county, district authority, or municipal officer, department, division, board, bureau, commission, or other separate unit of government created or established by law, including, for the purposes of this chapter, the Commission on Ethics, the Public Service Commission, and the Office of Public Counsel, and any other public or private agency, person, partnership, corporation, or business entity acting on behalf of any public agency."
[5] Section 119.011(12), F.S.
[6] *Shevin v. Byron, Harless, Schaffer, Reid and Associates, Inc.*, 379 So.2d 633, 640 (Fla. 1980).
[7] *Wait v. Florida Power & Light Co*., 372 So.2d 420 (Fla. 1979).
[8] Article I, s. 24(c) of the State Constitution.
[9] *Memorial Hospital-West Volusia v. News-Journal Corporation*, 729 So.2d 373, 380 (Fla. 1999); *Halifax Hospital Medical Center v. News-Journal Corporation*, 724 So.2d 567, 568-69 (Fla. 1999).
[10] Attorney General Opinion 85-62.
[11] *Williams v. City of Minneola*, 575 So.2d 683, 687 (Fla. 5th DCA 1991), review denied, 589 So.2d 289 (Fla. 1991).
[12] Section 119.15, F.S.

automatic repeal of the exemption on October 2 of the fifth year after creation or substantial amendment, unless the Legislature reenacts the exemption.

The Act provides that a public record or public meeting exemption may be created or maintained only if it serves an identifiable public purpose. In addition, it may be no broader than is necessary to meet one of the following purposes:

- Allows the state or its political subdivisions to effectively and efficiently administer a governmental program, which administration would be significantly impaired without the exemption.
- Protects sensitive personal information that, if released, would be defamatory or would jeopardize an individual's safety; however, only the identity of an individual may be exempted under this provision.
- Protects trade or business secrets.[13]

Office of Financial Regulation Public Records Exemptions

Florida law exempts certain information obtained or created by the Office when it is involved in the charter, examination, or investigation of financial institutions.[14] However, the exemptions vary among the Office's regulatory programs. Nevertheless, there are three areas where confidentiality and exemptions are currently disallowed, but would assist the Office in performing its investigatory and examination duties more diligently and efficiently.

The first instance in which the Office is impeded from gathering information is when a federal or out-of-state regulatory agency maintains confidentiality requirements of certain information obtained through investigations or examinations. In this instance, the Office is required to keep the information confidential, but cannot do so because there is no confidentiality provision for the information under current Florida law. Therefore, valuable information that could be obtained from other agencies is not accessible by the Office.

Furthermore, the Office is limited in its capacity to become involved in out-of-state or federal investigations due to limited confidentiality and exemptions. Currently, if the Office is involved in a multi-agency examination or investigation, the Office cannot accept information from other agencies if the information is confidential under the federal or out-of-state laws. The Office is also inadvertently limited in the supply of information in multi-jurisdictional investigations. Several of the Office's exemptions are only effective for the time of the investigation or examination. Specifically, information used in multi-jurisdictional investigations or examinations may become public record under current Florida law after the examination or investigation is complete. If the federal or out-of-state laws provide for a continuing confidentiality, then the Office is limited in its ability to provide information in these instances.

Additionally, the Office is limited in the gathering of information from out-of-state and federal agencies that treat certain information as confidential. In these cases, the Office is required to sign confidentiality agreements with the appropriate regulatory agency. However, the Office

[13] Section 119.15(6)(b), F.S.
[14] *See* ss. 560.129, F.S. (Money Services Businesses exemptions), 494.00125, F.S. (mortgage brokering and lending), 517.2015, F.S. (securities), 520.9965, F.S. (retail installment sales), 655.057, F.S. (financial institutions).

cannot sign these agreements if Florida law does not exempt the information from public records requirements. Therefore, the Office is inhibited in its investigative capacity to gather information from other regulatory agencies.

III. Effect of Proposed Changes:

Section 1 creates public records exemptions for certain documents and information held by the Office. Therefore all records obtained by the office from a state or federal agency through an agreement of confidentiality or restricted basis is subject to the public records exemption. Additionally, the bill exempts information that is developed as part of a joint investigation or examination from public records requirements. Information held by the office on or after the effective date of the bill is subject to this exemption. The bill provides for an automatic repeal, in accordance with s. 119.15, F.S., on October 2, 2016, unless reenacted by the Legislature prior to that date.

Section 2 states the public necessity of the bill. The bill explains that the exemption is necessary to facilitate the Office's access to information that could assist in pursuing violations of the laws and regulations under the Office's jurisdiction. The exemption is also necessary to allow for the participation by the Office in joint or multiagency investigations and examinations because this would assist the Office in more efficiently using its resources by sharing information and coordinating examinations and investigations with other governmental agencies. Therefore, the public records exemption provided for in this bill is necessary to ensure the effective and efficient administration of the regulatory programs administered by the Office.

Section 3 provides that the bill take effect July 1, 2011.

Other Potential Implications:

IV. Constitutional Issues:

A. Municipality/County Mandates Restrictions:

None.

B. Public Records/Open Meetings Issues:

Article I, s. 24(c) of the State Constitution, requires a two-thirds vote of the members present and voting for passage of a newly created public records or public meetings exemption. Thus, this bill requires a two-thirds vote for passage.

C. Trust Funds Restrictions:

None.

V. Fiscal Impact Statement:

A. Tax/Fee Issues:

None.

B. Private Sector Impact:

None.

C. Government Sector Impact:

Indeterminate. The bill could create a fiscal impact on the Office because its staff would have to be trained with regard to the categories of information made confidential and exempt from public disclosure versus records that are available for public inspection and copying. The Office could also incur costs associated with redacting confidential and exempt information prior to releasing a record.

VI. Technical Deficiencies:

None.

VII. Related Issues:

The First Amendment Foundation has expressed concerns that the exemption is broader than necessary to meet public necessity. Specifically, the First Amendment Foundation is concerned with out-of-state regulators possibly transferring information to Florida in order to keep information confidential.

VIII. Additional Information:

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

None.

B. Amendments:

None.

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LEGISLATIVE ACTION

Senate . House

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The Committee on Banking and Insurance (Bennett) recommended the following:

Senate Amendment (with title amendment)

Before line 36

insert:

Section 1. Section 90.5021, Florida Statutes, is created to read:

90.5021 Fiduciary lawyer-client privilege.—

(1) For the purpose of this section, a client acts as a fiduciary when serving as a personal representative or a trustee as defined in ss. 731.201 and 736.0103, an administrator ad litem as defined in s. 733.308, a curator as described in s. 733.501, a guardian or guardian ad litem as defined in s.

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744.102, a conservator as defined in s. 710.102, or an attorney in fact as described in chapter 709.

(2) A communication between a lawyer and a client acting as a fiduciary is privileged and protected from disclosure under s. 90.502 to the same extent as if the client were not acting as a fiduciary. In applying s. 90.502 to a communication under this section, only the person or entity acting as a fiduciary is considered a client of the lawyer.

(3) This section does not affect the exception to the lawyer-client privilege which is provided for crime or fraud as set forth in s. 90.502(4)(a).

Between lines 103 and 104
insert:

Section 7. Paragraph (b) of subsection (2) of section 733.212, Florida Statutes, is amended to read:

733.212 Notice of administration; filing of objections.—

(2) The notice shall state:

(b) The name and address of the personal representative and the name and address of the personal representative's attorney, and that the fiduciary lawyer-client privilege in s. 90.5021 applies with respect to the personal representative and any attorney employed by the personal representative.

Between lines 125 and 126
insert:

Section 9. Paragraphs (a) and (b) of subsection (1) of section 736.0813, Florida Statutes, are amended to read:

736.0813 Duty to inform and account.—The trustee shall keep


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the qualified beneficiaries of the trust reasonably informed of the trust and its administration.

(1) The trustee's duty to inform and account includes, but is not limited to, the following:

(a) Within 60 days after acceptance of the trust, the trustee shall give notice to the qualified beneficiaries of the acceptance of the trust, ~~and~~ the full name and address of the trustee, and that the fiduciary lawyer-client privilege in s. 90.5021 applies with respect to the trustee and any attorney employed by the trustee.

(b) Within 60 days after the date the trustee acquires knowledge of the creation of an irrevocable trust, or the date the trustee acquires knowledge that a formerly revocable trust has become irrevocable, whether by the death of the settlor or otherwise, the trustee shall give notice to the qualified beneficiaries of the trust's existence, the identity of the settlor or settlors, the right to request a copy of the trust instrument, ~~and~~ the right to accountings under this section, and that the fiduciary lawyer-client privilege in s. 90.5021 applies with respect to the trustee and any attorney employed by the trustee.

Paragraphs (a) and (b) do not apply to an irrevocable trust created before the effective date of this code, or to a revocable trust that becomes irrevocable before the effective date of this code. Paragraph (a) does not apply to a trustee who accepts a trusteeship before the effective date of this code.

========== T I T L E A M E N D M E N T ==========

And the title is amended as follows:

Delete lines 2 - 24

and insert:

An act relating to estates; creating s. 90.5021, F.S.; creating a fiduciary lawyer-client privilege; providing that the lawyer-client privilege applies to the communications between a lawyer and a client that is a fiduciary; providing that the act does not affect the crime or fraud exception to the lawyer-client privilege; amending s. 732.102, F.S.; revising provisions relating to the intestate share of a surviving spouse; creating s. 732.615, F.S.; providing a right to reform the terms of a will to correct mistakes; creating s. 732.616, F.S.; providing a right to modify the terms of a will to achieve tax objectives; creating s. 733.1061, F.S.; providing for a court to award fees and costs in reformation and modification proceedings either against a party's share in the estate or in the form of a personal judgment against a party individually; amending s. 732.5165, F.S.; clarifying that a revocation of a will is subject to challenge on the grounds of fraud, duress, mistake, or undue influence; amending s. 732.518, F.S.; specifying that a challenge to the revocation of a will may not be commenced before the testator's death; amending s. 733.212, F.S.; requiring a notice of administration to state that the fiduciary lawyer-client privilege applies with respect to the personal representative and his or her attorney;


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amending s. 736.0207, F.S.; clarifying when a challenge to the revocation of a revocable trust may be brought; amending s. 736.0406, F.S.; providing that the creation of a trust amendment or trust restatement and the revocation of a trust are subject to challenge on the grounds of fraud, duress, mistake, or undue influence; amending s. 736.0813, F.S.; providing that the fiduciary lawyer-client privilege applies to communications between a trustee and an attorney employed by the trustee; amending s. 744.441,

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 Judiciary Committee

BILL:	SB 648
INTRODUCER:	Senator Joyner
SUBJECT:	Estates
DATE:	March 8, 2011
REVISED:	

	ANALYST	STAFF DIRECTOR	REFERENCE	ACTION
1.	Munroe	Maclure	JU	**Favorable**
2.	Burgess	Burgess	BI	**Pre-Meeting**
3.			RC	
4.				
5.				
6.				

I. Summary:

Effective October 1, 2011, the bill increases the share a decedent's surviving spouse will receive in an intestate estate to the entire intestate estate when all of the decedent's descendants are also descendants of the surviving spouse and the surviving spouse does not have any other descendants.

Effective July 1, 2011, the bill:

- Permits wills to be reformed for mistake, which would be comparable to an existing provision applicable to testamentary trusts, revocable trusts, and other trusts.
- Allows wills to be modified to achieve the testator's tax objectives where it is not contrary to the testator's probable intent.
- Authorizes a court to award taxable costs, including attorney's fees and guardian ad litem fees, in a proceeding arising to reform a will for mistake or a proceeding for modifications to achieve the testator's tax objectives.

The bill authorizes a challenge to the revocation of a will or trust on the grounds of fraud, duress, mistake, or undue influence after the death of the testator or settlor. The bill limits powers of a guardian to prosecute or defend certain proceedings, to provide that there is a rebuttable presumption that an action challenging the ward's revocation of all or part of a trust is not in the ward's best interest if the revocation relates solely to a devise. This limitation does not preclude a challenge after the ward's death.

The bill provides that Florida Rule of Civil Procedure 1.525 applies to clarify when and under what circumstances a trustee or beneficiary of a trust or attorney must file a motion for attorney's fees and costs incurred in a judicial proceeding concerning a trust, with exceptions. Florida Rule of Civil Procedure 1.525 requires a party seeking costs or attorney's fees to serve a motion within the 30 days that follow the filing of a judgment.

Except as otherwise provided in the bill, it provides an effective date of upon becoming a law and applies to all proceedings pending before such date and all cases commenced on or after the effective date.

This bill creates sections 732.615, 732.616, and 733.1061, Florida Statutes. This bill amends sections 732.102, 732.5165, 732.518, 736.0207, 736.0406, 744.441, and 736.0201, F.S.

II. Present Situation:

Surviving Spouse's Intestate Share

In the event of intestacy, when a person dies without a will, the Florida Probate Code provides a default position which establishes a public policy. Intestate provisions are designed to distribute estates in a manner that most decedents would have wanted had they prepared their own wills.[1] If a decedent dies without any descendants, the surviving spouse gets the entire intestate estate. If a decedent dies with lineal descendants who are also descendants of the surviving spouse, the surviving spouse receives the first $60,000 of the intestate estate and one-half of the balance of the intestate estate.[2] If the decedent's descendants, one or more of whom are not lineal descendants of the surviving spouse, the intestate estate is divided 50 percent to the surviving spouse and 50 percent to descendants.

Trusts – Reformation of Mistake

Trusts and other donative documents may be reformed due to mistake. Upon application of a settlor or any interested person, the court may reform the terms of a trust, even if ambiguous, to conform the terms to the settlor's intent if it is proved by clear and convincing evidence that both the accomplishment of the settlor's intent and the terms of the trust were affected by a mistake of fact or law, whether in expression or inducement.[3] To the contrary, the non-trust provisions of wills may not be reformed due to mistake.[4] Trusts under a will (testamentary trusts) may be reformed due to mistake, but the non-trust provisions of the same will may not be reformed for

[1] Probate Law Committee of the Real Property, Probate and Trust Law Section of the Florida Bar, White Paper: Surviving Spouse's Intestate Share (2011) (on file with the Senate Committee on Judiciary).
[2] Section 732.102, F.S.
[3] Section 736.0415, F.S.
[4] *See, e.g., In re Estate of Barker*, 448 So. 2d 28 (Fla 1st DCA 1984) (Extrinsic evidence of testator's intent regarding revocation of earlier will was not admissible and, without aid of extrinsic evidence, subsequent will was clear as to its meaning and did not preclude distribution of residuary estate to legal heirs who were specifically bequeathed only $1 each); *In re Mullin's Estate*, 128 So. 2d 617 (Fla. 2d DCA 1961) (Scrivener's mistake in drafting codicil so that residuary legatees were excluded was insufficient reason to revoke probate of an otherwise valid codicil).

mistake.[5] Deeds of remainder interests and life insurance beneficiary designations, which are documents that have testamentary effect, may be reformed for mistake under Florida law.[6]

Upon application of any interested person, to achieve the settlor's tax objectives the court may modify the terms of a trust in a manner that is not contrary to the settlor's probable intent.[7] In all actions for breach of fiduciary duty or challenging the exercises of, or failure to exercise, a trustee's powers, and in proceedings under ss. 736.410-736.0417, F.S.,[8] the court shall award taxable costs as in chancery actions, including attorney fees and guardian ad litem fees.[9] When awarding the costs and fees, the court may direct payment from a party's interest or enter a judgment that may be satisfied from other property.

Wills – Post-Death Challenges to the Revocation of a Will or Codicil

A "will" is defined as an "instrument, including a codicil, executed by a person in the manner prescribed by [the Probate Code], which disposes of the person's property on or after his or her death and includes an instrument which merely appoints a personal representative or revokes or revises another will."[10] Section 732.5165, F.S., provides that a will is void if the execution is procured by fraud, duress, mistake, or undue influence. Since "will" includes an "instrument revoking a will, Florida law would appear to permit a challenge to a "written instrument" revoking a will on grounds that it was procured by fraud, duress, mistake, or undue influence. There are no reported Florida cases addressing a challenge to the revocation of a will on these grounds.[11]

Trusts – Challenge of a Revocation or Amendment of Revocable Trust

The creation of a trust may be challenged on the grounds of fraud, duress, mistake, or undue influence in post-death proceedings.[12] The law does not appear to authorize a challenge of a revocation or amendment of a revocable trust on the same grounds.[13] The Second District Court

[5] Probate Law Committee of the Real Property, Probate and Trust Law Section of the Florida Bar, White Paper: Proposed Enactment of sections 732.615, 732.616, and 733.1061, F.S. (2011) (on file with the Senate Committee on Judiciary).
[6] *Id*.
[7] Section 736.0416, F.S.
[8] Proceedings under s. 736.0410, F.S., involve the modification or termination of trusts; proceedings under s. 736.04113,F.S., involve judicial modifications of an irrevocable trust when the modifications is not inconsistent with the settlor's purpose; proceedings under s. 736.04114, F.S., involve proceedings for judicial construction of an irrevocable trust with federal tax provisions; proceedings under s. 736.04115, F.S., involve judicial modification of an irrevocable trust when modification is in the best interests of beneficiaries; proceedings under s. 736.04117, F.S., involve the trustee's power to invade the principal in a trust; proceedings under s. 736.0412, F.S., involve nonjudicial modification of an irrevocable trust; proceedings under s. 736.0413, F.S., involve application of the cy pres doctrine to modify a charitable trust; proceedings under s. 736.0414, F.S., involve the modification or termination of an uneconomic trust; proceedings under s. 736.0415, F.S., involve reformation of a trust to correct mistakes; proceedings under s. 736.0416, F.S., involve modifications to achieve the settlor's tax objectives; and proceedings under s. 736.0417, F.S., involve proceedings to combine or divide trusts.
[9] Section 736.1004, F.S.
[10] Section 731.201(40), F.S.
[11] Probate Law Committee of the Real Property, Probate and Trust Law Section of the Florida Bar, White Paper: Revocation of a Will or Revocable Trust is Subject to Challenge (2011) (on file with the Senate Committee on Judiciary).
[12] Section 736.0406, F.S.
[13] *Hoffman v. Kohns*, 385 So. 2d 1064 (Fla. 2d DCA 1980), and *Florida National Bank of Palm Beach County v. Genova*, 460 So. 2d 895 (Fla. 1984), discussed in Probate Law Committee of the Real Property, Probate and Trust Law Section of the

of Appeal in *Hoffman v. Kohns* allowed a challenge to a revocation of a revocable trust in post-death proceedings on the grounds that the settlor had been subject to undue influence and the court set aside the revocation.[14] The *Hoffman* case was later found to be in conflict with *Genova v. Florida National Bank of Palm Beach County*, where the Fourth District Court of Appeal did not allow a trustee's challenge to a settlor's attempted revocation of her revocable trust where the challenge was based on the grounds that the revocation was the product of undue influence.[15] The Fourth District reasoned that the settlor could not be deprived of her right to revoke the trust without a judicial or medical determination of the settlor's incapacity.[16] The Florida Supreme Court later disapproved *Hoffman*, when it was certified for a conflict with *Genova*.[17] The Florida Supreme Court found that undue influence cannot be asserted as a basis for preventing a competent settlor from revoking a revocable trust.[18]

In a recent case, a trustee asserting that a settlor had been subject to undue influence sought to challenge a settlor's revocation of an inter vivos revocable trust after the settlor's death. Weeks prior to the settlor's death, she placed her money into a joint account with the person who allegedly asserted undue influence on the settlor.[19] The Fourth District Court of Appeal held that the settlor's revocation of a revocable trust during her lifetime was not subject to a challenge on the ground of undue influence.[20] The Probate Law Committee of the Real Property, Probate and Trust Law Section of the Florida Bar (RPPTL) argues that once a settlor is dead, the remedies available for a post-death challenge of revocation of trust which could serve as a will substitute should be consistent with the remedies for post-death challenges to the revocation of a will or codicil.[21]

Guardianship

A guardian of the property of an incapacitated settlor may bring an action to contest the validity of all or part of a trust before the trust becomes irrevocable.[22] To prosecute or defend claims or proceedings in any jurisdictions for the protection of the estate and of the guardian in the performance of his or her duties, court approval is necessary and may only be obtained upon a finding that the action appears to be in the ward's best interests during the ward's probable lifetime.[23]

Florida Bar, White Paper: Revocation of a Will or Revocable Trust is Subject to Challenge (2011) (on file with the Senate Committee on Judiciary).
[14] *Id.*
[15] *Id.*
[16] *Id.*
[17] *Id.*
[18] *Id.*
[19] *MacIntyre v. Wedell*, 12 So. 3d 273, 273 (Fla. 4th DCA 2009).
[20] *Id.*
[21] Probate Law Committee of the Real Property, Probate and Trust Law Section of the Florida Bar, *supra*, note 11.
[22] Section 736.0207, F.S.
[23] Section 744.441, F.S.

Attorney's Fees and Costs in Trust Proceedings

Uncertainty exists as to when and under what circumstances a trustee or beneficiary of a trust or attorney must file a motion for attorney's fees and costs incurred in a judicial proceeding concerning a trust.[24]

III. Effect of Proposed Changes:

Surviving Spouse's Intestate Share

Effective October 1, 2011, the bill amends s. 732.102, F.S., to increase the share a decedent's surviving spouse will receive in an intestate estate to the entire intestate estate when all of the decedent's descendants are also descendants of the surviving spouse and the surviving spouse does not have any other descendants. If there are one or more surviving descendants of the decedent who are not lineal descendants of the surviving spouse, then the surviving spouse gets one-half of the intestate estate. If there are one or more surviving descendants of the decedent, all of whom are also descendants of the surviving spouse, and the surviving spouse has one or more descendants who are not descendants of the decedent, the surviving spouse gets one-half of the intestate estate.

Trusts – Reformation of Mistake

Effective July 1, 2011, the bill creates s. 732.615, F.S., to permit wills to be reformed for mistake, which would be comparable to an existing provision applicable to testamentary trusts, revocable trusts, and other trusts.[25]

Effective July 1, 2011, the bill creates s. 732.616, F.S., to allow wills to be modified to achieve the testator's tax objectives where it is not contrary to the testator's probable intent, which would be comparable to existing provisions applicable to testamentary trusts, revocable trusts, and other trusts.[26]

Effective July 1, 2011, the bill creates s. 733.1061, F.S., to authorize a court to award taxable costs, including attorney's fees and guardian ad litem fees, in a proceeding arising to reform a will for mistake or a proceeding for modifications to achieve the testator's tax objectives. When awarding the costs and fees, the court may direct payment from a party's interest or enter a judgment that may be satisfied from other property.

Trusts – Challenge of a Revocation or Amendment of Revocable Trust

The bill amends s. 732.5165, F.S., to authorize a challenge to the revocation of a will on the grounds of fraud, duress, mistake, or undue influence.

[24] The Probate & Trust Litigation Committee of the Real Property, Probate and Trust Law Section of the Florida Bar approved on September 25, 2010, to support a change in Florida law which clarifies the deadline for when and under what circumstances a trustee or beneficiary of a trust or attorney must file a motion for attorney's fees and costs incurred in a judicial proceeding concerning a trust, (2011 Legislative Position Request Form) (on file with the Senate Judiciary Committee).
[25] Section 736.0415, F.S.
[26] Section 736.0416, F.S.

The bill amends s. 732.518, F.S., to authorize a challenge to the revocation of all or part of a will.

The bill amends s. 736.0207, F.S., to authorize a challenge to the revocation of a revocable trust or part of the revocable trust on the grounds of fraud, duress, mistake, or undue influence on the death of a settlor.

The bill amends s. 736.0406, F.S., to authorize a challenge to the creation, amendment, restatement, or revocation of a trust on the grounds it was procured by fraud, duress, mistake, or undue influence.

The bill amends s. 744.441, F.S., to limit powers of a guardian to prosecute or defend certain proceedings to provide that there is a rebuttable presumption that an action challenging the ward's revocation of all or part of a trust is not in the ward's best interest if the revocation relates solely to a devise. This does not preclude a challenge after the ward's death.

Attorney's Fees and Costs in Trust Proceedings

The bill amends s. 736.0201, F.S., to clarify Florida Rule of Civil Procedure 1.525 applies to clarify when and under what circumstances a trustee or beneficiary of a trust, or attorney must file a motion for attorney's fees and costs incurred in a judicial proceeding concerning a trust. Florida Rule of Civil Procedure 1.525 requires a party seeking costs or attorney's fees to serve a motion within the 30 days that follow the filing of a judgment. The bill specifies two exceptions. It specifies that the following circumstances do not constitute taxation of costs or attorney's fees even if the payment is for services rendered or costs incurred in a judicial proceeding:

- a trustee's payment of compensation or reimbursement of costs to persons employed by the trustee from assets of the trust; or
- a determination by the court directing from what part of the trust fees or costs shall be paid, unless the determination is made in an action for a breach of fiduciary duty or challenging the exercise of, or failure to exercise, a trustee's powers.

Effective Date and Application

Except as otherwise provided in the bill, it provides an effective date of upon becoming a law and applies to all proceedings pending before such date and all cases commenced on or after the effective date.

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:

None.

C. Government Sector Impact:

None.

VI. Technical Deficiencies:

None.

VII. Related Issues:

None.

VIII. Additional Information:

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

None.

B. Amendments:

None.

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LEGISLATIVE ACTION

Senate . House

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The Committee on Banking and Insurance (Bennett) recommended the following:

Senate Amendment (with title amendment)

Delete everything after the enacting clause and insert:

Section 1. Section 631.152, Florida Statutes, is amended to read:

631.152 Conduct of delinquency proceeding; foreign insurers.—

(1) If ~~Whenever under this chapter~~ an ancillary receiver is to be appointed under this chapter in a delinquency proceeding for an insurer not domiciled in this state, the court shall appoint the department as ancillary receiver. The department

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shall file a petition requesting the appointment on the grounds set forth in s. 631.091:

(a) If it finds that there are sufficient assets of the insurer located in this state to justify the appointment of an ancillary receiver;~~, or~~

(b) If 10 or more persons resident in this state having claims against such insurer file a petition with the department or office requesting the appointment of such ancillary receiver; or~~.~~

(c) If it finds it is necessary to obtain records to adjudicate the covered claims of policyholders in this state.

(2) The domiciliary receiver for the purpose of liquidating an insurer domiciled in a reciprocal state is ~~shall be~~ vested by operation of law with the title to all of the property (except statutory deposits, special statutory deposits, and property located in this state subject to a security interest), contracts, and rights of action, and all of the books and records of the insurer located in this state, and ~~it~~ shall have the immediate right to recover balances due from local agents and ~~to~~ obtain possession of any books and records of the insurer found in this state. The domiciliary receiver is ~~It shall~~ also ~~be~~ entitled to recover the property subject to a security interest, statutory deposits, and special statutory deposits of the insurer located in this state, except that upon the appointment of an ancillary receiver in this state, the ancillary receiver shall during the ancillary receivership proceeding have the sole right to recover such other assets. The ancillary receiver shall, as soon as practicable, liquidate from their respective securities those special deposit claims and

secured claims which are proved and allowed in the ancillary proceeding in this state, and ~~shall~~ pay the necessary expenses of the proceeding. The ancillary receiver shall promptly transfer all remaining assets ~~it shall promptly transfer~~ to the domiciliary receiver. Subject to the foregoing provisions, the ancillary receiver and its agents ~~shall~~ have the same powers and are ~~be~~ subject to the same duties with respect to the administration of such assets as a receiver of an insurer domiciled in this state.

(3) The domiciliary receiver of an insurer domiciled in a reciprocal state may sue in this state to recover any assets of such insurer to which it may be entitled under the laws of this state.

(4) The provisions of s. 631.141(7)(b) apply to ancillary delinquency proceedings opened for the purpose of obtaining records necessary to adjudicate the covered claims of policyholders in this state.

Section 2. Section 631.2715, Florida Statutes, is created to read:

631.2715 Liability under federal priority of claims law.—The State Risk Management Trust Fund shall cover department officers, employees, agents, and other representatives for any liability under the federal act relating to priority of claims, 31 U.S.C. s. 3713, for any action taken by them in the performance of their powers and duties under this chapter.

Section 3. Subsection (6) is added to section 631.391, Florida Statutes, to read:

631.391 Cooperation of officers and employees.—

(6) Any person referred to in subsection (1) who refuses to

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cooperate in providing records upon the request of the department or office is liable for any penalties, fines, or other costs assessed against the guaranty association or the receiver which result from the refusal or delay to provide records.

Section 4. Subsection (3) of section 631.54, Florida Statutes, is amended to read:

631.54 Definitions.—As used in this part:

(3) "Covered claim" means an unpaid claim, including one of unearned premiums, which arises out of, and is within the coverage, and not in excess of, the applicable limits of an insurance policy to which this part applies, issued by an insurer, if such insurer becomes an insolvent insurer and the claimant or insured is a resident of this state at the time of the insured event or the property from which the claim arises is permanently located in this state. For entities other than individuals, the residence of a claimant, insured, or policyholder is the state in which the entity's principal place of business is located at the time of the insured event. "Covered claim" does ~~shall~~ not include:

(a) Any amount due any reinsurer, insurer, insurance pool, or underwriting association, sought directly or indirectly through a third party, as subrogation, contribution, indemnification, or otherwise; or

(b) Any claim that would otherwise be a covered claim under this part that has been rejected or denied by any other state guaranty fund based upon that state's statutory exclusions, including, but not limited to, those based on coverage, policy type, or an insured's net worth ~~on the grounds that an insured's~~

~~net worth is greater than that allowed under that state's guaranty law~~. Member insurers ~~shall~~ have no right of subrogation, contribution, indemnification, or otherwise, sought directly or indirectly through a third party, against the insured of any insolvent member.

Section 5. Subsection (4) is added to section 631.56, Florida Statutes, to read:

631.56 Board of directors.—

(4) Any board member representing an insurer in receivership shall be terminated as a board member, effective as of the date of the entry of the order of receivership.

Section 6. Subsection (2) of section 631.904, Florida Statutes, is amended to read:

631.904 Definitions.—As used in this part, the term:

(2) "Covered claim" means an unpaid claim, including a claim for return of unearned premiums, which arises out of, is within the coverage of, and is not in excess of the applicable limits of, an insurance policy to which this part applies, which policy was issued by an insurer and which claim is made on behalf of a claimant or insured who was a resident of this state at the time of the injury. The term ~~"covered claim"~~ includes unpaid claims under any employer liability coverage of a workers' compensation policy limited to the lesser of $300,000 or the limits of the policy. The term ~~"covered claim"~~ does not include any amount sought as a return of premium under any retrospective rating plan; any amount due any reinsurer, insurer, insurance pool, or underwriting association, as subrogation recoveries or otherwise; any claim that would otherwise be a covered claim that has been rejected or denied by

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any other state guaranty fund based upon that state's statutory exclusions, including, but not limited to, those based on coverage, policy type, or an insured's net worth ~~on the grounds that the insured's net worth is greater than that allowed under that state's guaranty fund or liquidation law~~, except this exclusion from the definition of covered claim does ~~shall~~ not apply to employers who, before ~~prior to~~ April 30, 2004, entered into an agreement with the corporation preserving the employer's right to seek coverage of claims rejected by another state's guaranty fund; or any return of premium resulting from a policy that was not in force on the date of the final order of liquidation. Member insurers have no right of subrogation against the insured of any insolvent insurer. This provision applies ~~shall be applied~~ retroactively to cover claims of an insolvent self-insurance fund resulting from accidents or losses incurred before ~~prior to~~ January 1, 1994, regardless of the date the petition in circuit court was filed alleging insolvency and the date the court entered an order appointing a receiver.

Section 7. Subsection (3) is added to section 631.912, Florida Statutes, to read:

631.912 Board of directors.—

(3) Any board member who is employed by, or has a material relationship with, an insurer in receivership shall be terminated as a board member, effective as of the date of the entry of the order of receivership.

Section 8. This act shall take effect July 1, 2011.

================ T I T L E A M E N D M E N T ================

And the title is amended as follows:

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Delete everything before the enacting clause and insert:

A bill to be entitled

An act relating to insurer insolvency; amending s. 631.152, F.S.; authorizing the Department of Financial Services to request appointment as ancillary receiver if necessary to obtain records to adjudicate covered claims; providing for the reimbursement of specified costs associated with ancillary delinquency proceedings; creating s. 631.2715, F.S.; providing for the State Risk Management Trust Fund to cover specified officers, employees, agents, and other representatives of the Department of Financial Services for liability under specified federal laws relating to receiverships; amending s. 631.391, F.S.; imposing penalties on persons who fail to cooperate in providing records; amending s. 631.54, F.S.; revising the definition of the term "covered claim" to exclude a claim rejected or denied by another state's guaranty fund based upon that state's statutory exclusions; amending s. 631.56, F.S.; providing that a board member of the Florida Insurance Guaranty Association representing an insurer in receivership shall be terminated as a board member; specifying a termination date; amending s. 631.904, F.S.; revising the definition of "covered claim" to exclude a claim rejected or denied by another state's guaranty fund based upon that state's statutory exclusions; amending s. 631.912, F.S.; providing that any board member of


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the Florida Workers' Compensation Insurance Guaranty Association who is employed by, or has a material relationship with, an insurer in receivership shall be terminated as a board member; specifying a termination date; providing an effective date.

The Florida Senate

BILL ANALYSIS AND FISCAL IMPACT STATEMENT

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

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

BILL:	SB 1568
INTRODUCER:	Senator Montford
SUBJECT:	Insurance Insolvency
DATE:	March 18, 2011
REVISED:	

	ANALYST	STAFF DIRECTOR	REFERENCE	ACTION
1.	Matiyow	Burgess	BI	**Pre-meeting**
2.			BC	
3.				
4.				
5.				
6.				

I. Summary:

The bill provides for the Insurance Risk Management Trust Fund[1] to cover employees, officers and agents at the Department of Financial Services (DFS) for liability under 31 U.S.C. s. 3713, relating to priority of claims paid by DFS while acting as a receiver.

The bill makes changes to the Florida Insurance Guaranty Association (FIGA) and Florida Workers' Compensation Insurance Guaranty Association (FWCIGA) statutes relating to the definition of "covered claims" rejected by another state's guaranty fund.

The bill amends qualifications of FIGA and FWCIGA board members representing or employed by an insurer in receivership.

The bill further clarifies FIGA and FWCIGA powers to obtain records from third-party administrators.

The bill creates the following section of the Florida Statutes: 631.2715.

The bill amends the following sections of the Florida Statutes: 631.54, 631.56, 631.57, 631.904 and 631.912.

[1] The State Risk Management Trust Fund provides the self-insurance pool for payment of workers' compensation claims, general liability claims, automotive liability claims, federal civil rights claims and court awarded attorney's fees. The revenues for this fund are premiums paid by state agencies from the agency's special appropriation category for risk management insurance.

II. Present Situation:

Chapter 631, F.S., governs the rehabilitation and liquidation process for insurers in Florida. Federal law specifies that insurance companies are exempted from federal bankruptcy jurisdiction and are instead subject to state laws regarding receivership.[2] Insurers are "rehabilitated" or "liquidated" by the state. In Florida, the Division of Rehabilitation and Liquidation in DFS is responsible for rehabilitating or liquidating insurance companies.

Typically, insurers are put into liquidation when the company is or is about to become insolvent;[3] whereas, insurers are placed into rehabilitation[4] for numerous reasons, one of which is that the insurer is impaired or failed to comply with an order of the office to address an impairment of capital or surplus or both. The goal of rehabilitation is to return the insurer to solvency. The goal of liquidation, however, is to liquidate the business of the insurer and use the proceeds to pay off the company's debts and outstanding insurance claims.

Under Florida law s. 631.271(1)(d), F.S., debts owed to the federal government by an insurer in receivership are to be paid after: all of the receiver's costs and expenses of administration are paid; all of the expenses of a guaranty association or foreign guaranty association in handling claims are paid; all claims under policies for losses incurred, including third-party claims are paid; and all claims are paid under nonassessable policies for unearned premiums or premium refunds. However, under 31 U.S.C. s. 3713(b), "a representative of a person or an estate (except a trustee acting under title 11) paying any part of a debt of the person or estate before paying a claim of the Government is liable to the extent of the payment for unpaid claims of the Government." As a result s. 631.271(1)(d), F.S., could expose employees, officers and agents at DFS to personal liabilities owed to the federal government while performing their duties as receiver.

Guaranty Associations

In Florida, five insurance guaranty funds have been established to ensure that policyholders of liquidated insurers are protected with respect to insurance premiums paid and settlement of outstanding claims, up to limits provided by law. A guaranty association generally is a nonprofit corporation created by law directed to protect policyholders from financial losses and delays in claim payment and settlement due to the insolvency of an insurance company. Insurers are required by law to participate in guaranty associations as a condition of transacting business in Florida.

Covered Claims

Florida's associations provide coverage for policies written to employees within Florida. Some states' guaranty associations do not provide coverage if the company in that state has a large deductible policy, unless the policyholder (employer) is insolvent.[5] When the guaranty

[2] U.S.C. s. 109(b)(2).
[3] Section 631.061, F.S.
[4] Section 631.051, F.S.
[5] Missouri Law 375.772 2(c)j - Any amount that constitutes a claim under a policy issued by an insolvent insurer with a deductible or self- insured retention of three hundred thousand dollars or more. However, such a claim shall be considered a

association of another state denies coverage, the injured worker (claimant) could possibly look to other states where the employer may also does business. Many national companies have locations in all fifty states including Florida. As a result of other states associations denying claims, Florida's guaranty associations could potentially end up paying claims to injured workers in other states.

Florida Insurance Guaranty Association (FIGA)

Part II of ch. 631, F.S., governs FIGA, which operates under a board of directors as a nonprofit corporation. FIGA is composed of all insurers licensed to sell property and casualty insurance in the state. When a property and casualty insurance company becomes insolvent, FIGA is required by law to assume the claims of the insurer and pay the claims of the company's policyholders. FIGA is responsible for claims on residential and commercial property insurance, automobile insurance, and liability insurance, among others.

The maximum claim amount FIGA will cover is $300,000, but special limits apply to damages relating to the structure and contents on homeowners', condominium, and homeowners' association claims. For damages to structure and contents on homeowners' claims, FIGA covers an additional $200,000, for a total of $500,000. For condominium and homeowners' association claims, FIGA covers the lesser of policy limits or $100,000 multiplied by the number of units in the association. In addition to any deductible in the insurance policy, all claims are subject to a $100 FIGA deductible.

FIGA is divided into three accounts: auto liability, auto physical damage, and all other property and casualty insurance other than workers' compensation.[6] This "all other" account includes property insurance (such as claims resulting from hurricane-related insolvencies), personal liability, commercial liability, commercial multi-peril, professional liability, and all other types of property and casualty insurance other than automobile and workers' compensation.

Funding is provided by assessments against authorized insurers, as needed for the payment of covered claims and costs of administration. The maximum annual assessment against each insurer is 2 percent of the insurer's net direct written premiums in the state in the prior year, for the types of insurance in each account. FIGA may also impose annual emergency assessments on insurers of up to 2 percent of written premium if necessary to fund revenue bonds issued by a municipality or county to pay claims of an insurer rendered insolvent due to a hurricane. FIGA also obtains funds from the liquidation of assets of insolvent insurers domiciled in other states but having claims in Florida.

Insurers pay the assessment to FIGA and submit a rate filing with the Office of Insurance Regulation (office) to recoup the assessment from their policyholders.[7] Pursuant to s. 631.64, F.S., the rates and premiums charged for insurance policies may include amounts sufficient to recoup a sum equal to the amounts paid to FIGA by the member insurer, less any amounts

covered claim, if, as of the deadline set forth for the filing of claims against the insolvent insurer or its liquidator, the insured is a debtor under 11 U.S.C. Section 701, et seq.;

[6]Section 631.55, F.S.

[7]Section 631.57(3)(a), F.S.

returned to the member insurer by FIGA, and such rates shall not be deemed excessive because they contain an amount reasonably calculated to recoup assessments paid by the member insurer.

Section 631.56, F.S., establish requirements for selecting members to the FIGA board. The board shall consist of not less than five or more than nine members. Each board member serves for a 4-year term and may be reappointed. DFS approves and appoints each member recommended by the member insurers (all companies writing licensed business in that state). In the event DFS finds a candidate does not meet the qualifications for service on the board, DFS shall request the member insurers to recommend another candidate. Vacancies on the board are filled for the remaining term and are handled in the same manner as initial appointments. Currently members on the board representing an insurer in receivership are not required to step down.

Section 631.57(2), F.S., enumerates the powers and duties of FIGA necessary to carry out their legislative mandate. Access to the records of an insurer in receivership is a vital component for the association to properly complete its duties. Currently many insurance companies utilize third-party administrators (TPA) to handle some of their administrative functions such as claims processing. Given that a TPA is a separate entity apart for the insurance company, some argue that FIGA lacks the legal authority to bring action against any TPA who refuses to furnish records of an insurance company in receivership that the TPA was contracted to provide services for.

Florida Workers' Compensation Insurance Guaranty Association (FWCIGA)

The FWCIGA pays workers' compensation claims of insolvent insurers and group self-insurance funds authorized in Florida, as well as unearned premium claims. FWCIGA does not have a coverage limit for workers' compensation claims of insolvent insurers. When FWCIGA was created, the responsibility for handling insolvent workers' compensation claims was transferred from FIGA to FWCIGA. However, claims under the employer's liability part of a workers' compensation insurance policy continue to be covered by FIGA. According to representatives of FIGA, FIGA experiences difficulties in the administration of employer liability claims if FIGA is required to assess workers' compensation carriers for a portion of their workers' compensation premium. A workers' compensation insurance policy is divided into Part A and Part B. Part A provides workers' compensation coverage to cover medical expenses, lost income wages, rehabilitation costs and, if needed, death benefits for employees who sustain an injury or illness as a result of their employment. Part B provides employer's liability coverage to cover the employer in the event the injured employee elects not to accept the coverage offered under Part A of the policy. In such case, the employee exercises his or her right to sue the employer and part B defends and protects the employer's interests.

Section 631.912, F.S., establishes requirements for selecting members to the FWCIGA board. The board shall consist of 11 persons, 1 of whom is the insurance consumer advocate appointed under s. 627.0613, F.S., and 1 of whom is designated by the Chief Financial Officer (CFO). DFS shall appoint to the board 6 persons selected by private carriers from among the 20 workers' compensation insurers with the largest amount of net direct written premium as determined by DFS, and 3 persons selected by the self-insurance funds. At least two of the private carriers shall be foreign carriers authorized to do business in this state. The board shall elect a chairperson from among its members. The CFO may remove any board member for cause. Each board

member shall serve for a 4-year term and may be reappointed. A vacancy on the board shall be filled for the remaining term and in the same manner by which the original appointment was made. Currently members on the board who have material relationships with or are employed by an insurer in receivership are not required to step down.

Section 631.913(3), F.S., enumerates the powers and duties of FWCIGA necessary to carry out their legislative mandate. Access to the records of an insurer in receivership is a vital component for the association to properly complete its duties. Currently many insurance companies utilize third-party administrators (TPA) to handle some of their administrative functions such as claims processing. Given that a TPA is a separate entity apart for the insurance company, some argue that FWCIGA lacks the legal authority to bring action against any TPA who refuses to furnish records of an insurance company in receivership that the TPA was contracted to provide services for.

III. Effect of Proposed Changes:

By extending coverage of the Insurance Risk Management Trust Fund to protect DFS employees, the bill provides state employees personal protection against actions brought by the federal government while they are performing DFS's duties as the receiver of an insolvent insurance company.

The bill provides that a claim will not be covered by FIGA or FWCIGA if that claim had already been rejected by another state's guaranty fund. This provision will protect the associations and Florida policitholders from having to pay claims for workers of companies domiciled in other states.

The bill requires that a board member of FIGA or FWCIGA must immediately step down if the company the member represents goes into receivership\

The bill specifically allows FIGA and FWCIGA to bring a suit against a third party administer who fails to turn over requested records. This provision assures that the associations have a legal remedy to insure all records of an insolvent insurance company are provided to the associations.

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:

Third-party administrators could be sued for failing to turn over records to a guaranty association.

C. Government Sector Impact:

DFS employees will be covered by the Insurance Risk Management Trust Fund for potential liability to the federal government while performing their duties as receiver of an insolvent insurance company.

VI. Technical Deficiencies:

None.

VII. Related Issues:

None.

VIII. Additional Information:

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

None.

B. Amendments:

None.

The Florida Senate

BILL ANALYSIS AND FISCAL IMPACT STATEMENT

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

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

BILL:	SB 1754
INTRODUCER:	Senator Garcia
SUBJECT:	Health Insurance
DATE:	March 18, 2011
REVISED:	

	ANALYST	STAFF DIRECTOR	REFERENCE	ACTION
1.	Johnson	Burgess	BI	**Pre-meeting**
2.			HR	
3.			RC	
4.				
5.				
6.				

I. Summary:

The bill provides that a person may not be compelled to purchase health insurance, except as a condition of:

- Public employment;
- Voluntary participation in a state or local benefit;
- Operating a dangerous instrumentality;
- Undertaking an occupation having a risk of occupational injury or illness;
- An order of child support; or
- An activity between private persons.

The bill also provides that this would not prohibit the collection of debts lawfully incurred for health insurance.

This bill creates an undesignated section of the Florida Statutes.

II. Present Situation:

The Federal Patient Protection and Affordable Care Act

On March 23, 2010, President Obama signed into law the Patient Protection and Affordable Care Act, (PPACA), P.L. 111-148, as amended by the Reconciliation Act, P.L. 111-152. The PPACA is a broad-based, national approach designed to reform various aspects of the health care system including access and affordability of coverage.

The PPACA establishes new requirements on individuals, employers, and health plans; restructures the private health insurance market; and creates exchanges for individuals and employers to obtain coverage. An exchange is not an insurer; however, it would provide eligible individuals and businesses with access to insurers' plans.

The PPACA expands the Medicaid program in 2014 to include nonelderly, nonpregnant individuals with income below 133 percent of the federal poverty level who were previously ineligible for Medicaid. Also in 2014, some individuals who do not qualify for Medicaid, but who meet other requirements, will be provided with premium tax credits and cost-sharing subsidies to help pay for the premiums and out-of-pocket costs of health plans offered through an exchange.

The PPACA requires most U.S. citizens and legal residents to obtain health insurance by January 1, 2014, [1] or potentially pay a penalty for noncompliance. A taxpayer is exempt from the penalty if the individual has a household income below a certain threshold, is a member of an Indian tribe, or has a religious objection to purchasing health insurance. An individual who fails to maintain coverage is required to pay an annual tax penalty of the greater of $95 for each household member (up to $285), or 1 percent of household income in 2014, $325 or 2 percent of household income in 2015, and $695 or 2.5 percent of income in subsequent years. The penalty for an entire family is capped at $2,250. The applicable penalty for dependents under the age of 18 is one-half the amount for adults.

If an individual that is subject to the penalty fails to pay the penalty, the Internal Revenue Service can attempt to collect funds by reducing the amount of an individual's tax refund in the future. However, individuals that fail to pay the penalty will not be subject to any criminal prosecution for such failure.

Congressional Authority and Constitutionality

Commerce Clause (U.S. Const. Art. I, Sec. 8, Clause 3)

Congress has the power to regulate interstate commerce, including local matters and issues that "substantially affect" interstate commerce. Proponents of reform assert that although health care delivery is local, the sale and purchase of medical supplies and health insurance occurs across state lines, thus regulation of health care is within Commerce Clause authority. Arguing in support of an individual mandate, proponents point to insurance market destabilization caused by the large uninsured population as reason enough to authorize Congressional action under the Commerce Clause.[2] Opponents suggest that the decision not to purchase health care coverage is not a commercial activity and cite to *United States v. Lopez*[3] which held that Congress is prohibited from "…unfettered use of the Commerce Clause authority to police individual behavior that does not constitute interstate commerce."[4]

[1] Section 1501(b) as amended by section 101006 (b) of P.L. 111-148 and by s. 1002 of P.L. 111-152.
[2] Jack Balkin, *The Constitutionality of the Individual Mandate for Health Insurance*, N. Eng. J. Med. 362:6, at 482 (February 11, 2010).
[3] 514 U.S. 549 (1995).
[4] Peter Urbanowicz and Dennis G. Smith, *Constitutional Implications of an 'Individual Mandate' in Health Care Reform*, The Federalist Society for Law and Public Policy, at 4 (July 10, 2009).

The Tenth Amendment and the Anti-Commandeering Doctrine (U.S. Const. Amend. 10)
The Tenth Amendment reserves to the states all power that is not reserved expressly for the federal government in the U.S. Constitution. Opponents of federal reform assert that the individual mandate violates federalism principles because the U.S. Constitution does not authorize the federal government to regulate health care. They argue, "…state governments – unlike the federal government – have greater, plenary authority and police powers under their state constitutions to mandate the purchase of health insurance."[5] Further, opponents argue that the state health insurance exchange mandate may violate the anti-commandeering doctrine, which prohibits the federal government from requiring state officials to carry out onerous federal regulations.[6] Proponents for reform suggest that Tenth Amendment jurisprudence only places wide and weak boundaries around Congressional regulatory authority to act under the Commerce Clause.[7]

State Legislative Actions

State Legislation Implementing PPACA
As of September 27, 2010, at least 25 states have enacted or adopted legislation or taken official action to form a committee, task force, or board concerning health reform implementation.[8] Additionally, at least 14 governors have issued executive orders to begin the process of health reform implementation.[9]

State Legislation Opposing PPACA
In response to the federal health care reform, state legislators in at least 40 states have filed legislation to limit, alter, or oppose certain state or federal action, including single-payer provisions and mandates that would compel the purchase of health care insurance.[10] In 30 of the states, the legislation includes a proposed constitutional amendment by ballot.[11]

[5] *Id*.
[6] Matthew D. Adler, *State Sovereignty and the Anti-Commandeering Cases*, The Annals of the American Academy of Policy and Social Science, 574, at 158 (March 2001).
[7] Hall, *supra* note 25, at 8-9.
[8] National Conference of State Legislators, *State Actions to Implement Federal Health Reform*, Nov. 22, 2010, available at http://www.ncsl.org/default.asx?tabid=20231#Legislative (last visited Jan. 3, 2011).
[9] *Id*.
[10] National Conference of State Legislatures, *State Legislation and Actions Challenging Certain Health Reforms, 2010*, Dec. 18, 2010, *available at* http://www.ncsl.org/?tabid=18906 (last visited Jan. 3, 2011).
[11] *Id*.

Florida Insurance Coverage Requirements

Florida law does not require state residents to maintain health insurance coverage. However, Florida law does require drivers to carry Personal Injury Protection (PIP) insurance,[12] which includes specified medical benefits, as a condition of registering a motor vehicle.[13] Florida law also requires employers to secure the payment of workers' compensation. Employers secure workers' compensation coverage by purchasing insurance or meeting the requirements to self-insure.[14] Workers' compensation insurance provides certain medical and indemnity benefits.[15]

III. Effect of Proposed Changes:

The bill provides that a person may not be compelled to purchase health insurance, except as a condition of:

- Public employment;
- Voluntary participation in a state or local benefit;
- Operating a dangerous instrumentality;
- Undertaking an occupation having a risk of occupational injury or illness;
- An order of child support; or
- An activity between private persons.

The bill also provides that the act does not prohibit the collection of debts lawfully incurred for health insurance.

The bill takes effect upon becoming a law.

IV. Constitutional Issues:

A. Municipality/County Mandates Restrictions:

None.

B. Public Records/Open Meetings Issues:

None.

C. Trust Funds Restrictions:

None.

D. Other Constitutional Issues:

Florida and 25 other states brought an action in the United States District Court for the Northern District of Florida challenging the constitutionality of PPACA. On January 31, 2011, Judge

[12] Section 627.736, F.S.
[13] Section 320.02(5)(a), F.S.
[14] Section 440.38, F.S.
[15] Sections 440.13, 440.15, and 440.16, F.S.

Roger Vinson found the Act unconstitutional.[16] The court rejected the argument by the United States that the individual mandate is a tax and made it clear that he agreed with the plaintiff's argument that the power the individual mandate seeks to harness "is simply without precedent." On March 3, 2011, Judge Vinson granted a stay of his order on the condition that the federal government seek an immediate appeal and seek an expedited review. The federal government filed the appeal and motion for expedited review to the United State Court of Appeal for the Eleventh Circuit on March 8, 2011.[17] Florida and the other plaintiffs have filed a motion requesting a more condensed briefing and oral argument schedule than requested by the federal government. The Eleventh Circuit responded on March 11, 2011 setting the briefing schedule beginning on April 4, 2011 and ending May 25, 2011.[18]

V. Fiscal Impact Statement:

A. Tax/Fee Issues:

None.

B. Private Sector Impact:

None.

C. Government Sector Impact:

None.

VI. Technical Deficiencies:

None.

VII. Related Issues:

None.

VIII. Additional Information:

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

None.

B. Amendments:

None.

[16] State of Florida, et al. v. United States Department of Health and Human Services, et al., --- F.Supp.2d ----, 2011 WL 285683 (N.D.Fla.).
[17] Case No. 11-11021-HH.
[18] State of Fla., et al. v. U.S. Dept. of Health & Human Serv., Nos. 11-11021-HH & 11-11067-HH, Order on Appellants' Mtn. to Expedite Appeal (11th Cir. March 11, 2011).

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LEGISLATIVE ACTION

Senate . House

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The Committee on Banking and Insurance (Bennett) recommended the following:

Senate Amendment (with title amendment)

Delete everything after the enacting clause and insert:

Section 1. Section 440.094, Florida Statutes, is created to read:

440.094 Extraterritorial reciprocity.—

(1) If an employee in this state who is subject to this chapter temporarily leaves the state incidental to his or her employment and receives an accidental injury arising out of and in the course of employment, the employee, or the beneficiaries of the employee if the injury results in death, is entitled to

the benefits of this chapter as if the employee were injured within this state.

(2) An employee from another state and the employer of the employee in the other state are exempt from this chapter while the employee is temporarily in this state doing work for the employer if:

(a) The employer has furnished workers' compensation insurance coverage under the workers' compensation insurance or similar laws of the other state to cover the employee's employment while in this state;

(b) The extraterritorial provisions of this chapter are recognized in the other state; and

(c) Employees and employers who are covered in this state are likewise exempted from the application of the workers' compensation insurance or similar laws of the other state.

(3) The benefits under the workers' compensation insurance or similar laws of the other state, or other remedies under similar laws, are the exclusive remedy against the employer for any injury, whether resulting in death or not, received by the employee while temporarily working for that employer in this state.

(4) A certificate from the duly authorized officer of the appropriate department of another state certifying that the employer of the other state is insured in that state and has provided extraterritorial coverage insuring employees while working in this state is prima facie evidence that the employer carries workers' compensation insurance.

(5) If in any appeal or other litigation the construction of the laws of another jurisdiction is required, the courts

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shall take judicial notice of such construction of the laws of the other jurisdiction.

(6) If an employee has a claim under the workers' compensation law of another state, territory, province, or foreign nation for the same injury or occupational disease as the claim filed in this state, the total amount of compensation paid or awarded under such other workers' compensation law shall be credited against the compensation due under the state workers' compensation law.

(7) For purposes of this section, an employee is considered to be temporarily in a state doing work for an employer if the employee is working for no more than 10 consecutive days or no more than 25 total days during a calendar year for the employer in a state other than the state where the employee is primarily employed.

(8) This section applies to any claim made on or after July 1, 2011, regardless of the date of the accident.

Section 2. This act shall take effect July 1, 2011.

================ T I T L E A M E N D M E N T ================

And the title is amended as follows:

Delete everything before the enacting clause and insert:

A bill to be entitled

An act relating to state reciprocity in workers' compensation claims; creating s. 440.094, F.S.; providing extraterritorial coverage for employees of this state who temporarily leave this state incidental to his or her employment; exempting certain employees

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from another state working in this state and the employers of such employees from the workers' compensation law of this state under certain conditions; providing that the benefits under the workers' compensation insurance or similar laws of the other state are the exclusive remedy against the employer for any injury received by an employee working temporarily in this state; providing requirements for the establishment of prima facie evidence that the employer carries certain workers' compensation insurance; requiring courts to take judicial notice of the construction of certain laws; requiring an employee having a claim under the workers' compensation law of another state, territory, province, or country for the same injury as the claim filed in this state, to have the total amount of compensation paid under another workers' compensation law be credited against the compensation due under the state workers' compensation law; providing criteria for employees to be considered temporarily in a state; providing for the application of the act to a claim; providing an effective date.

The Florida Senate

BILL ANALYSIS AND FISCAL IMPACT STATEMENT

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

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

BILL:	SB 1286
INTRODUCER:	Senator Bennett
SUBJECT:	State Reciprocity in Workers' Compensation Claims
DATE:	March 18, 2011
REVISED:	

	ANALYST	STAFF DIRECTOR	REFERENCE	ACTION
1.	Burgess	Burgess	BI	**Pre-meeting**
2.			BC	
3.				
4.				
5.				
6.				

I. Summary:

The bill creates a process designed to ensure that if a Florida employee is injured in the course of employment while temporarily in another state, that employee is entitled to receive only the benefits required under Florida law, and not the benefits required by the law of the other state, provided that state has a reciprocal provision similar to Florida's.

This bill substantially amends the following sections of the Florida Statutes: 440.09.

II. Present Situation:

Generally

Workers' compensation is a form of insurance designed to provide wage replacement and medical benefits for employees who are injured in the course of employment, in exchange for giving up the right to sue the employer for negligence. Workers' compensation insurance was established to address cost of lawsuits filed by employees against employers for work-related injuries. Through the Florida workers' compensation law, employers must provide medical benefits and indemnity (wage replacement) benefits to their employees who are injured in the course of their employment.

Florida Workers' Compensation Law

In Florida, the worker's compensation process is governed by ch. 440, F.S., titled the "Workers' Compensation Law." Section 440.015, F.S., expresses the legislative intent that the Workers' Compensation Law "be interpreted so as to assure the quick and efficient delivery of disability and medical benefits to an injured worker and to facilitate the worker's return to gainful

reemployment at a reasonable cost to the employer." Further, the Legislature expressed the intent that:

> It is the intent of the Legislature to ensure the prompt delivery of benefits to the injured worker. Therefore, an efficient and self-executing system must be created which is not an economic or administrative burden. The department (Department of Financial Services), agency (Agency for Health Care Administration), the Office of Insurance Regulation, the Department of Education, and the Division of Administrative Hearings shall administer the Workers' Compensation Law in a manner which facilitates the self-execution of the system and the process of ensuring a prompt and cost-effective delivery of payments.[1]

Chapter 440, F.S., provides a detailed framework for coverage and benefit issues,[2] as well as the process for resolving disputes,[3] all of which are specific to Florida and may have substantially different provisions than in other states.

The Florida laws provide predictability for employees, employers and workers' compensation insurance carriers. A greater degree of predictability helps the National Council of Compensation Insurance (NCCI), the rating organization that files annual worker's compensation rates in Florida, to more accurately evaluate the risks being covered and to seek the appropriate premium levels. Further, a greater degree of predictability helps the Office of Insurance Regulation (OIR) to evaluate the annual rate filing and establish the most appropriate premium levels for Florida businesses.

Recently, however, a number of Florida employees, most notably former professional athletes, have begun to file for benefits under the workers' compensation laws of other states, particularly California. The claims are based on the premise that, although the employer and primary employment is in Florida, the injury was sustained in the other state.

Currently, s. 440.09(1)(d), F.S., provides that if a Florida employee is injured while employed elsewhere than in Florida, and the injury would entitle the employee or dependents to compensation if it had happened in this state, the employee or his or her dependents are entitled to compensation. If, however, the employee receives compensation or damages under the laws of any other state, the total compensation for the injury may not be greater than is provided in ch. 440, F.S.

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[1] Id.

[2] *See*, e.g., s. 440.09, F.S. (coverage requirements), s. 440.102, F.S. (drug free workplace provisions), s. 440.106, F.S. (civil remedies), s. 440.15 F.S. (permanent total disability, temporary total disability, permanent impairment benefits, temporary partial disability, and subsequent injury), s. 440.151, F.S. (occupational diseases), and s. 440.16, F.S. (compensation for death).

[3] S*ee*, e.g., s. 440.021, F.S. (exemption from Administrative Procedure Act), s. 440.011, F.S. (exclusiveness of liability), s. 440.192, F.S. (dispute resolution procedures), s. 440.1926, F.S. (alternate dispute resolution procedures), s. 440.25, F.S. (procedures for mediation and hearings), s. 440.271, F.S. (appeal rights), and s. 440.29, F.S. (procedures before a judge of compensation claims).

III. Effect of Proposed Changes:

The bill creates a process designed to ensure that if a Florida employee is injured in the course of employment while temporarily in another state, that employee is entitled to receive only the benefits required under Florida law, and not the benefits required by the law of the other state, if that state has a reciprocal provision similar to Florida's. To accomplish this purpose, the bill would:

- Provide that if a Florida employee temporarily leaves the state incidental to his or her employment and is injured in the course of employment, that employee, or beneficiaries if the injury results in death, is entitled to the benefits as if the employee were injured in Florida.
- Provide that if an employee from another state is injured incidental to employment while temporarily in Florida, that employee and his or her employer are exempt from Florida law if: (1) the employer has workers' compensation insurance coverage under its own state laws; (2) the extraterritorial provisions of Florida law are recognized in the employer's state and; (3) employers and employees covered in Florida are exempted from the workers' compensation laws of the other state.
- If an employee from another state is injured incidential to employment while temporarily in Florida, the exclusive remedy against the employer are the workers' compensation laws of the other state.
- A certificate from the appropriate office of another state is prima facie evidence that an employer carries workers' compensation coverage in the other state.
- For any litigation in Florida that involves a question of construction of laws in another state, the Florida court shall take judicial notice of the laws of the other state.
- The Division of Workers' Compensation is authorized to enter into an agreement with the workers' compensation agency of any other state on matters relating to: (1) conflicts of jurisdiction where the employment in one state with the injury in another; or (2) there is a dispute as to the boundaries or jurisdiction of the states. Any such agreement would determine the rights of Florida employees injured in the other state to the agreement, and for employees of the other state injured in Florida.
- When an employee has a claim under workers' compensation in another jurisdiction for the same injury or occupational disease as a claim filed in Florida, the total amount of compensation derived from the other jurisdiction shall be credited against the compensation due under Florida Workers' Compensation laws.
- An employee is considered to be temporarily working in another state, if the duration of that work does not exceed 10 consecutive days or 25 days during a calendar year.

The bill has an effective date of July 11, 2011.

Other Potential Implications:

IV. Constitutional Issues:

A. Municipality/County Mandates Restrictions:

None.

B. Public Records/Open Meetings Issues:

None.

C. Trust Funds Restrictions:

None.

D. Other Constitutional Issues:

The bill authorizes the Division of Workers' Compensation of the Department of Financial Services to enter into an agreement with the workers' compensation agency of any other state on conflicts of jurisdiction or boundaries. The bill provides that any such agreement would determine the rights of Florida employees injured in the other state that is party to the agreement, and the rights for employees of the other state injured in Florida. This authorization may raise issues of the proper delegation of authority.

Article III, Section 1 of the Florida Constitution states that "[t]he legislative power of the state shall be vested in a legislature of the State of Florida." The Florida Supreme Court has held that this constitutional provision requires application of a "strict separation of powers doctrine...which `encompasses two fundamental prohibitions.'" *Fla. Dep't of State, Div. of Elections v. Martin*, 916 So.2d 763, 769 (Fla. 2005) (quoting *State v. Cotton*, 769 So.2d 345, 353 (Fla.2000), and *Chiles*, 589 So.2d at 264). No branch of Government may delegate its constitutionally assigned powers to another branch. *Chiles*, 589 So.2d at 264.

The legislature may constitutionally transfer subordinate functions to "permit administration of legislative policy by an agency with the expertise and flexibility to deal with complex and fluid conditions." *Microtel v. Fla. Pub. Serv. Comm'n*, 464 So.2d 1189, 1191 (Fla.1985) (citing *State, Dep't of Citrus v. Griffin*, 239 So.2d 577 (Fla.1970)). However, the legislature "may not delegate the power to enact a law or the right to exercise unrestricted discretion in applying the law." *Sims v. State*, 754 So.2d 657, 668 (2000). Further, the nondelegation doctrine precludes the legislature from delegating its powers "absent ascertainable minimal standards and guidelines." *Dep't of Bus. Reg., Div. of Alcoholic Beverages & Tobacco v. Jones*, 474 So.2d 359, 361 (Fla. 1st DCA 1985). When the Legislature delegates power to another body, it "must clearly announce adequate standards to guide ... in the execution of the powers delegated." *Martin, 916 So.2d at 770.*

V. Fiscal Impact Statement:

A. Tax/Fee Issues:

None.

B. Private Sector Impact:

By establishing a process to ensure that a single jurisdiction will apply in cases involving employees injured in a state other than where they are employed, the legislation should reduce the ability of an injured employee to choose the jurisdiction with the more generous benefits. As a result, workers' compensation premiums and potential litigation costs ultimately should be lower for those businesses that employ significant numbers of employees who temporarily travel to other states as part of their employment.

C. Government Sector Impact:

None.

VI. Technical Deficiencies:

None.

VII. Related Issues:

None.

VIII. Additional Information:

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

None.

B. Amendments:

None.

159022

LEGISLATIVE ACTION

Senate . House

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The Committee on Banking and Insurance (Fasano) recommended the following:

Senate Amendment

In title, delete line 25
and insert:
certain insureds or self insurers engaging in
specified

In title, delete line 29
and insert:
requiring such insureds or self insurers to pay the

119096

LEGISLATIVE ACTION

Senate . House

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The Committee on Banking and Insurance (Fasano) recommended the following:

Senate Amendment

Delete line 52
and insert:
expiration of a 330-day period that began on July 21, 2010, to

166596

LEGISLATIVE ACTION

Senate . House

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The Committee on Banking and Insurance (Fasano) recommended the following:

Senate Amendment

Delete lines 155 - 156

and insert:

following each calendar quarter ~~Within 30 days~~ after the insurance is procured, continued, or renewed~~, and simultaneously~~

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LEGISLATIVE ACTION

Senate . House

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The Committee on Banking and Insurance (Bennett) recommended the following:

Senate Amendment (with title amendment)

Between lines 165 and 166
insert:

Section 6. Subsection (3) of section 626.916, Florida Statutes, is amended to read:

626.916 Eligibility for export.—

(3)(a) Subsection (1) does not apply to wet marine and transportation or aviation risks, which are subject to s. 626.917.

(b) Paragraphs (1)(a)-(d) do not apply to classes of insurance which are subject to s. 627.062(3)(d)1. These classes

443498

may be exportable under the following conditions:

1. The insurance must be placed only by or through a surplus lines agent licensed in this state;

2. The insurer must be made eligible under s. 626.918; and

3. The insured must sign a disclosure that substantially provides the following: "You are agreeing to place coverage in the surplus lines market. Superior coverage may be available in the admitted market and at a lesser cost. Persons insured by surplus lines carriers are not protected under the Florida Insurance Guaranty Act with respect to any right of recovery for the obligation of an insolvent unlicensed insurer." If the notice is signed by the insured, the insured is presumed to have been informed and to know that other coverage may be available, and, with respect to the diligent-effort requirement under subsection (1), there is no liability on the part of, and no cause of action arises against, the retail agent presenting the form.

========== T I T L E A M E N D M E N T ==========

And the title is amended as follows:

Delete line 32

and insert:

Office on or before a specified time; amending s. 626.916, F.S.; providing an exemption from certain restrictions on insurance coverage that is eligible for export; providing the conditions for such exemption, including the provision of notice to the insured; providing the requirements of such notice; providing an

The Florida Senate

BILL ANALYSIS AND FISCAL IMPACT STATEMENT

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

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

BILL: SB 1816

INTRODUCER: Senators Fasano and Richter

SUBJECT: Surplus Lines Insurance

DATE: March 18, 2011 REVISED:

	ANALYST	STAFF DIRECTOR	REFERENCE	ACTION
1.	Knudson	Burgess	BI	**Pre-meeting**
2.			BC	
3.				
4.				
5.				
6.				

I. Summary:

Surplus lines insurance is an alternative type of insurance coverage for consumers to buy property-liability insurance from unauthorized (non-admitted) insurers when consumers are unable to purchase the coverage they need from admitted insurers. The premiums charged for surplus lines coverages are subject to a premium receipts tax of 5 percent and a service fee of up to .3 percent. When a surplus lines policy covers risks over multiple states, Florida requires payment of a 5 percent surplus lines tax and the .3 percent service fee on the portion of the premium which is properly allocable to the risks or exposures located in this state.

The Nonadmitted and Reinsurance Reform Act of 2010 (NRRA) was included within the Federal Dodd-Frank Wall Street Reform and Consumer Protection Act. The NRRA creates 15 USC 8201 through 8206, limits regulatory authority over nonadmitted (surplus lines) insurance to the home state of the insured (policyholder). Under the NRRA, Florida will no longer have jurisdiction to collect taxes and fees on surplus lines policies that cover risks over multiple states unless Florida is the home state of the risk. This may result in the loss of tax revenue in the millions of dollars. However, the NRRA authorizes states to enter agreements with one another that provide for the collection of taxes on multi-state risks by the home state and then allocate tax revenue to the appropriate state.

Senate Bill 1816 authorizes the Department of Financial Services (DFS) and the Office of Insurance Regulation (OIR) to enter into cooperative reciprocal agreements with other states to collect and allocate nonadmitted insurance taxes for multistate risks pursuant to the NRRA. The bill also provides 45 days after the end of the calendar quarter for surplus lines agents and insureds that do not use a surplus lines agent to procure coverage to file an affidavit describing transactions handled during the last quarter and pay the required premium tax and fees.

This bill substantially amends the following sections of the Florida Statutes: 626.931, 626.932, 626.9325, 626.9362, and 626.938.

II. Present Situation:

Surplus Lines Insurance Coverage – Background

Insurance companies that transact insurance in Florida or that have offices located in the state are required to obtain a certificate of authority (COA) issued by the Office of Insurance Regulation (OIR) pursuant to s. 624.401, F.S. These companies, referred to as authorized or admitted insurers,[1] are broadly regulated by the OIR under the Insurance Code as to reserves, surplus as to policyholders, solvency, rates and forms, market conduct, permissible investments, and affiliate relationships.[2] Authorized insurers are also required to participate in a variety of government mandated insurance programs and pay assessments levied by state guaranty funds in the event of insurer insolvencies.[3]

Surplus lines insurers are regulated by the state, but do not have to obtain a COA and are not required to adhere to the other requirements mentioned above. Surplus lines insurance is an alternative type of insurance coverage for consumers to buy property-liability insurance from unauthorized (non-admitted) insurers when consumers are unable to purchase the coverage they need from admitted insurers. Surplus lines insurance is coverage provided by a company that is not licensed in Florida, but is allowed to transact insurance in the state as an "eligible" insurer[4] under the surplus lines law (ss. 626.913-626.937, F.S.). Under this law, insurance may only be purchased from a surplus lines carrier if the necessary amount of coverage cannot be procured after a diligent effort to buy the coverage from authorized insurers.[5] Rates charged by a surplus lines carrier must not be lower than the rate applicable and in use by the majority of the authorized insurers writing similar coverages on similar risks in Florida.[6] Likewise, a surplus lines policy contract form must not be more favorable to the insured as to the coverage or rate offered by the majority of authorized carriers.[7]

The surplus lines law contains specific financial and other requirements that unauthorized insurers must comply with in order to become eligible surplus lines insurers and obtain approval by the OIR. For example, a surplus lines insurer must maintain a surplus as to policyholders of

[1] An "authorized" or "admitted" insurer is one duly authorized by a COA to transact insurance in this state.
[2] The Insurance Code consists of chs. 624-632, 634, 635, 636, 641, 642, 648, and 651, F.S.
[3] For example, Florida licensed direct writers of property and casualty insurance must be members of the Florida Insurance Guaranty Association, which handles the claims of insolvent insurers under part II of ch. 631, F.S., and insurers offering workers' compensation coverage in Florida must be members of the Florida Workers' Compensation Insurance Guaranty Association, which provides payment of covered claims for insurers that are declared insolvent under part V of ch. 631, F.S.
[4] An "eligible surplus lines insurer" as defined in s. 626.914(2), F.S., is an "unauthorized insurer" which has been made eligible by the Office of Insurance Regulation to issue insurance coverage under the surplus lines law.
[5] See s. 626.914(4), F.S. A "diligent effort" is defined as seeking coverage from and being rejected by at least three authorized insurers that write the type of coverage being sought. The rejections must be documented.
[6] Section 626.916(1)(b), F.S.
[7] Section 626.916(1)(c), F.S.

not less than $15 million and have been licensed in its state or country of domicile for at least three years.[8]

Historically, surplus lines insurers have never been held subject to Florida's regulation of rates, forms, or other requirements under ch. 627, F.S., as are admitted insurers.[9] This is true of the regulatory treatment of surplus lines insurers in other states across the country. The different regulatory treatment is due to the unique nature of surplus lines insurance because it covers consumer needs arising from emerging technologies, new business practices, or changing legal environments which require a quick response that is often difficult for admitted insurers to provide, according to representatives with the Florida Surplus Lines Office.

Florida Surplus Lines Service Office and Surplus Lines Agents

In 1997, the Legislature created the Florida Surplus Lines Service Office (FSLSO), a non-profit association designed to act as a "self-regulating organization" to permit better access by consumers to approved surplus lines insurers.[10] The FSLSO is governed by a nine-person board of governors and is required to perform its functions under a plan of operation approved by the OIR. The FSLSO:

- Receives, records, and reviews all surplus lines insurance policies;
- Maintains records of policies;
- Prepares and delivers to each surplus lines agent quarterly reports of each agent's business;
- Collects and remits the surplus lines tax; and
- Performs other activities as specified by statute.

There are 1,215 licensed surplus lines agents in Florida which are authorized to handle the placement of insurance coverages with surplus lines insurers and are deemed to be members of the FSLSO. These agents are required to report and file with the FSLSO a copy of, or information on, each surplus lines insurance policy, including the name of the insured and insurer, the policy number and its effective date, the policy's expiration date, the type of coverage, the premium, and other information.

Surplus Lines Premium Tax and Other Fees

There are 172 surplus lines insurers writing insurance in Florida with over $4 billion in written premiums during 2009.[11] The premiums charged for surplus lines coverages are subject to a premium receipts tax of 5 percent.[12] The surplus lines premium tax is more than double the percentage for admitted carriers. Surplus lines premiums are also subject to a service fee of up to 0.3 percent, as determined by the office, of the total gross premium of each surplus lines policy

[8] Section 626.918, F.S.
[9] *See Affidavits In Support of Intervenor-Plaintiff Essex Insurance Company's Amended Motion for Summary Judgment* by Steve Parton, Office of Insurance Regulation, General Counsel, and Belinda Miller, Office of Insurance Regulation, Deputy Commissioner for Property and Casualty Insurance, filed in *Howard v. Choice Hotels International, Inc.*, Case No. CA06-680-55 (Fla. 7th Cir. Tr. Ct. 2008).
[10] Chapter 97-196, Laws of Fla. Section 626.921, F.S.
[11] Florida Surplus Lines Service Office.
[12] Section 626.932, F.S.

for the cost of operation of the service office.[13] Florida also applies the premium tax and the service fee to the gross premium of policies purchased from an unauthorized insurer when the insurance is not purchased from a Florida-authorized surplus lines insurer or through the FSLSO. The surplus lines agent collects the tax, the service fee from the insured at the time of the delivery of the cover note, certificate of insurance, policy, or other initial confirmation of insurance. In 2009, the FSLSO collected $180,784,308 in taxes and $3,673,838 in fees. The 2009 revenue constituted a decrease from the prior two years. The FSLSO collected taxes totaling $194,670,864 in 2008 and $211,285,737 in 2007.

A surplus lines policy will often cover risks or exposures that are only partially in this state. For instance, the policy might cover multiple structures located across multiple states. In this instance, the surplus lines tax is computed on the portion of the premium which is properly allocable to the risks or exposures located in this state. The FSLSO has promulgated different methods of determining the taxes and service fees payable to Florida for a multi-state risk. The tax for multistate residential property is determined by calculating the premium for structures and other property permanently located in Florida. The surplus lines agent makes the calculation and remits the proper tax and fee payment for the portion of the risk based in Florida. Representatives from the FSLSO estimate that approximately 10 percent of surplus lines premium tax revenue is attributable to taxes on multi-state risks.

Nonadmitted and Reinsurance Reform Act of 2010

The Nonadmitted and Reinsurance Reform Act of 2010 (NRRA) was included within the Federal Dodd-Frank Wall Street Reform and Consumer Protection Act [H.R. 4173 (2010)]. The NRRA creates 15 USC 8201-8206, governing nonadmitted (surplus lines) insurance. The NRRA limits regulatory authority to the home state of the insured (policyholder). The insured's home state is the state in which the insured maintains its principle place of business or an individual's principal residence.

The NRRA allows only the home state of an insured to require premium tax payments for nonadmitted insurance. However, the NRRA allows states to enter into a compact to allocate the premium taxes paid to the insured's home state. If the compact is enacted on or before June 15, 2011, the compact will apply to premium taxes that must be paid to states that are signatories to the compact. However, if the compact is enacted after that date, it will not be effective until January 1 of the first year after the compact is enacted.

The NRRA specifies that the placement of nonadmitted insurance is only subject to the statutory and regulatory requirements of the insured's home state.[14] Only the insured's home state may require the licensure of a surplus lines broker (agents) to sell, solicit or negotiate nonadmitted insurance with respect to that insured. Surplus lines policies purchased on risks located entirely in Florida will continue to be subject to Florida law. However, if the risk is located in multiple states, under the NRRA the home state has sole jurisdiction over all aspects of the insurance policy. For example, if a surplus lines policy is purchased on a risk covering multiple states,

[13] Section 626.921(3)(f), F.S.

[14] The act does not preempt a state law restricting the placement of workers' compensation insurance or excess insurance for self-funded workers' compensation plans with a nonadmitted insurer.

Florida will only have jurisdiction if Florida is the home state of the risk. If Florida lacks jurisdiction over the surplus lines policy, the state will not be able to collect premium taxes and fees on the Florida portion of the risk. Representatives from the Office of Insurance Regulation and the Florida Surplus Lines Service Office indicate that Florida is likely to lose millions of dollars in tax revenue if the state is unable to collect surplus lines premium taxes on multistate risks.

III. Effect of Proposed Changes:

Section 1. Amends s. 626.931(1), F.S., to allow surplus lines agents 45 days after the end of the calendar quarter to file an affidavit stating that the agent has submitted all of the agent's surplus lines transactions to the Florida Surplus Lines Service Office.

Section 2. Amends s. 626.932(3), F.S., to specify that the surplus lines tax shall be computed on the gross premium when the surplus lines policy covers risks that are only partially in Florida and Florida is the home state as defined by the NRRA.

Section 3. Amends s. 626.9325, F.S., to allow surplus lines agents 45 days following each calendar quarter to pay to the Surplus Lines Service Office all service fees related to policies reported during the previous quarter. The fee is computed on the gross premium when the surplus lines policy covers risks that are only partially in Florida, and Florida is the home state as defined by the NRRA.

Section 4. Creates s. 626.9362, F.S., to authorize the Department of Financial Services and the OIR to enter into cooperative reciprocal agreements with other states to collect and allocate nonadmitted insurance taxes for multistate risks pursuant to the NRRA. The agreements are authorized to create a comprehensive system for reporting, collecting, and allocating these taxes. The agreement may:

- Create a clearinghouse to receive and disburse nonadmitted insurance taxes;
- Create reporting requirements;
- Determine the methods for collecting and forwarding taxes to the appropriate state;
- Develop a premium tax allocation formula for multi-state nonadmitted risks;
- Provide for audits and exchanging information; and
- Facilitate the reasonable administration of the cooperative reciprocal agreement.

The reciprocal agreements must be implemented by the Florida Surplus Lines Service Office, which is authorized to collect the total tax imposed on a multi-state risk nonadmitted insurance premium. The OIR and the DFS are granted rulemaking authority to administer agreements reached with other states.

Section 5. Amends s. 626.938(3), F.S., to require that insureds that do not use a surplus lines agent to procure surplus lines coverage must pay the surplus lines premium tax and the service fee within 45 days following each calendar quarter. The section also specifies that the surplus lines tax paid by the insured shall be computed on the gross premium when the surplus lines policy covers risks that are only partially in Florida and Florida is the home state as defined by the NRRA.

Other Potential Implications:

IV. Constitutional Issues:

A. Municipality/County Mandates Restrictions:

None.

B. Public Records/Open Meetings Issues:

None.

C. Trust Funds Restrictions:

None.

D. Other Constitutional Issues:

Statutory authorization to compact or enter reciprocal agreements with other states potentially implicate the "nondelegation doctrine." Article III, Section 1 of the Florida Constitution states that "[t]he legislative power of the state shall be vested in a legislature of the State of Florida." The Florida Supreme Court has held that this constitutional provision requires application of a "strict separation of powers doctrine...which `encompasses two fundamental prohibitions'." *Fla. Dep't of State, Div. of Elections v. Martin*, 916 So.2d 763, 769 (Fla. 2005) (quoting *State v. Cotton*, 769 So.2d 345, 353 (Fla. 2000), and *Chiles*, 589 So.2d at 264). No branch of Government may delegate its constitutionally assigned powers to another branch. *Chiles*, 589 So.2d at 264.

The Legislature may constitutionally transfer subordinate functions to "permit administration of legislative policy by an agency with the expertise and flexibility to deal with complex and fluid conditions." *Microtel v. Fla. Pub. Serv. Comm'n*, 464 So.2d 1189, 1191 (Fla.1985) (citing *State, Dep't of Citrus v. Griffin*, 239 So.2d 577 (Fla.1970)). However, the Legislature "may not delegate the power to enact a law or the right to exercise unrestricted discretion in applying the law." *Sims v. State*, 754 So.2d 657, 668 (2000). Further, the nondelegation doctrine precludes the legislature from delegating its powers "absent ascertainable minimal standards and guidelines." *Dep't of Bus. Reg., Div. of Alcoholic Beverages & Tobacco v. Jones*, 474 So.2d 359, 361 (Fla. 1st DCA 1985). When the Legislature delegates power to another body, it "must clearly announce adequate standards to guide ... in the execution of the powers delegated." *Martin, 916 So.2d at 770.*

V. Fiscal Impact Statement:

A. Tax/Fee Issues:

The Florida Surplus Lines Service Office estimates that approximately 10 percent of the current premium tax collected could be lost to other states due to the NRRA's

requirement that only the home state of the insured may require the payment of premium taxes. The FSLSO estimates a potential loss of $15-20 million to the state's general revenue collections. Much of this revenue should be recaptured if Florida successfully enters into reciprocal agreements with a large number of states.

B. Private Sector Impact:

The creation of a uniform clearinghouse to collect information, taxes, and fees related to surplus lines insurance on multi-state risks will be less burdensome to surplus lines agents and entities purchasing such insurance. Currently, agents must file reports and pay taxes to multiple different states and perform calculations regarding the appropriate tax revenues due the various states.

C. Government Sector Impact:

Representatives from the OIR state that implementation of the legislation can be absorbed within current resources of the office.

VI. Technical Deficiencies:

Section 5 of the bill incorrectly requires payment of the surplus lines premium tax after each calendar quarter.

VII. Related Issues:

None.

VIII. Additional Information:

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

None.

B. Amendments:

None.

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LEGISLATIVE ACTION

Senate . House

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The Committee on Banking and Insurance (Hays) recommended the following:

Senate Amendment (with title amendment)

Delete everything after the enacting clause and insert:

Section 1. Subsections (5) through (9), (10) through (14), (15) through (24), and (26) through (34) of section 494.001, Florida Statutes, are renumbered as subsections (6) through (10), (12) through (16), (18) through (27), and (28) through (36), respectively, new subsections (5), (11), and (17) are added to that section, and present subsections (14), (25), and (26) of that section are amended, to read:

494.001 Definitions.—As used in ss. 494.001-494.0077, the

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term:

(5) "Contract loan processor" means an individual who is licensed under part II of this chapter as a loan originator, who is an independent contractor for a mortgage broker or mortgage lender, and who engages only in loan processing.

(11) "In-house loan processor" means an individual who is an employee of a mortgage broker or a mortgage lender who engages only in loan processing.

(16) ~~(14)~~ "Loan originator" means an individual who, directly or indirectly, solicits or offers to solicit a mortgage loan, accepts or offers to accept an application for a mortgage loan, negotiates or offers to negotiate the terms or conditions of a new or existing mortgage loan on behalf of a borrower or lender, ~~processes a mortgage loan application,~~ or negotiates or offers to negotiate the sale of an existing mortgage loan to a noninstitutional investor for compensation or gain. The term includes an individual who is required to be licensed as a loan originator under t~~he activities of a loan originator as that term is defined in~~ the S.A.F.E. Mortgage Licensing Act of 2008~~, and an individual acting as a loan originator pursuant to that definition is acting as a loan originator for purposes of this definition~~. The term does not include an employee of a mortgage broker or mortgage lender whose duties are limited to ~~who performs only administrative or clerical tasks, including quoting available interest rates,~~ physically handling a completed application form~~,~~ or transmitting a completed application form to a lender on behalf of a prospective borrower.

(17) "Loan processing" means:

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(a) Receiving, collecting, distributing, and analyzing information common for the processing of a mortgage loan; or

(b) Communicating with a consumer to obtain information necessary for the processing of a mortgage loan if such communication does not include offering or negotiating loan rates or terms, or counseling consumers about residential mortgage loan rates or terms.

~~(25) "Person" has the same meaning as in s. 1.01.~~

(28) ~~(26)~~ "Principal loan originator" means the licensed loan originator in charge of, and responsible for, the operation of a mortgage lender or mortgage broker, including all of the activities of the mortgage lender's or mortgage broker's loan originators, in-house loan processors, and branch managers, whether employees or independent contractors.

Section 2. Subsection (2) of section 494.0011, Florida Statutes, is amended to read:

494.0011 Powers and duties of the commission and office.—

(2) ~~To administer ss. 494.001-494.0077,~~ The commission may adopt rules to administer parts I, II, and III of this chapter, including rules:

(a) Requiring electronic submission of any forms, documents, or fees required by this act.

(b) Relating to compliance with the S.A.F.E. Mortgage Licensing Act of 2008, including rules to:

1. Require in-house loan processors, loan originators, mortgage brokers, mortgage lenders, and branch offices to register through the registry.

2. Require the use of uniform forms that have been approved by the registry, and any subsequent amendments to such forms if

the forms are substantially in compliance with the provisions of this chapter. Uniform forms that the commission may adopt include, but are not limited to:

a. Uniform Mortgage Lender/Mortgage Broker Form, MU1.

b. Uniform Mortgage Biographical Statement & Consent Form, MU2.

c. Uniform Mortgage Branch Office Form, MU3.

d. Uniform Individual Mortgage License/Registration & Consent Form, MU4.

3. Require the filing of forms, documents, and fees in accordance with the requirements of the registry.

4. Prescribe requirements for amending or surrendering a license or other activities as the commission deems necessary for the office's participation in the registry.

5. Prescribe procedures that allow a licensee to challenge information contained in the registry.

6. Prescribe procedures for reporting violations of this chapter and disciplinary actions on licensees to the registry.

(c) Establishing time periods during which an in-house processor, a loan originator, a mortgage broker, or a mortgage lender license applicant under part II or part III is barred from licensure due to prior criminal convictions of, or guilty or nolo contendere pleas by, any of the applicant's control persons, regardless of adjudication.

1. The rules must provide:

a. Permanent bars for felonies involving fraud, dishonesty, breach of trust, or money laundering;

b. A 15-year disqualifying period for felonies involving moral turpitude;

c. A 7-year disqualifying period for all other felonies; and

d. A 5-year disqualifying period for misdemeanors involving fraud, dishonesty, or any other act of moral turpitude.

2. The rules may provide for an additional waiting period due to dates of imprisonment or community supervision, the commitment of multiple crimes, and other factors reasonably related to the applicant's criminal history.

3. The rules may provide for mitigating factors for crimes identified in sub-subparagraph 1.b. However, the mitigation may not result in a period of disqualification less than 7 years. The rule may not mitigate the disqualifying periods in sub-subparagraphs 1.a., 1.c., and 1.d.

4. An applicant is not eligible for licensure until the expiration of the disqualifying period set by rule.

5. Section 112.011 is not applicable to eligibility for licensure under this part.

Section 3. Subsection (1) of section 494.0018, Florida Statutes, is amended to read:

494.0018 Penalties.—

(1) Whoever knowingly violates any provision of s. 494.00255(1)(a), (b), or (c) or s. 494.0025(1), (3)~~(2)~~, (4)~~(3)~~, (5)~~(4)~~, or (6)~~(5)~~, except as provided in subsection (2) of this section, commits a felony of the third degree, punishable as provided in s. 775.082, s. 775.083, or s. 775.084. Each such violation constitutes a separate offense.

Section 4. Subsections (2) through (10) of section 494.0025, Florida Statutes, are renumbered as subsections (3) through (11), respectively, and a new subsection (2) is added to

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that section, to read:

494.0025 Prohibited practices.—It is unlawful for any person:

(2) To act as an in-house loan processor in this state without a current, active in-house processor license issued by the office pursuant to part II of this chapter.

Section 5. Paragraphs (n) and (p) of subsection (1), paragraph (f) of subsection (2), and subsections (3), (4), (5), (6), and (8) of section 494.00255, Florida Statutes, are amended, and paragraph (m) of subsection (1) is reenacted, to read:

494.00255 Administrative penalties and fines; license violations.—

(1) Each of the following acts constitutes a ground for which the disciplinary actions specified in subsection (2) may be taken against a person licensed or required to be licensed under part II or part III of this chapter:

(m) In any mortgage transaction, violating any provision of the federal Real Estate Settlement Procedures Act, as amended, 12 U.S.C. ss. 2601 et seq.; the federal Truth in Lending Act, as amended, 15 U.S.C. ss. 1601 et seq.; or any regulations adopted under such acts.

(n) Having a loan originator, an in-house loan processor, a mortgage broker, or a mortgage lender license, or the equivalent of such license, revoked in any jurisdiction.

(p) Acting as a loan originator, an in-house loan processor, a mortgage broker, or a mortgage lender without a current license issued under part II or part III of this chapter.

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(2) If the office finds a person in violation of any act specified in this section, it may enter an order imposing one or more of the following penalties:

(f) An administrative fine of up to $1,000 per day, but not to exceed $25,000 cumulatively, for each day that:

1. A mortgage broker or mortgage lender conducts business at an unlicensed branch office.

2. An unlicensed person acts as a loan originator, an in-house loan processor, a mortgage broker, or a mortgage lender.

(3) A mortgage broker or mortgage lender, as applicable, is subject to the disciplinary actions specified in subsection (2) for a violation of subsection (1) by:

(a) A control person of the mortgage broker or mortgage lender; ~~or~~

(b) A loan originator employed by or contracting with the mortgage broker or mortgage lender; or

(c) An in-house loan processor who is an employee of the mortgage broker or mortgage lender.

(4) A principal loan originator of a mortgage broker is subject to the disciplinary actions specified in subsection (2) for violations of subsection (1) by a loan originator or an in-house loan processor in the course of an association with the mortgage broker if there is a pattern of repeated violations by the loan originator or in-house loan processor or if the principal loan originator has knowledge of the violations.

(5) A principal loan originator of a mortgage lender is subject to the disciplinary actions specified in subsection (2) for violations of subsection (1) by a loan originator or an in-house loan processor in the course of an association with a

mortgage lender if there is a pattern of repeated violations by the loan originator or in-house loan processor or if the principal loan originator has knowledge of the violations.

(6) A branch manager is subject to the disciplinary actions specified in subsection (2) for violations of subsection (1) by a loan originator or an in-house loan processor in the course of an association with the mortgage broker or mortgage lender if there is a pattern of repeated violations by the loan originator or in-house loan processor or if the branch manager has knowledge of the violations.

(8) Pursuant to s. 120.60(6), the office may summarily suspend the license of a loan originator, an in-house loan processor, a mortgage broker, or a mortgage lender if the office has reason to believe that a licensee poses an immediate, serious danger to the public's health, safety, or welfare. The arrest of the licensee, or the mortgage broker or the mortgage lender's control person, for any felony or any crime involving fraud, dishonesty, breach of trust, money laundering, or any other act of moral turpitude is deemed sufficient to constitute an immediate danger to the public's health, safety, or welfare. Any proceeding for the summary suspension of a license must be conducted by the commissioner of the office, or designee, who shall issue the final summary order.

Section 6. Subsection (5) of section 494.00312, Florida Statutes, is amended to read:

494.00312 Loan originator license.—

(5) The office may not issue a license to an applicant who has had a loan originator or an in-house loan processor license or its equivalent revoked in any jurisdiction.

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Section 7. Section 494.00314, Florida Statutes, is created to read:

494.00314 In-house loan processor license.—

(1) An individual acting as an in-house loan processor must be licensed under this section.

(2) In order to apply for an in-house loan processor license, an applicant must:

(a) Be at least 18 years of age and have a high school diploma or its equivalent.

(b) Submit a completed license application form as prescribed by commission rule.

(c) Submit a nonrefundable application fee of $100. Application fees may not be prorated for partial years of licensure.

(d) Submit fingerprints in accordance with rules adopted by the commission.

1. The fingerprints must be submitted to a live-scan vendor authorized by the Department of Law Enforcement.

2. A state criminal history background check must be conducted through the Department of Law Enforcement, and a federal criminal history check must be conducted through the Federal Bureau of Investigation.

3. All fingerprints submitted to the Department of Law Enforcement must be submitted electronically and entered into the statewide automated fingerprint identification system established in s. 943.05(2)(b) and available for use in accordance with s. 943.05(2)(g) and (h). The office shall pay an annual fee to the department to participate in the system and inform the department of any person whose fingerprints are no

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longer required to be retained.

4. The costs of fingerprint processing, including the cost of retaining fingerprints, shall be borne by the person subject to the background check.

5. The office is responsible for reviewing the results of the state and federal criminal history checks and determining whether the applicant meets licensure requirements.

(e) Submit additional information or documentation requested by the office and required by rule concerning the applicant. Additional information may include documentation of pending or prior disciplinary or criminal history events, including arrest reports and certified copies of charging documents, plea agreements, judgments and sentencing documents, documents relating to pretrial intervention, orders terminating probation or supervised release, final administrative agency orders, or other comparable documents that may provide the office with the appropriate information to determine eligibility for licensure.

(f) Submit any other information required by the registry for processing the application.

(3) An application is considered received for the purposes of s. 120.60 upon the office's receipt of all documentation from the registry, including the completed application form, criminal history information, and license application fee.

(4) The office shall issue an in-house loan processor license to each person who is not otherwise ineligible and who meets the requirements of this section. However, it is a ground for denial of licensure if the applicant:

(a) Has committed any violation specified in ss. 494.001-

494.0077; or

(b) Is the subject of a pending felony criminal prosecution or a prosecution or an administrative enforcement action in any jurisdiction which involves fraud, dishonesty, breach of trust, money laundering, or any other act of moral turpitude.

(5) The office may not issue a license to an applicant who has had an in-house loan processor or loan originator license or its equivalent revoked in any jurisdiction.

(6) An in-house loan processor license shall be annulled pursuant to s. 120.60 if it was issued by the office by mistake. A license must be reinstated if the applicant demonstrates that the requirements for obtaining the license have been satisfied.

(7) All in-house loan processor licenses must be renewed annually by December 31, pursuant to s. 494.00315. If a person holding an active license has not applied to renew the license on or before December 31, the license expires on December 31. If a person holding an active license has applied to renew on or before December 31, the license remains active until the renewal application is approved or denied. An in-house loan processor is not precluded from reapplying for licensure upon expiration of a previous license.

(8) An in-house loan processor licensed under this section may not act as a loan originator without a loan originator license issued under this part.

(9) A loan originator licensed under this part may also act as an in-house loan processor without an in-house loan processor license.

Section 8. Section 494.00315, Florida Statutes, is created to read:

494.00315 In-house loan processor license renewal.—In order to renew an in-house loan processor license, an in-house loan processor must:

(1) Submit a completed license renewal form as prescribed by commission rule.

(2) Submit a nonrefundable renewal fee of $75 and nonrefundable fees to cover the costs of further fingerprint processing and retention as set forth in commission rule.

(3) Submit any additional information or documentation requested by the office and required by rule concerning the licensee. Additional information may include documentation of pending and prior disciplinary and criminal history events, including arrest reports and certified copies of charging documents, plea agreements, judgments and sentencing documents, documents relating to pretrial intervention, orders terminating probation or supervised release, final administrative agency orders, or other comparable documents that may provide the office with the appropriate information to determine eligibility for renewal of licensure.

Section 9. Section 494.00331, Florida Statutes, is amended to read:

494.00331 Loan originator and loan processor employment.—

(1) LOAN ORIGINATORS.—An individual may not act as a loan originator unless he or she is an employee of, or an independent contractor for, a mortgage broker or a mortgage lender, and may not be employed by or contract with more than one mortgage broker or mortgage lender, or either simultaneously.

(2) CONTRACT LOAN PROCESSORS.—Subsection (1) ~~However, this provision~~ does not apply to a contract loan processor who has a

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declaration of intent to act solely as a contract loan processor on file with the office. The declaration of intent must be on a form as prescribed by commission rule ~~any licensed loan originator who acts solely as a loan processor and contracts with more than one mortgage broker or mortgage lender, or either simultaneously~~.

~~(2) For purposes of this section, the term "loan processor" means an individual who is licensed as a loan originator who engages only in:~~

~~(a) The receipt, collection, distribution, and analysis of information common for the processing or underwriting of a residential mortgage loan; or~~

~~(b) Communication with consumers to obtain the information necessary for the processing or underwriting of a loan, to the extent that such communication does not include offering or negotiating loan rates or terms or does not include counseling consumers about residential mortgage loan rates or terms.~~

~~(3) A person may not act as a loan processor unless the person is licensed as a loan originator under this chapter and has on file with the office a declaration of intent to engage solely in loan processing. The declaration of intent must be on such form as prescribed by the commission by rule.~~

(a) ~~(4)~~ A loan originator ~~that currently has a declaration of intent to engage solely in loan processing on file with the office~~ may withdraw his or her declaration of intent ~~to engage solely in loan processing~~. The withdrawal of declaration of intent must be on such form as prescribed by commission rule.

(b) ~~(5)~~ A declaration of intent or a withdrawal of declaration of intent is effective upon receipt by the office.

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(c) ~~(6)~~ The fee earned by a contract loan processor may be paid to the company that employs the loan processor without violating the restriction in s. 494.0025(8) ~~(7)~~ requiring fees or commissions to be paid to a licensed mortgage broker or mortgage lender or a person exempt from licensure under this chapter.

(3) IN-HOUSE LOAN PROCESSORS.—An individual may not act as an in-house loan processor unless he or she is an employee of a mortgage broker or a mortgage lender and may not be employed by more than one mortgage broker or mortgage lender, or either, simultaneously. An in-house loan processor must work at the direction of and be subject to the supervision and instruction of a loan originator licensed under this part.

Section 10. Subsection (1) of section 494.0035, Florida Statutes, is amended to read:

494.0035 Principal loan originator and branch manager for mortgage broker.—

(1) Each mortgage broker must be operated by a principal loan originator who shall have full charge, control, and supervision of the mortgage broker ~~business~~. The principal loan originator must have been licensed as a loan originator for at least 1 year before being designated as the principal loan originator, or must demonstrate to the satisfaction of the office that he or she has been actively engaged as ~~in~~ a mortgage-related ~~mortgage broker-related~~ business for at least 1 year before being designated as a principal loan originator. Each mortgage broker must keep the office informed of the person designated as the principal loan originator as prescribed by commission rule. If the designation is inaccurate, the mortgage broker ~~business~~ shall be deemed to be operated under the full

charge, control, and supervision of each officer, director, or ultimate equitable owner of a 10-percent or greater interest in the mortgage broker, or any other person in a similar capacity. A loan originator may not be a principal loan originator for more than one mortgage broker at any given time.

Section 11. Paragraph (c) of subsection (3) of section 494.0038, Florida Statutes, is amended to read:

494.0038 Loan origination and mortgage broker fees and disclosures.—

(3) At the time a written mortgage broker agreement is signed by the borrower or forwarded to the borrower for signature, or at the time the mortgage broker business accepts an application fee, credit report fee, property appraisal fee, or any other third-party fee, but at least 3 business days before execution of the closing or settlement statement, the mortgage broker shall disclose in writing to any applicant for a mortgage loan the following information:

(c) A good faith estimate <u>that discloses settlement charges and loan terms</u>~~, signed and dated by the borrower, which discloses the total amount of each of the fees the borrower may reasonably expect to pay if the loan is closed, including, but not limited to, fees earned by the mortgage broker, lender fees, third-party fees, and official fees, together with the terms and conditions for obtaining a refund of such fees, if any~~.

1. Any amount collected in excess of the actual cost shall be returned within 60 days after rejection, withdrawal, or closing.

2. At the time a good faith estimate is provided to the borrower, the loan originator must identify in writing <u>an</u>

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itemized list that provides the recipient of all payments charged the borrower, which, except for all fees to be received by the mortgage broker, may be disclosed in generic terms, such as, but not limited to, paid to lender, appraiser, officials, title company, or any other third-party service provider. This requirement does not supplant or is not a substitute for the written mortgage broker agreement described in subsection (1). The disclosure required under this subparagraph must be signed and dated by the borrower.

Section 12. Paragraph (a) of subsection (7) of section 494.00421, Florida Statutes, is amended to read:

494.00421 Fees earned upon obtaining a bona fide commitment.—Notwithstanding the provisions of ss. 494.001-494.0077, any mortgage broker which contracts to receive a loan origination fee from a borrower upon obtaining a bona fide commitment shall accurately disclose in the mortgage broker agreement:

(7)(a) The following statement, in at least 12-point boldface type immediately above the signature lines for the borrowers:

"You are entering into a contract with a mortgage broker to obtain a bona fide mortgage loan commitment under the same terms and conditions as stated hereinabove or in a separate executed good faith estimate form. If the mortgage broker obtains a bona fide commitment under the same terms and conditions, you will be obligated to pay the loan origination fees even if you choose not to complete the loan transaction. If the provisions of s. 494.00421, Florida Statutes, are not met, the loan origination fee can only be earned upon the funding of the mortgage loan.

The borrower may contact the Office of Financial Regulation ~~Department of Financial Services~~, Tallahassee, Florida, regarding any complaints that the borrower may have against the loan originator. The telephone number of the office ~~department~~ is: ...(insert telephone number)....”

Section 13. Subsection (5) of section 494.00611, Florida Statutes, is amended to read:

494.00611 Mortgage lender license.—

(5) The office may not issue a license if the applicant has had a mortgage lender license or its equivalent revoked in any jurisdiction, or any of the applicant’s control persons has ever had a loan originator or an in-house loan processor license or its equivalent revoked in any jurisdiction.

Section 14. Paragraph (e) of subsection (1) of section 494.00612, Florida Statutes, is amended to read:

494.00612 Mortgage lender license renewal.—

(1) In order to renew a mortgage lender license, a mortgage lender must:

(e) Authorize the registry to obtain an independent credit report on each of the mortgage lender’s control persons ~~lender~~ from a consumer reporting agency, and transmit or provide access to the report to the office. The cost of the credit report shall be borne by the licensee.

Section 15. Subsection (13) is added to section 494.0067, Florida Statutes, to read:

494.0067 Requirements of mortgage lenders.—

(13) Each mortgage lender shall submit to the registry reports of condition which are in a form and which contain such information as the registry may require.

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Section 16. This act shall take effect January 1, 2012.

========== T I T L E A M E N D M E N T ==========

And the title is amended as follows:

Delete everything before the enacting clause and insert:

A bill to be entitled

An act relating to loan processing; amending s. 494.001, F.S.; creating and revising definitions; deleting a redundant definition; amending s. 494.0011, F.S.; specifying rulemaking powers of the Financial Services Commission; amending s. 494.0018, F.S.; revising cross-references; amending s. 494.0025, F.S.; prohibiting acting as an in-house loan processor without a specified license; amending s. 494.00255, F.S.; including licensed in-house loan processors in disciplinary provisions; amending s. 494.00312, F.S.; providing that a loan originator license may not be issued to a person who has had an in-house loan processor license or its equivalent revoked in any jurisdiction; creating s. 494.00314, F.S.; providing for licensing of in-house loan processors; providing application requirements; specifying when an application is considered received; providing grounds for denial of licensure; prohibiting issuance of licenses to applicants who have had certain licenses revoked in other jurisdictions; providing for annulment of licenses in certain circumstances; requiring annual renewal of licenses; prohibiting an

in-house loan processor from acting as a loan originator without a loan originator license; authorizing a licensed loan originator to act as an in-house loan processor without an in-house loan processor license; creating s. 494.00315, F.S.; providing for license renewals; amending s. 494.00331, F.S.; providing that specified provisions do not apply to a licensed contract loan processor who has on file with the office a declaration of intent to act solely as a contract loan processor; deleting a definition; providing restrictions on employment of persons licensed as in-house loan processors; amending s. 494.0035, F.S.; clarifying provisions concerning operation of mortgage brokers; amending s. 494.0038, F.S.; revising provisions relating to disclosure of settlement charges and loan terms; amending s. 494.00421, F.S.; revising an agency reference in the mortgage broker agreement; providing that a borrower may contact the Office of Financial Regulation rather than the Department of Financial Services regarding any complaints against a loan originator; amending s. 494.00611, F.S.; providing that a mortgage lender license may not be issued to an applicant if any of the applicant’s control persons has ever had an in-house loan processor license or its equivalent revoked in any jurisdiction; amending s. 494.00612, F.S.; requiring that in order to renew a mortgage lender license a mortgage lender must authorize the Nationwide Mortgage Licensing System and Registry to

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obtain an independent credit report on each of the mortgage lender's control persons; amending s. 494.0067, F.S.; requiring each mortgage lender to submit certain reports to the registry as may be required; providing an effective date.

The Florida Senate

BILL ANALYSIS AND FISCAL IMPACT STATEMENT

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

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

BILL:	SB 1316
INTRODUCER:	Senator Detert
SUBJECT:	Loan Processing
DATE:	March 16, 2011
REVISED:	

	ANALYST	STAFF DIRECTOR	REFERENCE	ACTION
1.	Matiyow	Burgess	BI	**Pre-meeting**
2.			BC	
3.				
4.				
5.				
6.				

I. Summary:

The Office of Financial Regulation under the Financial Services Commission regulates mortgage loan originators whose scope of work includes loan processing. The bill amends Ch. 494, F.S., to define loan processing with regard to mortgage lending. The bill allows licensed loan originators to work as contract loan processors or in-house loan processors. The bill further streamlines license processing by creating an in-house loan processing license type with fewer requirements and lower fees then a loan originator license. The new in-house license type is a regulatory relief for loan processors and will not affect any consumer protections.

The bill makes technical conforming changes to ch. 494, F.S., required by the federal Secure and Fair Enforcement Mortgage Licensing Act (SAFE) of 2008.

The bill creates the following sections of the Florida Statutes: 494.00314 and 494.00315.

The bill amends the following sections of the Florida Statutes: 494.001, 494.0011, 494.0025, 494.0018, 494.00255, 494.00312, 494.00331, 494.0035, 494.0038, 494.00421, 494.00611, 494.00612 and 494.0067.

II. Present Situation:

The federal Secure and Fair Enforcement Mortgage Licensing Act (SAFE) was enacted in July 2008.[1] Under the SAFE Act, a loan processor who performs clerical or support duties at the direction and supervision of a state licensed loan originator is not required to be licensed. In

1 Title V of P.L. 110-289.

2009, the Florida Legislature adopted the minimum standards of the SAFE Act.[2] The SAFE Act minimum standards adopted by the Florida Legislature did not distinguish between in-house loan processors and contract loan processors, as all loan processors are required to be licensed as loan originators under ch. 494, F.S. The definition of a loan originator under s. 494.001(14), F.S., includes "process[ing] a mortgage loan application." In-house and contract loan processors are captured under this provision. Licensure as a loan originator under ch. 494, F.S., and the SAFE Act includes pre-licensure education, testing, credit history screening, and criminal background checks. To renew a license, the licensee must pay a fee, meet continuing education requirements, and undergo a criminal background check on an annual basis.

The SAFE Act also required the Conference of State Bank Supervisors (CSBS) and the American Association of Residential Mortgage Regulators (AARMR) to establish and maintain a nationwide mortgage licensing system and registry for the residential mortgage industry. Under the Act each mortgage lender must submit to the national mortgage licensing system and registry for the purpose of providing: uniform state licensing application and reporting requirements for residential mortgage loan originators; and a comprehensive database to find and track mortgage loan originators licensed by the states and mortgage loan originators that work for federally regulated depository institutions.

In 2008, the Department of Housing and Urban Development (HUD) published its final rule amending parts of Regulation X of the Real Estate and Settlement Procedures Act (RESPA), substantially revising the Good Faith Estimate and required settlement disclosures.[3] The new Good Faith Estimate became effective January 1, 2010, and no longer requires the borrower's signature. Further, HUD has indicated that the form cannot be altered to include a signature block.[4]

III. Effect of Proposed Changes:

The bill defines "contract loan processor" as a licensed loan originator under s. 494.00312 F.S., who is an independent contractor for a mortgage broker or a mortgage lender and has on file with the Office a letter of intent to engage only in loan processing. These requirements are consistent with the SAFE Act.

The bill creates an "in-house loan processor" license for individuals who are employed by a mortgage broker or a mortgage lender and engage only in loan processing. This license type will not be subject to the same licensing requirements of a loan originator but will still be required to pay an initial license fee and subsequent renewal fee and complete a background check. Creating this license type for this scope of work is a streamlining measure in line with the SAFE Act and does not decrease any consumer protections.

The SAFE Act provides that "[e]ach mortgage licensee shall submit to the Nationwide Mortgage Licensing System and Registry reports of condition, which shall be in such form and shall contain such information as the Nationwide Mortgage Licensing System and Registry may

2 Ch. 2009-241.

3 RESPA: Rule to Simplify and Improve the Process of Obtaining Mortgages and Reduce Consumer Settlement Costs, 73 Fed. Reg. 22, 68204 (November 17, 2008).

4 See "New RESPA Rule FAQs (Updated 4-2-10)," Page 10, Question 28, available on HUD's website: http://www.hud.gov/offices/hsg/rmra/res/respa_hm.cfm.

require."[5] Although the SAFE Act applies to individual loan originators, the national system is being designed so that the reports are submitted by the businesses on behalf of the loan originators. Florida's 2009 legislation implemented this requirement for mortgage brokers (businesses) at s. 494.004(3), F.S., but it did not address it in the mortgage lenders' counterpart statute, s. 494.0067, F.S.[6] The bill will correct this discrepancy with regard to compliance with the SAFE Act.

The bill removes the requirement in s. 494.0038(3)(c), F.S., that the borrower must sign and date the good faith estimate of settlement charges upon receipt, this change will conform ch. 494, F.S., to the requirements of RESPA and changes made by HUD to the good faith estimate form.

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:

The average cost savings for a new in-house loan processor license compared to a loan originator license is estimated to be $600. The average cost saving for a renewal of an in-house loan processor license compared to a loan originator license is estimated to be $225.[7]

B. Private Sector Impact:

Between October 1, 2010, and March 2, 2011, the Office received 15,549 loan originator applications. It is indeterminate how many licensed loan originators will opt for the in-house loan processor license. Given the in-house loan processor license does not require educational courses, there could be an impact on the schools that teach the licensure courses.

5 Title V of P.L. 110-289 Sec. 1505(e).

6 Ch. 2009-241, L.O.F.

7 Cost savings are the result of lower licensing fees and no educational or testing requirements.

C. Government Sector Impact:

It is indeterminate what effect these changes could have. Due to the lesser requirements and lower fees more people may apply for the in-house loan processor license who otherwise would have applied for the costlier loan originator license. With the in-house loan processor license more people may choose to be licensed who previously were not licensed as loan originators to perform the scope of work.

VI. Technical Deficiencies:

None.

VII. Related Issues:

None.

VIII. Additional Information:

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

None.

B. Amendments:

None.