

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 Appropriations Subcommittee on Health and Human Services

BILL: CS/SB 1138

INTRODUCER: Children, Families, and Elder Affairs Committee and Senator Clemens

SUBJECT: Ethical Marketing Practices for Substance Abuse Services

DATE: February 23, 2016

REVISED: _____

	ANALYST	STAFF DIRECTOR	REFERENCE	ACTION
1.	Crosier	Hendon	CF	Fav/CS
2.	Shettle	Pigott	AHS	Recommend: Favorable
3.			AP	

Please see Section IX. for Additional Information:

COMMITTEE SUBSTITUTE - Substantial Changes

I. Summary:

CS/SB 1138 creates a prohibition of unethical marketing practices by substance abuse treatment providers and operators of recovery residences. The bill provides that a violation of the unethical marketing practices is also a violation of the prohibition on patient brokering and subject to criminal penalties under s. 817.505, F.S.

Additionally, the bill provides that a violation of the prohibition against certain unethical marketing practices by a provider or operator is a violation of the Florida Deceptive and Unfair Trade Practices Act. Violations are subject to criminal penalties.

The bill has no fiscal impact to state funds.

The bill has an effective date of July 1, 2016.

II. Present Situation:

Florida's Patient Brokering Act of 1996¹

Florida's Patient Brokering Act of 1996 (the "Brokering Act") is a criminal statute which makes it unlawful for any person, including any health care provider or health care facility, to offer, pay, solicit or receive any commission, bonus, rebate, kickback or bribe, directly or indirectly, in

¹ Section 817.505, F.S.

cash or in kind, or engage in any split-fee arrangement, in any form whatsoever, in exchange for patient referrals to a health care provider or health care facility.² The Brokering Act also prohibits any person, including any health care provider or health care facility, from aiding, abetting, advising or otherwise participating in a prohibited referral scheme.³ Violations of the Brokering Act are punishable as a third degree felony.⁴

The Brokering Act provides certain exceptions to the referral prohibition.⁵ Some of the exceptions include: payments to a health care provider or health care facility for professional consultation services;⁶ commissions, fees or other remuneration lawfully paid to insurance agents as provided under the insurance code;⁷ any discount, payment, waiver of payment or payment practice not prohibited by the Federal Anti-Kickback Statute (or regulations promulgated thereunder);⁸ and any payment, compensation or financial arrangement within a group practice as defined in the Florida Patient Self-Referral Act.⁹

Florida's Anti-Kickback Statute¹⁰

Florida's anti-kickback statute ("AKS") prohibits any health care provider or any provider of health care services from offering, paying, soliciting or receiving a kickback, directly or indirectly, overtly or covertly, in cash or in kind, for referring or soliciting patients.¹¹ "Kickback" is defined as remuneration or payment back pursuant to an investment interest, compensation arrangement, or otherwise, by or on behalf of a provider of health care services or items, to any person for a portion of the charges for services rendered to a referring health care provider as an incentive or inducement to refer patients for future services or items, when the payment is not tax deductible as an ordinary and necessary expense.¹² Violation of this statute is considered a criminal violation and is punished under the terms of the Brokering Act¹³

Florida's Patient Self-Referral Act of 1992¹⁴

Florida's Patient Self-Referral Act of 1992 (the "Act") prohibits a health care provider from referring a patient for the provision of certain designated health services, or any other health care item or service, to an entity in which the health care provider is an investor or has an investment interest.¹⁵ The Act defines "designated health services" as: clinical laboratory services, physical therapy services, comprehensive rehabilitative services, diagnostic-imaging services and radiation therapy services.¹⁶

² Section 817.505(1)(a), F.S.

³ Section 817.505(1)(d), F.S.

⁴ Section 817.505(4), F.S.

⁵ Section 817.505(3), F.S.

⁶ Section 817.505(3)(c), F.S.

⁷ Section 817.505(3)(d), F.S.

⁸ Section 817.505(3)(a), F.S.

⁹ Section 817.505(3)(a), F.S.

¹⁰ Section 456.054, F.S.

¹¹ Section 456.054(2), F.S.

¹² Section 456.054(1), F.S.

¹³ Section 456.054(3), F.S.

¹⁴ Section 456.053, F.S.

¹⁵ Section 456.053(5)(a), F.S.

¹⁶ Section 456.053(3)(c), F.S.

The Act provides certain exceptions to the self-referral prohibition for orders, recommendations or plans of care that do not constitute a referral. Some of these exceptions include, services furnished by a sole provider or group practice; lithotripsy services by a urologist; services provided by an ambulatory surgery center licensed under ch. 395, F.S.; renal dialysis services and supplies by a nephrologist; and diagnostic-imaging services by a radiologist.¹⁷ There are civil penalties for violations of this statute.¹⁸

Florida's Fee-Splitting Statute (the "FSS") prohibits a physician from paying or receiving any commission, bonus, kickback, or rebate, or engaging in any split-fee arrangement in any form whatsoever with another physician, organization, agency, or person, either directly or indirectly, for patients referred to providers of health care goods and services (this includes, but not limited to, hospitals, nursing homes, clinical laboratories, ambulatory surgical centers, or pharmacies).¹⁹ Penalties for violating this statute include a fine and possible medical license revocation. There are civil penalties for violations of this statute.²⁰

Clinical Labs Rebates²¹

Section 483.245, F.S., prohibits any person to pay or receive any commission, bonus, kickback, or rebate or engage in any split-fee arrangement in any form whatsoever with any dialysis facility, physician, surgeon, organization, agency, or person, either directly or indirectly, for patients referred to a clinical laboratory licensed under Part I of ch. 483, F.S. In addition, s. 483.245, F.S., also prohibits a clinical laboratory from, directly or indirectly, providing through employees, contractors, an independent staffing company, lease agreement, or otherwise, personnel to perform any functions or duties in a physician's office, or any part of a physician's office, for any purpose whatsoever, including for the collection or handling of specimens, unless the laboratory and the physician's office are wholly owned and operated by the same entity. A clinical laboratory is also prohibited from leasing space within any part of a physician's office for any purpose, including for the purpose of establishing a collection station.²² There are civil penalties for violations of this statute.²³

Voluntary Certification of Recovery Residences and Recovery Residence Administrators

In June 2015, CS/CS/HB 21 (Substance Abuse Services) was signed into law creating ss. 397.487, 397.4871, and 397.4872, F.S., to establish voluntary certification programs and requirements for recovery residences and recovery residence administrators.²⁴ As it specifically relates to these voluntary certification programs, the term "recovery residence" means a residential dwelling unit, or other form of group housing, that is offered or advertised through any means, including oral, written, electronic, or printed means, by any person or entity as a residence that provides a peer-supported, alcohol-free, and drug-free living environment.²⁵

¹⁷ Section 456.053(o)3, F.S.

¹⁸ Section 456.053((5)(f), F.S.

¹⁹ Section 458.331(1)(i), F.S.

²⁰ Section 458.331(1)(t)3, F.S.

²¹ Section 483.245, F.S.

²² Section 483.245(1), F.S.

²³ Section 483.245(2), F.S.

²⁴ Ch. 2015-100, L.O.F.

²⁵ Section 397.311(33), F.S.

Additionally, a “recovery residence administrator” is defined to mean to the person responsible for overall management of the recovery residence, including, but not limited to, the supervision of residents and staff employed by, or volunteering for, the residence.²⁶

The Department of Children and Families (DCF) is required to approve at least one credentialing entity by December 1, 2015, for the development and administration of each certification program. To date, the department has approved the Florida Association of Recovery Residences to be a credentialing entity for the voluntary certification of recovery residences and the Florida Certification Board to be a credentialing entity for the voluntary certification of recovery residence administrators.

A certified recovery residence must be actively managed by a certified recovery residence administrator; however, a certified recovery residence administrator may actively manage no more than three recovery residences at any given time. In addition, all owners, directors and chief financial officers of a recovery residence, as well as individuals seeking certification as an administrator, are subject to Level 2 background screening as provided under ch. 435, F.S. The department may exempt an individual from the disqualifying offenses of a Level 2 background screening²⁷ if the individual meets certain criteria and the recovery residence attests that it is in the best interest of the program.

Effective July 1, 2016, a service provider licensed under ch. 397, F.S., may not refer a current or discharged patient to a recovery residence unless the recovery residence holds a valid certificate of compliance as provided in s. 397.487, F.S., and is actively managed by a certified recovery residence administrator as provided in s. 397.4871, F.S., or the recovery residence is owned and operated by a licensed service provider or a licensed service provider’s wholly owned subsidiary. For purposes of this subsection, the term “refer” means to inform a patient by any means about the name, address, or other details of the recovery residence.

A person may not advertise himself or herself to the public, in any way or by any medium whatsoever, as a “certified recovery residence” or a “certified recovery residence administrator” unless he or she has first secured a certificate of compliance under s. 397.487, F.S., or 397.4871, F.S. A person who violates this provision commits a misdemeanor of the first degree, punishable as provided in s. 775.082, F.S., or s. 775.083, F.S.

III. Effect of Proposed Changes:

Section 1 amends s. 397.305, F.S., to update the legislative intent to provide that treatment and recovery support for individuals with substance abuse impairment are offered in an ethical and professional manner that includes ethical marketing practices.

Section 2 amends s. 397.311, F.S., to add and define new terms. A definition for disabling conditions is created to mean a diagnosable substance abuse disorder, serious mental illness, developmental disability, specific learning disability, or chronic physical illness or disability, or the co-occurrence of two or more of these conditions. This new definition also includes an

²⁶ Section 397.311(34), F.S.

²⁷ The disqualifying offenses are listed in s. 435.04(2), F.S.

educational deficiency that substantially affects a person's ability to read and comprehend the terms of a contractual agreement to which he or she is a party. This definition is inconsistent with the definition of "disability" under the Americans with Disabilities Act (ADA).

This section also adds and defines the term "marketing practices" and "substance abuse lead generator".

Section 3 creates s. 397.335, F.S., to prohibit substance abuse treatment providers licensed under ch. 397, F.S. and operators of recovery residences from engaging in specific marketing practices considered unethical. Specifically, the bill prohibits substance abuse treatment providers and operators of recovery residences from engaging in the following marketing practices:

- Making false or misleading statements or providing false or misleading information about their products, goods, services, or geographical location in marketing or advertising materials or media or on their respective websites;
- Including on their respective websites coding that provides false information or surreptitiously directs the reader to another website;
- Soliciting or receiving a commission, bonus, rebate, kickback, or bribe, directly or indirectly, in cash or in kind, or engaging or making an attempt to engage in a split-fee arrangement in return for an acceptance or acknowledgment of treatment from a health care provider, health care facility, or recovery residence. Referrals from recovery residences to another recovery residence are not applicable to this part; or
- Entering into a marketing contract with a substance abuse lead generator that engages in marketing through a call center, unless the call center discloses certain information to the caller.

The bill also prohibits a substance abuse treatment provider licensed under ch. 397, F.S., which is operating as an outpatient, a partial hospitalization or intensive outpatient program from offering a prospective patient free or reduced rent at a recovery residence to induce the prospective patient to choose it as the patient's provider. The provider may not make a direct or an indirect payment to a recovery residence for a patient's housing or other housing-related services.

A violation of this section is a violation of the Florida Deceptive and Unfair Trade Practices Act under Part II of ch. 501, F.S. The DCF is required to submit copies related to violations by entities licensed and regulated under ch. 397, F.S. to the Department of Legal Affairs.

Additionally, a violation under this section for soliciting, receiving, or making an attempt to solicit or receive a commission, bonus, rebate, kickback, or bribe, directly or indirectly, in cash or in kind, or engaging or making an attempt to engage in a split-fee arrangement in return for an acceptance or acknowledgment of treatment from a health care provider, health care facility, or recovery residence is considered patient brokering and subject to criminal penalties under s. 817.505, F.S.

As written, the terms "substance abuse treatment providers" and "operators of recovery residences" are not currently defined in ch. 397, F.S., or in the bill. In addition, the term "recovery residence administrator" is currently defined in s. 397.311, F.S., as it specifically relates to the voluntary certification program for recovery residence administrators under s.

397.4871, F.S. Clarification is needed to determine whether the prohibition applies to all “operators of recovery residences” or only recovery residence administrators voluntarily certified pursuant to s. 397.4871, F.S., as well as whether the prohibition applies to “recovery residences” that are voluntarily certified pursuant to s. 397.487, F.S.

Section 4 amends s. 397.501, F.S., to provide each individual receiving treatment services in a residential treatment facility or living in a recovery residence the right to a safe living environment free from drugs, alcohol, harassment, abuse, and harm.

Section 5 amends s. 456.053(3), F.S., to add the Board of Clinical Social Work, Marriage and Family Therapy, and Mental Health Counseling to the list of health care providers and providers of health care services to the definition of “Board” in this section.

Additionally, the term “recovery residence” is defined in this section to mean a residential dwelling unit or other form of group housing offered or advertised through any means of communication, by any person or entity, as a residence that provides a peer-supported, alcohol-free, and drug-free living environment.

The bill amends s. 456.053(5), F.S., which prohibits referrals and claims for payment, to include substance abuse providers licensed under ch. 397, F.S. found in violation of this section and makes such action grounds for disciplinary action.

Additionally, a substance abuse treatment provider licensed under ch. 397, F.S. which is operating as an outpatient, a partial hospitalization or intensive outpatient program may not offer a prospective patient free or reduced rent at a recovery residence to induce the prospective patient to choose it as the patient’s provider.

The bill amends s. 456.053(6), F.S., to provide an exemption to the prohibitions under this section for referrals made by a substance abuse treatment provider, health care service entities owned by such providers or in which the providers have a financial interest, or subsidiaries of those health care service entities to which such subsidiaries have a financial interest if the financial interest is clearly stated in writing to patients, clients, consumers, and facility residences; on marketing and advertising materials; and on a posted notice that can be easily read by patients in a common area at the substance abuse treatment facility.

Section 6 amends s. 501.2077, F.S., to add the definition of “disabling condition” as set forth in s. 397.311(12), F.S.

Section 7 amends s. 817.505(1), F.S., to add the definition of recovery residences to the section and to provide that it is unlawful for recovery residences to participate in patient brokering. However, referrals by recovery residences to other recovery residences are not subject to this prohibition.

Section 8 amends s. 212.055, F.S., to correct a cross-reference.

Section 9 amends s. 397.416, F.S., to correct a cross-reference.

Section 10 amends s. 440.102, F.S., to correct a cross-reference.

Section 11 provides an effective date for the bill of July 1, 2016.

IV. Constitutional Issues:

A. Municipality/County Mandates Restrictions:

None.

B. Public Records/Open Meetings Issues:

None.

C. Trust Funds Restrictions:

V. Fiscal Impact Statement:

A. Tax/Fee Issues:

None.

B. Private Sector Impact:

Substance abuse treatment providers and operators of recovery residences who engage in prohibited marketing practices in violation of s. 397.335, F.S., may be in violation of patient brokering and subject to criminal penalties under s. 817.505, F.S. Substance abuse treatment providers and operators of recovery residences who are found to be in violation of prohibited marketing practices under s. 397.335, F.S., will also be in violation of the Florida Deceptive and Unfair Practices Act under s. 501.2077(2), F.S.

C. Government Sector Impact:

None.

VI. Technical Deficiencies:

The new definition of “disabling condition” added to s. 397.311, F.S., in Section 2 of the bill conflicts with the definition of “disabling” under the ADA. The ADA includes individuals with substance use disorders that are in recovery, as well as individuals participating in substance abuse treatment. However, disability under the ADA excludes people who continue to abuse substances, or have been convicted or manufacture or distribution of a controlled substance.

VII. Related Issues:

Clarification is needed to determine whether the prohibition of unethical marketing practices applies to all “operators of recovery residences” or only recovery residence administrators voluntarily certified pursuant to s. 397.4871, F.S., and whether the

prohibition applies to “recovery residences” that are voluntarily certified pursuant to s. 397.487, F.S.

VIII. Statutes Affected:

This bill substantially amends the following sections of the Florida Statutes: 397.305, 397.311, 397.501, 456.053, 501.2077, 817.505, 212.055, 397.416, and 440.102.

This bill creates section 397.335 of the Florida Statutes.

IX. Additional Information:

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

CS by Children, Families, and Elder Affairs on January 20, 2016:

- Provides that referrals from recovery residences to recovery residences are not included in the prohibition on patient brokering.
- Removes the requirement for civil penalties to be assessed for violations of the Florida Deceptive and Unfair Trade Practices Act. Directs the DCF to submit copies of findings related to violations of this Act to the Department of Legal Affairs (DLA).

- B. **Amendments:**

None.