

SENATE STAFF ANALYSIS AND ECONOMIC IMPACT STATEMENT

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

BILL: CS/SB 314

SPONSOR: Banking and Insurance Committee and Senator Rossin

SUBJECT: Primary Agents/Sharing of Insurance Commissions

DATE: February 21, 2000 REVISED: _____

| | ANALYST | STAFF DIRECTOR | REFERENCE | ACTION |
|----|---------------|--------------------|-----------|---------------------|
| 1. | <u>Emrich</u> | <u>Deffenbaugh</u> | <u>BI</u> | <u>Favorable/CS</u> |
| 2. | _____ | _____ | _____ | _____ |
| 3. | _____ | _____ | _____ | _____ |
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| 5. | _____ | _____ | _____ | _____ |

I. Summary:

Committee Substitute for Senate Bill 314 would apply the requirements for insurance agencies to designate a primary agent to a foreign (out-of-state) insurance agency under certain circumstances. Specifically, a foreign insurance agency that is owned by a person in Florida and that uses unlicensed personnel to initiate customer contact with a nonresident agent would have to comply with the primary agent requirements under the Insurance Code. The bill exempts financial institutions from these requirements.

The bill further prohibits an unlicensed person or entity from the sharing of property and casualty insurance commissions by creating a foreign corporation or entity that is controlled by an unlicensed Florida resident or entity, that uses or employs a nonresident agent, and uses unlicensed personnel to initiate customer contact with a nonresident agent. Financial institutions are also exempt from this provision.

A current practice in Florida, which appears to be legal, but arguably skirts the requirements of Florida law, has led to the filing of this bill. Certain recreational vehicle (RV) dealerships in Florida provide insurance information that may be considered "advertisements" to customers who buy RV's, and unlicensed sales persons at the dealership direct customers to a telephone number to call, if the RV purchaser would like to obtain insurance. The insurance is sold by an agent in another state who is licensed as a nonresident agent in Florida. An insurance agency is incorporated in the other state (which may be a "paper" agency only) which is owned or jointly owned by the RV dealership in Florida which then shares in the nonresident agent's commissions. All this appears to be legal, based on Department of Insurance investigations, assuming the materials provided to and by the RV dealerships do not constitute "solicitation" materials, and the RV sales persons at the dealership are not engaging in solicitation activities for which an agent's license is required. As owners of the foreign insurance agency, the Florida RV dealers may share in the commissions and profits, as permitted under current law.

The bill is drafted to prohibit the (“paper” agency) circumstances described by requiring that foreign insurance agencies have a separate primary agent at each agency location and by disallowing the sharing of commissions in specified circumstances. However, the bill does exempt financial institutions from the noted provisions.

This bill amends the following sections of the Florida Statutes: 626.592 and 626.753.

II. Present Situation:

Insurance Agency

Under Florida law, an insurance agency is a business location at which an individual, firm, partnership, corporation, association, or other entity (except for an employee of the individual, firm, or other entity, and other than an insurer or insurance adjuster) engages in any activity or employs individuals to engage in any activity which by law may be performed only by a licensed insurance agent or solicitor (s. 626.094, F.S.).

Insurance Agents

Florida law requires persons who solicit insurance, procure applications, or directly or indirectly represent themselves as agents of an insurer, to be licensed by the Department of Insurance (s. 626.112, F.S.). The purpose of a license is to in good faith engage in insurance business with respect to the public and not for the purpose of enabling the licensee to receive commissions (s. 626.730, F.S.). The three primary classifications of agent licensure include general lines agents who sell all types of property and casualty insurance (part II of ch. 626), life insurance agents (part III of ch. 626), and health insurance agents (part IV of ch. 626), in addition to other classifications. Certain requirements apply to all types of insurance agents (part I of ch. 626).

Primary Agents

Under the primary agent provision, each person operating an insurance agency and each location of a multiple location agency must designate a primary agent for each agency location (s. 626.592, F.S.). Further, an agent may be designated as primary agent for only one insurance agency location.

Nonresident Agents

Persons who are nonresidents of Florida, who sell or solicit insurance in Florida, may obtain a nonresident agent license (s. 626.741, F.S.). Nonresident agent licenses are available for each of the three categories of general lines, life, and health insurance agents. Persons who have a nonresident license as a general lines agent may not directly or indirectly solicit, negotiate, or effect insurance contracts in this state unless accompanied by a countersigning resident agent. Nor may a nonresident general lines agent have an office or place of business in Florida or have any direct or indirect pecuniary interest in any insurance agent or agency in Florida. Persons who have a nonresident’s agent license will typically solicit sales in Florida through advertising media, such as newspapers, magazines, and the Internet, or by providing advertising materials to persons in Florida who make such materials available to prospective buyers of insurance. The furnishing of

supplies to unlicensed persons is considered a violation of Florida law under certain circumstances, but some situations appear to be unclear, particularly when the facts involve the sharing of commissions.

Section 626.342, F.S. prohibits an agent (resident or nonresident) from furnishing to any agent any blank forms, applications, stationery, or other supplies to be used in soliciting, negotiating, or effecting contracts of insurance on its behalf, unless such materials relate to a class of business with respect to which the agent is licensed and appointed. This section does not specifically address the provision of such materials to a person who is not licensed as an agent. However, the department interprets this law as prohibiting the provision of solicitation materials to an unlicensed person, in conjunction with the law that prohibits the sharing of commissions with unlicensed persons.

Sharing of Commissions

Section 626.753, F.S., sets forth the circumstances under which commissions may be shared by insurance agents. The law provides that agents may only share commissions with their employed solicitors, and with other agents appointed and licensed to write the same kinds of insurance. Likewise, the law allows resident agents to share commissions with nonresident agents as to the kinds of insurance for which both are appointed and licensed. Under s. 626.753(2), F.S., a licensee is prohibited from sharing commissions with any corporation *unless* the corporation is an insurance agency.

Thus, (unlicensed) owners of insurance agencies are permitted to share in the commissions of the insurance agency, which appears to be a practical recognition of the need for owners of insurance agencies to share in the profits. An insurance agency, as a business entity, is not subject to licensure, except under the limited circumstances of when a majority owner, partner, officer, or director has been found guilty of a felony or has had a license relating to the business of insurance or any regulated profession denied, revoked, or suspended. (s. 626.172, F.S.)

Financial Institutions

Section 655.005(1)(h), F.S., defines a financial institution as a state or federal association, bank, savings bank, trust company, international bank agency, representative office or international administrative office, or credit union. Under s. 655.005(1)(p), F.S., a state financial institution means a state-chartered or state-organized association, bank, investment company, trust company, international bank agency, international representative office, international administrative office, or credit union.

Under legislation enacted last year in Florida, financial institutions, including banks and savings and loans, may now associate with or employ insurance agents to engage in insurance agency activities (ch. 99-388, Laws of Florida, ch. 626, F.S.). These activities include the negotiation and sale of insurance products or the servicing of insurance policies.

Current Practice

The present situation that has led to the filing of this bill appears to be legal, but arguably skirts the requirements of the laws discussed above. Under the current practice, certain recreational vehicle (RV) dealerships in Florida provide insurance information that may be considered “advertisements” to persons who buy RV’s, and unlicensed sales persons at the dealership direct customers to a telephone number to call, if the RV purchaser would like to obtain insurance. The insurance is sold by an agent in another state who is licensed as a nonresident agent in Florida. An insurance agency is incorporated in the other state (which may be a “paper” agency only) which is owned or jointly owned by the RV dealership in Florida which then shares in the nonresident agent’s commissions. All this appears to be legal, based on Department of Insurance investigations, assuming the materials provided to and by the RV dealerships do not constitute “solicitation” materials, and the RV sales persons at the dealership are not engaging in solicitation activities for which an agent’s license is required. As owners of the foreign insurance agency, the Florida RV dealers may share in the commissions and profits, as permitted under current law.

According to officials with the Department of Insurance, it appears that the practice outlined above could not be legally done by insurance agents in Florida, although there are ambiguities under current law. That is, a licensed Florida resident agent who, on paper, forms multiple insurance agency corporations, but having only one actual insurance agency or business location, simply for the purpose of sharing commissions with unlicensed persons who initiate insurance sales would violate provisions of the Insurance Code noted above. The particular provisions include the requirements that each insurance agency specify a primary agent at each agency location and that an agent may not be designated as primary agent for more than one insurance agency location.

A current situation which is permitted under Florida law is for insurance agents to rent physical space at an auto dealership for the purpose of selling customers auto insurance. In this instance, the auto dealer cannot share in the commissions or profits of the insurance agent, but is paid rent by the agent for the leased space at the dealership.

III. Effect of Proposed Changes:

Section 1. Amends s. 626.592, F.S., relating to the “primary agents” provision of the Insurance Code, to apply the requirements for insurance agencies to designate a primary agent to a foreign (out-of-state) insurance agency under certain circumstances. Specifically, a foreign insurance agency that is owned by a person in Florida and that uses unlicensed personnel to initiate customer contact with a nonresident agent would have to comply with the primary agent requirements under the law. The bill exempts financial institutions as defined in s. 655.005(1)(h) and (p), F.S., or a parent, subsidiary, or affiliate of such institution, from these requirements.

Section 2. Amends s. 626.753, F.S., relating to “commission sharing” under the Insurance Code, to prohibit an unlicensed person or entity from sharing commissions on the sale of property and casualty insurance by the creation of a foreign partnership, corporation, or other entity that is controlled by an unlicensed person or entity within this state and that uses or employs a nonresident agent licensed under s. 626.741, F.S., and uses unlicensed personnel to initiate customer contact with a nonresident agent. This subsection does not apply to a financial institution as defined in s. 655.005(1)(h) and (p), F.S., or a parent, subsidiary, or affiliate of such institution.

The bill is drafted to *prohibit* the sharing of commissions in a specific circumstance, where a Florida resident or business entity forms a foreign insurance agency corporation, uses a nonresident agent's license to market property and casualty insurance, and uses unlicensed personnel to initiate customer contact with a nonresident agent.

The bill would not prohibit a Florida resident from establishing a Florida insurance agency, use a Florida resident's insurance license, and share in the agent's commission when using unlicensed personnel to initiate customer contact with the resident agent. However, *current* Florida law may prohibit this practice if the insurance agency that is formed is merely a "paper corporation" that does not have business location with a designated primary agent (who may not be a primary agent for another agency), which is formed for the purpose of sharing commissions with unlicensed persons who initiate insurance sales.

The term "owned" is not defined in the bill. Arguably, a Florida resident or business entity could circumvent the intent of this bill by holding a 49 percent (or less) share of the foreign insurance corporation and thus not control the company.

Section 2. The bill will take effect July 1, 2000.

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:

Constitutional issues of equal protection and interstate commerce may be raised as to this bill because it attempts to restrict the business activities of a foreign (out-of-state) corporation and a duly licensed nonresident agent, where similar business activities and sharing of commissions with unlicensed owners of a Florida corporation (agency) would still be permitted under certain circumstances. To be constitutional under an equal protection analysis, there must be a rational basis for making a distinction between the resident and nonresident agent for this purpose. Additionally, the fact that the bill's requirements do *not apply* to financial institutions may likewise raise equal protection issues.

Further, this bill may violate the recently passed Gramm-Leach Bliley Act (referred to as the Financial Services Modernization Act) which provides for the functional regulation of financial activities by state and federal agencies. Under a provision of the bill, Subtitle C, Sec.

321(c)(3), a majority of the States *cannot impose* “any requirement upon any insurance producer to be licensed or otherwise qualified to do business as a nonresident that has the effect of limiting or conditioning that producer’s activities because of its residence or place of operations...”. If a majority (29) of states and territories has not, within three years (by November 12, 2002), enacted uniform agent licensing laws or reciprocity measures, a private national licensing organization will be created. That organization, the National Association of Registered Agents and Brokers (NARAB), will function as a self-regulating organization much like the National Association of Securities Dealers. Under NARAB, a licensed agent will be able to obtain an insurance license in a foreign (out-of-state) jurisdiction through NARAB.

V. Economic Impact and Fiscal Note:

A. Tax/Fee Issues:

None.

B. Private Sector Impact:

The bill may inhibit competition in the marketing of insurance by Florida residents who have set up a foreign corporation or insurance agency, and use a nonresident agent to sell insurance for the foreign corporation or insurance agency. Insurers and agents who sell insurance by more traditional methods would benefit.

C. Government Sector Impact:

The Department of Insurance would be required to monitor the commissions received by nonresident agents to ensure that the nonresident agent is not improperly sharing commissions with a foreign corporation set up by a resident of Florida. The fiscal impact of such activities is indeterminate.

VI. Technical Deficiencies:

None.

VII. Related Issues:

None.

VIII. Amendments:

None.