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**HOUSE OF REPRESENTATIVES
COMMITTEE ON
STATE ADMINISTRATION
ANALYSIS**

BILL #: HB 347
RELATING TO: Public Employees Optional Retirement Program
SPONSOR(S): Representative(s) Fasano
TIED BILL(S): HB 503

ORIGINATING COMMITTEE(S)/COUNCIL(S)/COMMITTEE(S) OF REFERENCE:

- (1) STATE ADMINISTRATION
 - (2) FISCAL POLICY & RESOURCES
 - (3) FISCAL RESPONSIBILITY COUNCIL
 - (4)
 - (5)
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I. SUMMARY:

Last year, the Legislature authorized the State Board of Administration (SBA) to establish the Public Employee Optional Retirement Program. Under this program, an employee will have the responsibility of selecting how his or her retirement money is invested, within an approved set of investment choices. Additionally, employees can take their investment with them when they leave the FRS. This program will be available to state employees, June 1, 2002; to education employees, September 1, 2002; and, to local government employees, December 1, 2002. An extensive education program is planned, which will begin three months prior to each of these enrollment dates.

Currently, the SBA is in the process of selecting an administrator, an education provider, and investment providers for the Public Employee Optional Retirement Program. Under current law, the third-party administrator and the education provider **may not** be an approved (investment) provider or affiliated with an approved provider. However, the approved provider may provide educational information concerning its products and services. The SBA must select one or more providers who offer multiple investment products, when such an approach is determined by the SBA *to afford value to the participants otherwise not available through individual investment products*.

This bill adds the requirement that the SBA must offer participants the opportunity to invest exclusively with private bundled providers, and that the SBA is prohibited from creating its own investment products or services. Under current law, the SBA can create its own institutional funds made up of multiple investment products. Under this bill, the SBA would not be able to offer these types of choices. This bill requires the SBA to designate and contract with five or more bundled providers who offer multiple investment products and services, including one provider who offers guaranteed annuities. **With the addition of the requirement that SBA contract with five or more bundled providers and the elimination of the institutional options, it appears that the fees and costs of that program will be higher for the participants, and therefore lower their retirement benefit.**

This bill removes the language prohibiting any fee that limits or restricts the ability of participants to select any investment product available program; and adds that the prohibition will not apply to fees or charges on lump-sum distributions that are based primarily on liquidity risk management. This bill also provides that fees or charges for insurance, such as mortality and expense risk charges, must be reasonable relative to the benefits provided.

There appears to be a positive fiscal impact on the private sector, and a negative fiscal impact on the participants' retirement benefit under the Public Employee Optional Retirement Program. There are a number of concerns regarding this bill that are identified in the "Effect of Proposed Changes." Additionally, this bill does exactly what the primary sponsor of the legislation that created the Public Employees Optional Retirement Program recommended **not** occur. See "Other Comments" section of this analysis.

II. SUBSTANTIVE ANALYSIS:

A. DOES THE BILL SUPPORT THE FOLLOWING PRINCIPLES:

- | | | | |
|-----------------------------------|---|-----------------------------|---|
| 1. <u>Less Government</u> | Yes <input type="checkbox"/> | No <input type="checkbox"/> | N/A <input checked="" type="checkbox"/> |
| 2. <u>Lower Taxes</u> | Yes <input type="checkbox"/> | No <input type="checkbox"/> | N/A <input checked="" type="checkbox"/> |
| 3. <u>Individual Freedom</u> | Yes <input type="checkbox"/> | No <input type="checkbox"/> | N/A <input checked="" type="checkbox"/> |
| 4. <u>Personal Responsibility</u> | Yes <input checked="" type="checkbox"/> | No <input type="checkbox"/> | N/A <input type="checkbox"/> |
| 5. <u>Family Empowerment</u> | Yes <input type="checkbox"/> | No <input type="checkbox"/> | N/A <input checked="" type="checkbox"/> |

For any principle that received a "no" above, please explain:

B. PRESENT SITUATION:

Last year, the Legislature created s. 121.4501, F.S, which authorizes the State Board of Administration (SBA) to establish an optional retirement program called a "defined contribution" or DC plan. The DC plan is an optional individual retirement account that is established for each member of the Florida Retirement System (FRS) who selects this option. Each employer contributes a certain percentage of an employee's monthly income to that employee's individual account.¹ This plan is known as the Public Employee Optional Retirement Program (PEORP). Each employee will have the responsibility of selecting how this money is invested, within the approved set of investment choices, and each employee has the ability to take that investment with him or her when leaving the FRS. Vesting for the DC plan is defined as one year of service. For the defined benefit or "DB" plan, the traditional FRS retirement system, vesting has been lowered from ten to six years of service.

The DC plan will be available to state employees beginning June 1, 2002; to education employees beginning September 1, 2002; and, to local government employees beginning December 1, 2002. An extensive education program is planned, and that will begin three months prior to each of these enrollment dates. The DB plan still remains in place.

Between now and the 2002 enrollment dates, the SBA will select an third-party administrator,² an education provider, and investment providers for the DC retirement program. Under s. 121.4501(8)(b), F.S., the third-party administrator and the education provider may not be an approved (investment) provider or affiliated with an approved provider. However, the approved provider may provide educational information concerning *its* products and services.

¹ Regular class employees receive 9 percent, senior management class employees receive 10.95 percent, special risk administrative class employees receive 11.35 percent, special risk class employees receive 20 percent, and, most of the elected officers class employees receive 13.4 percent (except judicial-18.9 percent, and county officers—16.2 percent) as their employer contribution rates. State Board of Administration presentation on PEORP, September 2000.

² The SBA is required under s. 121.4501(8), F.S., to select and contract with a third-party administrator to provide administrative services for the program, such as: services relating to consolidated billing; individual and collective recordkeeping and accounting; asset purchase, control, and safekeeping; and direct disbursement of funds to and from the third-party administrator, the division, the board, employers, participants, approved providers, and beneficiaries.

All of these decisions will be reviewed by two different advisory councils, the Investment Advisory Council (IAC) and the Public Employee Optional Retirement Program Advisory Committee (PEORPAC), and ultimately approved by the SBA Trustees who act as fiduciaries³ for the FRS.

The SBA Trustees are the Governor, who serves as Chairman, and the State Treasurer and State Comptroller. The SBA Trustees, as fiduciaries, can object to any change to the current law that would not be in the best interest of the employees who will be participating in the DC plan. In fact, other states have found that state investment boards, that are separate from the retirement system administrative boards, have a fiduciary duty that extends beyond the investment of the retirement fund assets. The West Virginia retirement system's State Investment Board has taken action against legislation requiring an investment that the State Investment Board viewed as a threat to the actuarial soundness of its retirement system.⁴ In another, but similar, West Virginia case, the court found that

[i]f the Board finds that the creation of the new Deputy Fund will create actuarial or solvency problems, then the Board must immediately and forcefully inform the Legislature of the problems. If the Legislature does not take corrective action, then if necessary the Board must follow the route suggested in *Dadisman* -- and use the court system to protect the rights of the beneficiaries of the funds held in trust by the Board.⁵

Accordingly, the SBA Trustees must at least consider any action of the Legislature that would affect their role in managing PEORP investments.

The DC investment program will have a selected number of investment choices so the employees can diversify their assets. When an employee in the DC plan is ready to retire or otherwise separate from government service, these assets, as impacted by investment gains and losses, can be withdrawn and utilized as the employee chooses.

Under s. 121.4501(9), F.S., the SBA is required to develop policy and procedures for selecting, evaluating, and monitoring the performance of *approved providers* and investment products under the program. "Approved provider" or "provider" means a private sector company that is selected and approved by the SBA to offer one or more investment products or services to the Public Employee Optional Retirement Program. Private sector companies include investment management companies, insurance companies, depositories, and mutual fund companies.

In accordance with such policy and procedures, the SBA must designate and contract for a number of investment products as determined by the SBA. The SBA must select one or more providers who offer multiple investment products, when such an approach is determined by the SBA *to afford value to the participants otherwise not available through individual investment products*.⁶

³ A "fiduciary" must discharge his or her duties with respect to a plan "solely in the interest of the participants and beneficiaries and for the *exclusive* purpose of providing benefits to participants and their beneficiaries; and, defraying reasonable expenses of administering the plan; with the care, skill, prudence, and diligence under the circumstances then prevailing that a prudent man acting in a like capacity and familiarity" would use in the conduct of an enterprise of a like character and with like aims; by diversifying the investments of the plan so as to minimize the risks of large losses, unless under the circumstances it is clearly prudent not to do so. 29 U.S.C. §1104 (2000).

⁴ *State of West Virginia Regional Jail & Correctional Facility Authority v. West Virginia Investment Management Board*, 508 S.E. 2d 130, No. 25134 1998 W. Va. LEXIS 134 (W. Va. Supreme Court of Appeals, July 17, 1998).

⁵ *State ex rel. West Virginia Deputy Sheriffs' Ass'n v. Sims*, 513 S.E. 2d 669, 204 W. Va. 442, 1998 W. Va. LEXIS 169 (W. Va. Supreme Court of Appeals, November 16, 1998).

⁶ In 1998, the M&I Trust and Investment Management company conducted a study regarding the number of investment options offered in 401(k) plans and the percentage of those options used. They found that if more than 10 options were offered, the percentage of those options that were used dropped to under 20 percent. Only participants in 401(k) plans were interviewed. National 401(k) Investor Survey, M&I Trust and Investment Management, August 1998.

SBA must consider various investment options or products, pursuant to the following requirements:

- PEORP must offer a diversified mix of low-cost investment products that span the risk-return spectrum.
- Investment options or products offered by the group of approved providers may include mutual funds, group annuity contracts, individual retirement annuities, interests in trusts, collective trusts, separate accounts, and other such financial instruments.
- The SBA must not contract with any provider that imposes a front-end, back-end, contingent, or deferred sales charge, or any other fee that limits or restricts the ability of participants to select any investment product available in the optional program.

C. EFFECT OF PROPOSED CHANGES:

This bill amends the provision in s. 121.4501, F.S., which requires employers to fund the optional benefits program by expressly providing that the contributions be made to the Public Employee Optional Retirement Program Trust Fund.⁷

This bill also amends s. 121.4501(1), F.S., to add the requirement that the SBA must offer participants the opportunity to invest exclusively in private “bundled providers”⁸, and that the SBA is prohibited from creating its own investment products or services. Under current law, the SBA can create its own balanced or lifestyle “funds” made up of multiple investment products. *Under this bill, the SBA would not be able to offer these type of choices.*

Currently, the SBA is allowed to contract with a bundled provider if the bundled provider can show that it will add value to the core program, through the investment products, or non-investment services. The SBA staff views the Legislature’s requirement of low costs and independent vendors as implying that the PEORP investment program must be built with institutional products, unless there are specific and compelling circumstances that necessitate the use of specialty retail mutual funds.⁹ The SBA currently has several institutional funds within the Florida Retirement System.

Retail mutual fund expenses include non-investment expenses that would be duplicated by the third-party administrator and the education provider. Also, expanding the set of specialty options for a given asset base compromises the program’s ability to maintain low costs, due to change in volume for each of those options.¹⁰ Also, retail investment products directly levy costs on the participants for non-investment services (e.g., recordkeeping and custody services, education), for which the current language requires independent vendors.¹¹ The SBA staff recommends that the investment program be built with institutional investment products,¹² supported by independently

⁷ HB 503 creates the Public Employee Optional Retirement Program Trust Fund.

⁸ A “bundled provider” is a private company that offers investment products, as well as administrative and education/advisory services.

⁹ An Investment Policy Statement: Florida Retirement System Public Employee Optional Retirement Program, Florida State Board of Administration, July 1, 2001, at 31.

¹⁰ *Id.* at 25.

¹¹ *Id.* at 5.

¹² In 1999, Ennis Knupp surveyed corporate plan administrators and over two-thirds of 110 respondents replied that institutional accounts are more effective than mutual funds. Survey of Corporate Plan Sponsors, Ennis Knupp, 1999.

provided administrative and educational providers, because of the independence requirements¹³ in current law and the lower costs and fees associated with institutional investment products.¹⁴ If there is a 1 percent increase in annual fees, this increase in fees lowers a participant's long-term account balance by about 10 percent in 20 years and 15 percent in 30 years.¹⁵ At a beginning salary of \$35,000 and a 10 percent contribution rate, the account balance would be \$100,000 lower after 30 years¹⁶

This bill amends s. 121.4501(2)(a), F.S., to change the definition of "[a]pproved provider" or "provider" to include a "bundled provider" that

offers participants both a full range of individually allocated investment products and a full range of administrative and customer services, to include accounting and administration of individual participant benefits and contributions; individual participant recordkeeping; asset purchase, control, and safekeeping; direct execution of the participants instructions as to asset and contribution allocation . . . periodic reporting to participants, at least quarterly, on account balances and transactions; direct advice and guidance on investment options; a broad array of distribution options; and asset allocation and retirement counseling and education.

Additionally, this bill amends s. 121.4501(8)(b), F.S., regarding the administration of PEORP, to provide that the administrative services "shall be limited to" enrollment, collection of employer contributions, disbursement of those contributions to the approved providers as allocated by the participants, and collective plan-wide recordkeeping and accounting. This bill adds that the approved providers must perform all other administrative and customer services, including accounting and administration of participant benefits and contributions; individual participant recordkeeping; asset purchase, control, and safekeeping; and direct execution of the participant's instructions as to asset and contribution allocation. *This conflicts with the current law because the performance of these duties is currently the responsibility of the third-party administrator.*

This bill also adds new duties that will be the approved provider's responsibility, such as, providing direct access by the participant to the participant's account information; periodic reporting to participants on account balances and transactions; direct advice and guidance on investment options; a broad array of distribution options; and asset allocation and retirement counseling and education. This bill provides that approved providers may, with the approval of SBA, subcontract with other organizations to provide components of the administrative services. *There appears to be a conflict of interest where the investment provider is also the administrator and the advisor as to investment options on the individual accounts.*

This bill amends s. 121.4501(9), F.S., to require the SBA to designate and contract with *five or more* bundled providers who offer multiple investment products and services, including one provider who offers guaranteed annuities. This will significantly increase the number of investment products from which the participant will have to choose. This choice becomes increasingly complex and confusing as more options are offered.

¹³ Under s. 121.4501(8)(b), F.S., the third-party administrator and the education provider may not be an approved (investment) provider or affiliated with an approved provider.

¹⁴ Investment Policy Statement, July 1, 2001, at 5.

¹⁵ *Id.*

¹⁶ Overview of Proposed Investment Statement for the Public Employees Optional Retirement Program, Presentation to PEORPAC, September 14, 2000, at 27.

- Additionally, this bill removes language that allows the SBA to contract for investment products, or providers who offer multiple investment products, when such an approach is determined by the SBA *to afford value to the participants otherwise not available through individual investment products.*
- Changes PEORP from a plan that contains institutional products, with a possible bundled provider, if that provider can show that it affords an additional value; to a plan that contains *only* bundled providers.
- Adds the requirement that the SBA include a guaranteed account, as well as investment products that offer the option of receiving lifetime income consistent with the long-term retirement security of a pension plan and similar to the lifetime income benefit provided by the FRS.
- Adds the requirement that the SBA include products that give the participants the option of committing their contributions for an extended time period in an effort to obtain higher returns than could be attained from investment products offering full liquidity. *These products would keep the retired participant from accessing any of those funds committed.*
- Removes the language prohibiting any other fee that limits or restricts the ability of participants to select any investment product available in the optional program; and adds that the prohibition will not apply to fees or charges on lump-sum distributions that are based primarily on liquidity risk management.
- Provides that fees or charges for insurance, such as mortality and expense risk charges, must be reasonable relative to the benefits provided. Some bundled providers offer products with fees that do not reflect the cost for mortality expense, distribution, marketing, custody or recordkeeping.¹⁷
- Adds that an approved provider must comply with all applicable federal and state securities and insurance laws and regulations, as well as the regulations under the National Association of Securities Dealers regarding the ethical marketing of investment products. The approved provider must also establish and maintain a compliance education and monitoring system for all of the personnel of the provider who directly communicate with the participants and recommend investment products.
- Requires that the communications recommending investments by the personnel of those approved providers must be independent and unbiased; that the SBA develop a complaint procedure for participants; that the approved providers be responsible for the accuracy of their information; and, that the approved providers are prohibited from selling any customer list or participant information generated through their involvement in this program.

D. SECTION-BY-SECTION ANALYSIS:

See "Effect of Proposed Changes."

¹⁷ TIAA-CREF is a bundled provider that has this cost structure, which results from several factors: "[T]hey operate on a non-profit basis, all funds are managed internally, the assets under management are large, and there is a substantial reliance on passive management in the equities annuities." *Id.* at 31.

III. FISCAL ANALYSIS & ECONOMIC IMPACT STATEMENT:

A. FISCAL IMPACT ON STATE GOVERNMENT:

1. Revenues:

None.

2. Expenditures:

None.

B. FISCAL IMPACT ON LOCAL GOVERNMENTS:

1. Revenues:

None.

2. Expenditures:

None.

C. DIRECT ECONOMIC IMPACT ON PRIVATE SECTOR:

The requirement that the SBA contract with five or more bundled approved providers increases the volume of money and business that would go to private investment vendors. According to the SBA, the transition from the defined benefit plan to the defined contribution plan (PEORP) will be the largest pension plan transition in U.S. history. Currently, there are 650,000 non-retired members, over \$105 billion in assets, 800 employers that will be impacted in this transfer.¹⁸

D. FISCAL COMMENTS:

With the addition of the requirement that SBA contract with five or more bundled providers, it appears that the fees and costs of that program will be higher for the participants, and therefore lower their retirement benefit.

IV. CONSEQUENCES OF ARTICLE VII, SECTION 18 OF THE FLORIDA CONSTITUTION:

A. APPLICABILITY OF THE MANDATES PROVISION:

This bill does not require counties or municipalities to spend funds or to take action requiring the expenditure of funds.

B. REDUCTION OF REVENUE RAISING AUTHORITY:

This bill does not reduce the authority that counties or municipalities have to raise revenues in the aggregate.

C. REDUCTION OF STATE TAX SHARED WITH COUNTIES AND MUNICIPALITIES:

This bill does not reduce the percentage of a state tax shared with counties or municipalities.

¹⁸ The Florida State Board of Administration PowerPoint presentation, September 2000, at 22.

V. COMMENTS:

A. CONSTITUTIONAL ISSUES:

None.

B. RULE-MAKING AUTHORITY:

None.

C. OTHER COMMENTS:

Former Representative Pruitt was the primary sponsor for HB 2393 last year, which authorized the creation of the Public Employee Optional Retirement Program. On January 22, 2001, the former Representative Pruitt (now Senator Pruitt), wrote a letter to Governor Jeb Bush stating:

Obviously, the Legislature always has the option to rewrite any statute, but, in this case, I believe any rewrite would be premature. Furthermore, the letter of the law seems to me to be perfectly clear on its face. For example, the Trustees should only select multiple investment product providers, if and only if they can 'afford value not otherwise available through individual investment products'. **In other words, institutional priced investment products should be the primary offering and 'bundled providers' secondary and only then if they add value.**

(Emphasis added.)

This bill does exactly what the primary sponsor of the legislation recommended **not** occur.

VI. AMENDMENTS OR COMMITTEE SUBSTITUTE CHANGES:

N/A

VII. SIGNATURES:

COMMITTEE ON STATE ADMINISTRATION:

Prepared by:

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