

# SENATE STAFF ANALYSIS AND ECONOMIC IMPACT STATEMENT

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

BILL: CS/ SB 276

SPONSOR: Governmental Oversight & Productivity Committee and Senator Crist

SUBJECT: Nursing Homes and Related Health Care Facilities

DATE: February 6, 2002      REVISED: \_\_\_\_\_

	ANALYST	STAFF DIRECTOR	REFERENCE	ACTION
1.	Harkey	Wilson	HC	Favorable
2.	Rhea	Wilson	GO	Favorable/CS
3.	Johnson	Johnson	JU	Favorable
4.	_____	_____	_____	_____
5.	_____	_____	_____	_____
6.	_____	_____	_____	_____

## I. Summary:

The Committee Substitute for Senate Bill 276 modifies the members of the Governor’s Panel on Excellence in Long-Term Care. Membership is reconfigured to stagger terms in order to maintain continuity on the panel.

The committee substitute amends s. 400.4195, F.S., to delete the specific terms “physician” and “surgeon” from the list of entities for whom patient brokering is prohibited in assisted living facilities (ALF) and replaces those terms with the broader terms “health care practitioner” and “health care facility.” The committee substitute permits an ALF to market the facility for a fee or commission based on the volume or value of referrals to the facility, provided that specified conditions apply.

This committee substitute amends ss. 400.235 and 400.4195, Florida Statutes.

## II. Present Situation:

**Regulation of Nursing Homes by State Government** - Nursing Homes and Related Facilities is the subject of chapter 400, F.S. Part I of chapter 400, F.S., establishes the Office of State Long-Term Care Ombudsman, the State Long-Term Care Ombudsman Council, and the local long-term care ombudsman councils. Part II of chapter 400, F.S., provides for the regulation of nursing homes and part III of chapter 400, F.S., provides for the regulation of assisted living facilities. The Agency for Health Care Administration (AHCA) is charged with the responsibility of developing rules related to the operation of nursing homes, and the Department of Elderly Affairs develops rules for assisted living facilities. AHCA licenses and inspects nursing homes and other facilities licensed under chapter 400, F.S. The Department of Health performs inspections of facilities for sanitation and physical safety purposes and local authorities have

jurisdiction over fire safety inspections.

The Agency for Health Care Administration surveys nursing homes for state licensure and Medicare certification purposes. Surveys are unannounced and must take place at least once every 15 months. Any deficient practices found by AHCA surveyors will be ranked (class I, II, III, and IV, in order of severity), and the facility must correct any deficiency by a time certain.

**Gold Seal Program** - Chapter 99-394, L. O. F., created the Gold Seal Program at s. 400.235, F.S., to address nursing home quality. The stated intent was to protect the health and welfare of persons receiving care in nursing facilities, and to develop a regulatory framework that promotes the stability of the industry and facilitates the physical, social, and emotional well being of nursing home residents. Further, it was also the intent of the Legislature to develop an award and recognition program for nursing facilities that demonstrate excellence in long-term care over a sustained period – the Gold Seal Program. The program was developed and implemented by the Governor’s Panel on Excellence in Long-Term Care, operating under the authority of the Executive Office of the Governor (EOG).

The thirteen member panel is composed of: three persons appointed by the Governor, to include a consumer advocate for seniors and two persons with expertise in the fields of quality management, service delivery excellence, or public sector accountability; three persons appointed by the Secretary of Elderly Affairs, to include a member of a nursing facility family and resident care council, and a member of the University Consortium on Aging; the state Long-Term Care Ombudsman; one person appointed by the Florida Life Care Residents Association; one person appointed by the Secretary of Health; two persons appointed by the Secretary of AHCA; one person appointed by the Florida Association of Homes for the Aging; and one person appointed by the Florida Health Care Association. Vacancies are to be filled in the same manner as the original appointments.

Panel members are restricted from having an ownership interest in a nursing facility and members employed by a nursing facility are restricted from participating in the review of or vote on their own employing facility. Recommendations to the panel for designations of nursing homes as Gold Seal facilities were received beginning January 1, 2000. The panel considers the quality of care provided to residents in its decisions.

Gold Seal facilities must: have no class I or class II deficiencies within the 30 months preceding application; evidence financial soundness and stability; participate consistently in consumer satisfaction processes prescribed by AHCA; evidence involvement of residents’ families and members of the community; have a stable workforce (low rate of turnover of certified nursing assistants over the last 30 months); evidence an outstanding record as to complaints to the state Long-Term Care Ombudsman Council over the prior 30 months; and provide targeted in-service training.

The Agency for Health Care Administration, nursing facility industry organizations, the state Long-Term Care Ombudsman Council, and members of the community may make recommendations to the Governor as to facilities that may be considered for Gold Seal status. The panel reviews nominees and makes recommendations to the Governor for final approval and award. The decisions of the Governor regarding Gold Seal status are final and are not subject to

appeal. Facilities must be open for at least 30 months to be considered for nomination. Gold Seals are not transferable and entitle the facility to be subject to AHCA survey for relicensure and certification for Medicare purposes every 2 years.

As of the date of this analysis, no nursing homes have received the Gold Seal designation. On January 16, 2002, the panel will review 7 applications.

**Independent Marketing Agencies** - Section 400.4195, F.S., provides that it is illegal for any assisted living facility to contract or promise to pay or receive any commission, bonus, kickback, rebate, or split-fee arrangement in any form whatsoever with any physician, surgeon, organization, agency, or person for a resident referral. A facility may employ or contract with persons to market the facility, provided the employee or contract provider clearly indicates that he or she represents the facility. A person or agency independent of the facility may provide placement or referral services for a fee to individuals seeking assistance in finding a suitable facility, however, any fees must be paid by the individual seeking placement and not by the facility. Any violation of this prohibition is considered patient brokering and is punishable as provided in s. 817.505, F.S.

Section 817.505, F.S., provides that it is unlawful for any health care provider or health care facility to pay or receive any fees to induce the referrals of patients or patronage from another health care provider or facility. The prohibition does not apply to: any discount or waiver permitted under 42 USC s. 1320a-7b(b) or related regulations; any financial arrangement within a group practice as defined by s. 456.053, F.S.; payments to a provider or facility for professional consultation; payments by insurance agents as permitted by the insurance code; payments by insurers under a health benefit plan; payments to or by a provider or facility for goods or services under a health benefit plan; insurance advertising gifts permitted under s. 626.9541(1)(m), F.S.; payments to a nurse registry licensed under s. 400.506, F.S., for referrals of clients to the nurse registry; and payments by a provider or facility to a health, mental health, or substance abuse information service under specified circumstances. Any person who violates any provision of s. 817.505, F.S., commits a felony of the third degree, punishable as provided in ss. 775.082, 775.083 or 775.084, F.S. The Attorney General or the local state attorney may maintain an action for injunctive relief in order to enforce the anti-patient brokering law. Any party bringing an injunctive action under s. 817.505, F.S., is entitled to be awarded costs and fees.

### III. Effect of Proposed Changes:

**Section 1.** Amends s. 400.235, F.S., to modify the members of the Governor's Panel on Excellence in Long-Term Care for the purpose of staggering the panel members' terms and providing continuity on the panel. The panel is to be composed of:

- A consumer advocate for senior citizens, appointed by the Governor;
- Two persons with expertise in the fields of quality management, service delivery excellence, or public-sector accountability, appointed by the Governor;
- A consumer advocate for senior citizens, appointed by the Secretary of Elderly Affairs;
- An active member of a nursing facility family and resident care council, appointed by the Secretary of Elderly Affairs;
- A member of the University Consortium on Aging, appointed by the Secretary of Elderly Affairs;

- The state Long-Term Care Ombudsman;
- A consumer advocate for senior citizens, appointed by the Florida Life Care Residents Association;
- A consumer advocate for senior citizens, appointed by the Secretary of Health;
- A consumer advocate for senior citizens, appointed by the Secretary of AHCA;
- The Deputy Secretary for Medicaid of AHCA;
- A person appointed by the Florida Association of Homes for the Aging;
- A person appointed by the Florida Health Care Association;
- A member of the Florida Silver Hair Legislature appointed by the Florida Silver Hair Legislature; and
- A member of the Florida Alliance for Retired Americans, appointed by the Florida Alliance for Retired Americans; and,
- An elder law attorney appointed by The Florida Bar.

Persons serving on the panel on the effective date of the act will continue to serve under the committee substitute.

The member of the Florida Silver Hair Legislature, the member of the Florida Alliance for Retired Americans, and the elder law attorney are have terms beginning October 1, 2002. Terms for the two person having expertise in the field of quality management, the active member of a nursing facility family and resident care council, the consumer advocates for senior citizens appointed by the Florida Life Care Residents Association and the Secretary of AHCA, and the person appointed by the Florida Association of Homes for the Aging, all have terms which expire on September 30, 2002. The remainder have terms that expire September 30, 2003.

Thereafter, all panel members will be appointed to serve 4-year terms. A panel member may not be appointed to serve more than two consecutive 4-year terms. An appointee serving on the effective date of the act is not eligible for reappointment.

Panel members will select the panel chair by a majority vote at the panel's first meeting after all members have been appointed. The chairperson serves a 3-year term.

The bill defines the term "consumer advocate for senior citizens." Such a person does not receive more than 20 percent of his or her personal income from any business involved in the delivery of long-term care services, from any attorney or law firm that represents nursing home facilities or nursing home residents in personal injury actions, or from any affiliated membership organizations or corporations; is not an employee of AHCA or DEA; and is either a member of an organized senior advocacy group or has had or currently has a relative in a nursing home.

**Section 2.** Amends s. 400.4195, F.S., to delete the specific terms "physician" and "surgeon" from the list of entities for whom patient brokering is prohibited in assisted living facilities and replaces those terms with the broader terms "health care practitioner" and "health care facility." The committee substitute permits an ALF to market the facility for a fee or commission based on the volume or value of referrals to the facility, provided that the following conditions apply:

- The facility is not subject to the provisions of 42 U.S.C. s. 1320a-7b;
- Payment to the contract provider is made under a nonexclusive contract;

- The contract provider represents multiple facilities with different owners;
- The employee or contract provider indicates to all clients prior to referral that he or she represents the facility in addition to all other facilities represented by the person or agency; and
- The employee or contract provider is not a health care practitioner in a position to make a referral to an ALF; is not employed by a health care facility or any other organization or agency in a position to make a referral to an a ALF; or does not have an ownership interest in an ALF.

**Section 3.** Provides that the committee substitute will be effective upon becoming a law.

#### **IV. Constitutional Issues:**

##### **A. Municipality/County Mandates Restrictions:**

The provisions of this committee substitute have no impact on municipalities and the counties under the requirements of Art. VII, s. 18 of the State Constitution.

##### **B. Public Records/Open Meetings Issues:**

The provisions of this committee substitute have no impact on public records or open meetings issues under the requirements of Art. I, s. 24(a) and (b) of the State Constitution.

##### **C. Trust Funds Restrictions:**

The provisions of this committee substitute have no impact on the trust fund restrictions under the requirements of Art. III, s. 19(f) of the State Constitution.

#### **V. Economic Impact and Fiscal Note:**

##### **A. Tax/Fee Issues:**

None.

##### **B. Private Sector Impact:**

None.

##### **C. Government Sector Impact:**

The present panel has a budget of \$23,750, which is funded through the Office of the Governor. The Agency for Health Care Administration estimates that increasing the panel membership to 15 members would require an increase of \$4,000, thus increasing the total budget to \$27,750.

#### **VI. Technical Deficiencies:**

None.

**VII. Related Issues:**

Chapter 20, F.S., which provides the organizational structure for the executive branch, does not provide for a “panel” and does not define the term. Instead, the chapter provides for a “council” or “advisory council,”<sup>1</sup> “committee” or “task force,”<sup>2</sup> “coordinating council,”<sup>3</sup> “commission,”<sup>4</sup> and “board of trustees.”<sup>5</sup>

The Gold Seal Program is an award and recognition program for nursing facilities that demonstrate excellence in long-term care over a sustained period. The program is developed and implemented by the Governor’s Panel on Excellence in Long-Term Care, which operates under the authority of the Executive Office of the Governor. This panel consists primarily of persons appointed by the Governor, persons appointed by other persons who are appointed by the Governor, and persons appointed by associations. This panel reviews Gold Seal nominees and makes a recommendation to the Governor for final approval and award. The decision of the Governor is final and, according to s. 400.235(6), F.S., is not subject to appeal.

**VIII. Amendments:**

None.

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This Senate staff analysis does not reflect the intent or official position of the bill’s sponsor or the Florida Senate.

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<sup>1</sup> Section 20.03(7), F.S., defines the term “council” or “advisory council” to mean an advisory body created by specific statutory enactment and appointed to function on a continuing basis for the study of problems arising in a specified functional or program area of state government and to provide recommendations and policy alternatives.

<sup>2</sup> Section 20.03(8), F.S., defines the term “committee” or “task force” to mean an advisory body created without specific statutory enactment for a time not to exceed 1 year or created by specific statutory enactment for a time not to exceed 3 years and appointed to study a specific problem and recommend a solution or policy alternative with respect to that problem. Its existence terminates upon the completion of its assignment.

<sup>3</sup> Section 20.03(9), F.S., defines the term “coordinating council” to mean an interdepartmental advisory body created by law to coordinate programs and activities for which one department has primary responsibility but in which one or more other departments have an interest.

<sup>4</sup> Section 20.03(10), F.S., defines the term “commission” to mean, unless otherwise required by the State Constitution, a body created by specific statutory enactment within a department, the office of the Governor, or the Executive Office of the Governor and exercising limited quasi-legislative or quasi-judicial powers, or both, independently of the head of the department or the Governor.

<sup>5</sup> Section 20.03(12), F.S., defines “board of trustees” to mean, except with reference to the board created in chapter 253, a board created by specific statutory enactment and appointed to function adjunctively to a department, the Governor, or the Executive Office of the Governor to administer public property or a public program.