

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/CS/SB 2442

SPONSOR: Finance and Taxation Committee, Banking and Insurance Committee and Senator Margolis

SUBJECT: Life Insurance and Annuity Contracts; Charitable Organizations

DATE: April 20, 2004 REVISED: _____

	ANALYST	STAFF DIRECTOR	REFERENCE	ACTION
1.	<u>Emrich</u>	<u>Deffenbaugh</u>	<u>BI</u>	<u>Fav/CS</u>
2.	<u>Fournier</u>	<u>Johansen</u>	<u>FT</u>	<u>Fav/CS</u>
3.	_____	_____	<u>AGG</u>	_____
4.	_____	_____	<u>AP</u>	_____
5.	_____	_____	_____	_____
6.	_____	_____	_____	_____

I. Summary:

Insurance companies transacting insurance in Florida are required to obtain a certificate of authority (COA) issued by the Office of Insurance Regulation (OIR). However, there are exceptions to the requirement to obtain a COA which apply to insurers with respect to certain transactions. Committee Substitute for Senate Bill 2442 would add another exception to the certificate of authority requirement, by allowing an insurer domiciled outside of the United States to operate from offices within Florida for transactions involving life insurance policies and annuity contracts sold to non-residents of the United States, provided the insurer meets specified financial and disclosure requirements. The bill makes the following changes:

- requires such insurers to be authorized insurers in their country of domicile for the prior 3 years, or a wholly owned subsidiary thereof, and to have offered the types of insurance it proposes to offer in Florida;
- allows the OIR to waive the above 3-year requirement if the insurer has operated successfully for a period of 1 year and has capital and surplus of at least \$25 million;
- provides the OIR with annual and quarterly financial statements in the English language; maintain a surplus as to policyholders of at least \$15 million; have a good reputation as to providing service to insureds; agree to make books and records available to the OIR; provide disclosures in the application and contract that the policy is governed by the laws of a foreign country and, if the insurer becomes insolvent, disclose that the policy is not covered by the Florida Life and Health Guaranty Association;
- provides that the insurer is not exempt from the agent licensure requirements under the Insurance Code; provide that the insurer is subject to the Unfair Trade Practices provisions under ch. 626, F.S., and that the policies written under this provision are exempt from the Florida premium tax requirements; and

- requires the provisions of the Florida Money Laundering Act (ch. 896, F.S.) to apply to all single premium life insurance policies and annuity contracts issued to persons who are not residents of the United States.

The bill also broadens the definition of the term “charitable organization.” Under current law, such organizations may purchase life insurance on an insured who consents to the ownership or purchase of that insurance. Under the expanded definition, charitable organizations would include specified tax exempt organizations that could approve for-profit entities to obtain life insurance policies or annuity contracts on the lives of individual insureds. Before an entity could qualify as a charitable organization, the insured would have to be an accredited investor or the approving organizations must have total assets in excess of \$5 million. The bill would prohibit the assignment or transfer of the life insurance policy with certain exceptions, e.g., in cases of material default, insolvency of either the life insurer or annuity company, or misrepresentation.

Committee Substitute for Senate Bill 2442 also enacts legislation, based on model regulations adopted by the National Association of Insurance Commissioners (NAIC), which is intended to help protect senior consumers (age 65 or older) when they purchase or exchange annuity products.¹ The measure is designed to ensure that the insurance needs and financial objectives of senior consumers are appropriately addressed by establishing standards and procedures for insurance agents, or insurance companies if no agent is involved, so that:

- A reasonable determination has been made by the agent or insurer that the annuity transaction is suitable for the senior consumer, based on the financial information disclosed by the consumer;
- A reasonable effort has been made by the agent or insurer to obtain information about the senior consumer’s financial situation, tax status, and investment objectives as to whether the recommendations being considered are appropriate to the consumer’s needs;
- If a senior consumer refuses to provide relevant information, or fails to provide complete or accurate information, to an agent or insurer, but insists on entering into an annuity transaction regardless of the agent’s or insurer’s recommendation, the actions of such agent or insurer will be considered reasonable based on the information provided at the time;
- An agent or insurer is required actively to supervise compliance with the provisions of this regulation, either through internal means or contracting with a third party to assure necessary oversight;
- Information records that formed the basis for the recommendation of an annuity transaction must be kept on file by the insurer or agent for 5 years after the transaction is completed, for review by the Office of Insurance Regulation (OIR) or the Department of Financial Services (DFS), respectively; and
- Corrective action may be ordered by the OIR or the DFS upon determination that a senior consumer has been harmed by a violation of this regulation.

This bill substantially amends sections 624.402 and 627.404 and creates section 627.4554 of the Florida Statutes.

¹ The NAIC model regulation is entitled “Senior Protection In Annuity Transactions.”

II. Present Situation:

Background - Certificates of Authority to Transact Insurance

Insurance companies transacting insurance in Florida are required to obtain certificates of authority (COA) issued by the Office of Insurance Regulation (OIR).² These insurers are known as authorized insurers.³ To qualify for a COA, a prospective insurer⁴ must meet specified financial criteria including maintaining reserves⁵ applicable to the kind of insurance transacted by the insurer, as well as maintaining specified assets, deposits, capital, and surplus. Insurers must provide the OIR with specified background information and meet trustworthiness, fitness, and criminal history requirements. According to OIR staff, it takes about 90 days for a company to obtain a COA and the fee is \$1,500.

There are several exceptions to the requirement to obtain a COA which apply to insurers with respect to specified transactions ranging from surplus lines coverages and reinsurance to captive insurers.⁶

Insurance companies domiciled outside of the United States that do not possess a COA are referred to non-authorized alien insurers. The insurance products offered by these alien insurers may not be sold from offices in Florida, even to non-U.S. residents, without the company obtaining a COA. Currently, there are two alien insurers who are licensed in Florida (have certificates of authority), are domiciled outside of the U.S., and market to non-U.S. residents from offices in Florida.⁷

According to proponents of the bill, obtaining a certificate of authority by alien insurers that want to market products in Florida to non-U.S. residents is both a time-consuming and expensive process.⁸ These proponents state that by allowing alien insurers to establish offices in this state to serve non-U.S. residents would be an economic boon to the economy of South Florida. They point to a recent study by the Beacon Council (a public-private economic development

² Section 624.401, F.S.

³ Section 624.09, F.S. An unauthorized insurer does not have a certificate of authority issued by the OIR.

⁴ Insurers are divided into three categories under the Insurance Code: domestic insurers are formed under the laws of Florida; foreign insurers are formed under the laws of any state, district, or territory or commonwealth of the United States, other than Florida; and alien insurers are defined as insurers other than domestic or foreign insurers. Foreign and alien insurers must also meet certain capital, surplus, and operational requirements.

⁵ Part I of ch. 625, F.S.

⁶ These exemptions pertain to transactions involving surplus lines coverages; specified reinsurance; captive insurance companies; investments by foreign insurers; servicing life or health insurance policies or annuity contracts pertaining to insurers that have withdrawn from Florida; policies covering only subjects of insurance not resident or expressly performed in this state at the time of issuance and lawfully solicited or delivered outside this state; and, investigation or litigation of specified claims under policies written in this state, or liquidation of assets and liabilities of the insurer, all as resulting from its former authorized operations in Florida. Captive insurers are created and owned by one or more non-insurers, for the primary purpose of providing their owners with coverage, usually at rates lower than those of other insurers.

⁷ International Health Insurance Denmark (IHID)A/S, Copenhagen, Denmark, market's accident and health insurance policies; and Citicorp International Insurance Company, Ltd., in Bermuda, offers annuity products.

⁸ According to representatives with the OIR, it took about nine months to 2 years to license Citicorp and IHID, respectively, because of the difficulty of completing criminal and other background screenings on the non-resident officers, directors, and owners. Any large expense is attributable to costs associated with lawyers hired to represent the company throughout the COA process.

consortium in Dade county) which estimates that annual premium income from sales of insurance products to Latin Americans is in the billions of dollars and that, if such products could be sold and serviced from Florida, Florida's economy would experience a substantial economic benefit.

These proponents state that the advantages of marketing such insurance products to non-U.S. residents, compared with the same products issued by authorized Florida insurers, and the costs and restrictions imposed on Florida insurers, prevents Florida from participating in this "offshore" insurance market. Further, the proposed legislation contains numerous prudential safeguards which will afford the OIR the opportunity to regulate those selling these life insurance and annuity products.⁹

Surplus lines Requirements

The Florida Insurance Code contains specific financial and other requirements that unauthorized insurers must comply with in order to become eligible surplus lines insurers¹⁰. Generally, surplus lines insurance is insurance coverage provided by a company that is not licensed in Florida, but that is allowed to do business in the state, as an "eligible" insurer, because the particular coverage offered is not available from insurers authorized to sell insurance in Florida.

The law establishes requirements for approval of eligible surplus lines insurers and licensure of surplus lines agents by the OIR, including the provision that the surplus lines insurer maintain a surplus as to policyholders of \$15 million, have been licensed in its state or country of domicile for a least three years, and furnish annual and quarterly financial statements to the OIR.¹¹ The law also specifies the conditions that must be met before insurance coverage may be exported to an eligible surplus lines insurer, also referred to as a nonadmitted insurer. Surplus lines insurance is not subject to Florida regulation of rates or forms and there is no insurance guaranty fund protection if the insurer becomes insolvent.

Unfair Trade Practices

Insurance companies are prohibited from engaging in specified unfair methods of competition and unfair or deceptive acts and practices under s. 626.9541, F.S. Twenty seven unfair acts are specified ranging from misrepresentations and false advertising of insurance policies and unfair discrimination to defamation and intimidation. Insurers engaging in such acts may be fined, depending on whether the act is nonwillful or willful, or otherwise sanctioned by the OIR.

Premium Tax

Under current law, each insurer must annually on or before March 1, pay to the Department of Revenue a tax on insurance premiums, premiums on title insurance, assessments, and on annuity premiums.¹² These taxes are in an amount of 1.75 percent of the gross amount of specified

⁹ Life insurance policies and annuity contracts are regulated under part III of ch. 627, F.S.

¹⁰ Section 626.918, F.S.

¹¹ Section 626.918, F.S.

¹² Section 624.509, F.S. There are exceptions to the payment of such taxes for wet marine and transportation insurance under s. 624.510, F.S.

policies and contracts.¹³ Further, insurers are allowed to take specified credits and deductions against the premium tax.

Charitable Organizations

Under s. 627.404(2), F.S., a charitable organization that meets the requirements of a not-for-profit organization under s. 501 (c)(3) of the Internal Revenue Code may own or purchase life insurance on an insured who consents to the ownership or purchase of that insurance.¹⁴ The charitable organization would therefore own what is termed an “insurable interest” in the insured, e.g., a lawful and substantial economic interest in the subject of the insurance.

There are currently no provisions in Florida law to allow a not-for-profit organization¹⁵ to approve a separate and independent for-profit entity, e.g., trust, partnership, or limited liability company, to obtain or procure life insurance policies and annuity contracts on the life of an individual insured.

Annuities

Background - An annuity is generally defined as an insurance contract that provides a stipulated sum payable at certain regular intervals during the lifetime of a person or payable for a specified period. Annuities are regulated under part III, ch. 627, F.S., by two agencies, the Department of Financial Services (DFS), which exercises authority over insurance agents selling annuity products, and the Office of Insurance Regulation (OIR), which has regulatory jurisdiction over insurance companies. According to representatives with the DFS and the OIR, annuities can be an effective investment tool for many Floridians wanting to ensure a steady stream of income for retirement and achieve certain tax benefits. However, some of the state’s senior citizens are falling victim to insurance agents who don’t ensure that an annuity is suitable for their customers’ financial needs and objectives.

These representatives state that due to the wide range and complexity of annuity products available, selling these products without an adequate assessment of the consumers’ financial situation may be harmful to senior investors. More troubling are the few unscrupulous agents who are motivated solely by commission payments to lure consumers into purchasing annuities that are unsuitable.

Officials with the DFS assert that the agency has heard from hundreds of seniors and their families who say they were convinced to liquidate CDs, stocks, and savings accounts to fund annuities only to discover these actions were unsuitable and costly. Examples include individuals whose income and assets were such that no tax benefits could be realized. Two specific examples include Paul, a 75-year-old in poor health, who was interested in a short-term investment, but was persuaded to put his money into an annuity with a punitive surrender charge over the first 10

¹³ The provision also provides that an amount equal to 1 percent of gross receipts is to be paid on annuity policies or contracts.

¹⁴ Under s. 627.404(1), F.S., an insurer is entitled to rely upon the statements made by an applicant for insurance relative to the insurable interest which such applicant has in the insured.

¹⁵ Or organizations to which charitable contributions could be made under ss. 170 (c)(1) - (3) of the Internal Revenue Code of 1986, as amended. Organizations described in 170 (c) include various public and charitable entities.

years; and Mary, 85, wanted to be sure her savings would go to her adult children upon her death, but she was sold an unsuitable annuity that required a beneficiary payout stretching over three years to avoid a financial penalty. Other consumers told officials with DFS that they placed a majority of their liquid assets into annuities, only to be forced to pay high surrender charges when they needed cash for unexpected expenses.

Representatives with the DFS believe that because there are more than 2.9 million Floridians over the age of 65, many will consider investing in annuities. Therefore, it is important to help protect senior investors by requiring insurance companies offering these products and their agents to conduct an assessment of a senior's financial circumstances to ensure the annuity meets the consumer's needs.

National Association of Insurance Commissioners - This legislation is based on the model regulation promulgated by the National Association of Insurance Commissioners (NAIC) which is called the "Senior Protection in Annuity Transactions Model Regulation." That model was adopted by the NAIC on September 14, 2003, after years of development and negotiation with interested parties, including insurance companies, agents, and consumer representatives. According to officials with the DFS, the model was passed without significant objection from any of the parties and with an assurance from the American Council of Life Insurers that there would be no opposition in any state that adopted the model without change. The primary difference between this legislation and the NAIC model is that the bill makes changes to the model which are necessary to conform to Florida's unique regulatory structure in which the DFS exercises authority over agents and the OIR has jurisdiction over insurance companies.

The NAIC model and this legislation refer to rules adopted by the National Association of Securities Dealers (NASD), which apply to suitability and supervision provisions for the recommendation of variable annuities.¹⁶ Specifically, the NASD has adopted Rule 3010 which requires each member to establish and maintain a system to supervise the activities of registered representatives to achieve compliance with securities law, regulations, and NASD rules. Variable life insurance and variable annuities are securities and their distribution is subject to the NASD rules. In a similar vein, the NASD has adopted Rule 2310 that pertains to suitability which requires members to make reasonable efforts to obtain information concerning a customer's financial and tax status, investment objectives, and such other information used in making recommendations to consumers concerning variable annuities. According to representatives with both the DFS and OIR, this provision is intended to grant a safe harbor when the NASD has reviewed a transaction and found that it complies with the NASD rules pertaining to suitability and supervision relating to variable annuities.

Current consumer protections pertaining to annuities - Under s. 626.99(4)(a) and (b), F.S., insurers must provide to each prospective purchaser of a fixed annuity,¹⁷ a buyer's guide to annuities and a contract summary as provided in the NAIC's Model Annuity and Deposit Fund

¹⁶ NASD is a private-sector provider of financial regulatory services. Pursuant to federal law, virtually every securities firm doing business with the public is a member of this not-for-profit organization. Approximately 5,200 brokerage firms, over 92,000 branch offices and more than 653,000 registered securities representatives come under NASD's jurisdiction. The association registers member firms, writes rules to govern their behavior, examines members for compliance and disciplines those that fail to comply.

¹⁷ A fixed annuity provides a guaranteed fixed benefit amount, payable for the life of the annuitant.

Regulation, and the policy must contain a provision for an unconditional refund for a period of at least 10 days. The buyer's guide and policy summary must be provided by the insurer at the request of the prospective purchaser.

Under the unfair trade practices provisions of the Insurance Code,¹⁸ it constitutes a violation to knowingly misrepresent the benefits, advantages, conditions, or terms of any insurance policy.¹⁹ Pursuant to s. 624.418, F.S., an insurance company may have its certificate of authority suspended or revoked if it has violated a lawful order of the OIR as to any provision of the Insurance Code or has engaged in practices in the conduct of its business as to render further transactions injurious to policyholders. Under s. 626.611(5), F.S., an agent's license may be suspended or revoked if such agent makes willful misrepresentations as to an annuity contract or willful deception with regard to such contract, done either in person or by any form of dissemination of information or advertising.²⁰

III. Effect of Proposed Changes:

Section 1. Amends s. 624.402, F.S., pertaining to COA exceptions, to insert a new subsection (8). The bill provides that transactions involving life insurance policies or annuity contracts issued by an insurer domiciled outside the United States covering only persons who are not U.S. residents at the time of issuance, are exempt from the requirement to obtain a certificate of authority, provided the insurer meets specified financial and disclosure requirements. These requirements are similar to the provisions in current law that unauthorized insurers must meet to become eligible surplus lines insurers under s. 626.918, F.S. (*See*, discussion above under Present Situation.) The insurer must comply with the following requirements:

- be an authorized insurer in its country of domicile as to the kinds of insurance proposed to be offered and must have been an insurer for not less than the 3 years next preceding, or a wholly owned subsidiary of an authorized insurer or, must be the wholly owned subsidiary of an already eligible authorized insurer as to the kind or kinds of insurance proposed for not less than the 3 years next preceding. However, the OIR may waive the 3-year requirement if the insurer has operated successfully for a period of 1 year and has capital and surplus of at least \$25 million.
- furnish the OIR with its current annual financial statement in English language, and with such additional information the OIR requests.
- maintain a surplus to policyholders of at least \$15 million and such surplus must be represented by investments consisting of eligible investments for like funds of like domestic insurers under part II of ch. 625;²¹ however, any such surplus as to policyholders may be represented by investments permitted by the domestic regulator of such alien insurance company if such investments are substantially similar in terms of quality, liquidity, and security to eligible investments for like funds of like domestic insurers under part II of ch. 625.
- have a "good reputation" as to providing services to policyholders and paying losses and claims.

¹⁸ Section 626.9541, F.S. The Insurance Code includes chapters 624-632, 634-636, 641, 642, 648, and 651, F.S.

¹⁹ Fines may be imposed for willful and non-willful violations (s. 626.9521, F.S.)

²⁰ Section 626.611(5), F.S.

²¹ Part II of ch. 625, F.S., provides for investment requirements for domestic insurers and commercially domiciled insurers.

- furnish the OIR with authenticated copies of its current and quarterly financial statements in the English language.
- agree to make its books and records available for OIR inspection.
- provide the applicant a copy of its most recent quarterly financial statement as well as the date of organization of the insurer; the identity of and rating assigned by each rating organization or, if applicable, that the insurer is unrated; that the insurer does not hold a certificate of authority issued in Florida and that the OIR does not exercise regulatory oversight over the insurer; and the identity and address of the regulatory authority exercising oversight of the insurer.

The bill further provides that the OIR has no responsibility to determine the actual financial condition of the insurer and that if the OIR has reason to believe that the insurer is insolvent or in unsound financial condition, it shall withdraw the insurer's eligibility to issue policies or contracts. The legislation provides that the insurer is not exempt from agent licensure requirements of ch. 626, F.S., and must appoint agents used to sell such policies or contracts as provided by that chapter. The insurer is also subject to the Unfair Trade Practices provisions under part IX of ch. 626, F.S. The measure provides that policies written under this section are exempt from the premium tax specified in s. 624.509, F.S.

Applications for life insurance coverage must contain in 12-point type a statement to the effect that the policy is governed by the laws of a foreign country and, if the insurer becomes insolvent, the policy is not covered by the Florida Life and Health Guaranty Association. All life insurance policies and annuity contracts must contain a disclosure on the first page of the policy or contract in 10-point type, that the benefits of the policy are governed primarily by the law of a country other than the United States. Finally, it applies the Florida Money Laundering Act (ch. 896, F.S.) to all single premium life insurance policies and annuity contracts issued to persons who are not residents of the United States.

Section 2. Amends s. 627.404, F.S., relating to insurable interests, to broaden the definition of the term "charitable organization" for purposes of allowing charitable organizations to own or purchase life insurance on an insured who consents to the ownership or purchase of that insurance, to include:

1. any organization that meets the requirements of s. 501 (c)(3) of the IRS code;
2. any organization to which charitable contributions could be made under s. 170 (c)(1), (c)(2), or (c)(3) of the IRS code; or
3. any trust, partnership, limited liability company, or similar entity that is approved in writing by an organization described in 1. or 2. above to procure the combination of life insurance policies or annuity contracts on the life of an individual insured. Before an entity described in this provision can qualify as a "charitable organization" for the purposes of this provision, either: a) the individual insured must be an "accredited investor" as defined in s. 230.501(a) in Rule 501 Reg D of the Securities Act Rules; or b) the approving organization described above in 1. or 2. must have total assets in excess of \$5 million at the time of application for the life insurance policy and annuity contract is made.

The bill prohibits the assignment or transfer of the life insurance policy procured by a trust, partnership, limited liability company, or similar entity, with certain exceptions, e.g., in cases of material default, insolvency of either the life insurer or annuity company, or misrepresentation of the individual insured on the application for either the life insurance policy or annuity contract providing grounds for a contest by the life insurer or annuity company. Further, the charitable organization has an insurable interest in the life of the insured whether the organization originally purchased the insurance or the insurance is later transferred to the charitable organization by the insured.

According to representatives with the OIR, the provisions in this section of the bill would allow charities to approve for-profit entities to obtain life insurance policies and annuity contracts which would have unintended consequences potentially harmful to consumers. For example, under this proposal, an unlicensed viatical provider²² could persuade a charity to allow it to obtain life insurance policies and annuity contracts on individuals without being subject to any regulation by the office. Currently viatical transactions are regulated by the OIR and the Department of Financial Services under part X of ch. 626, F.S. Further, a fraudulent unlicensed viatical settlement provider could operate as a state sanctioned “charitable organization” so long as it met the provisions of the bill. Officials with the OIR also state that there are no provisions in the bill that authorize the charitable organization to receive the death benefits of the life insurance policies because the for-profit entity owns and controls the subject policies.

Section 3. Creates s. 627.4554, F.S., pertaining to annuity investments by seniors to provide that the purpose of the section is to establish standards and procedures for recommendations to senior consumers which result in a transaction involving annuity products to address the insurance needs and financial objectives of senior consumers at the time of the transaction. Nothing in the section is to be construed to create or imply a private cause of action for a violation of the section. The legislation applies to any recommendation to purchase or exchange an annuity made to a senior consumer by an insurance agent, or an insurer where no agent is involved, that results in the purchase or exchange recommended.

The bill defines three terms:

- “annuity” means a fixed or variable annuity that is individually solicited, whether the product is classified as an individual or a group annuity;
- “recommendation” means advice provided by an insurance agent, or an insurer if no insurance agent is involved, to an individual senior consumer which results in a purchase or exchange of an annuity in accordance with that advice; and
- “senior consumer” means a person 65 years of age or older. In the event of a joint purchase by more than one party, a purchaser is considered to be a senior consumer if any of the parties is age 65 or older.

The duties of insurers and agents are outlined to include the provision that in recommending to a senior consumer the purchase of an annuity or an exchange of an annuity that results in another insurance transaction, an agent, or insurer if no agent is involved, must have “reasonable

²² A viatical settlement provider is an entity which purchases the life insurance policy and beneficiary rights from the viator. Providers must be licensed by the Office of Insurance Regulation. A viator is the owner of a life insurance policy who enters into a viatical settlement agreement by selling the policy ownership and beneficiary rights in exchange for a cash payment.

grounds” for believing that a recommendation to a senior consumer is suitable for such person on the basis of the facts disclosed by the person as to his or her investments and other insurance products, and to his or her financial situation and needs. Before executing a purchase or exchange of an annuity resulting from a recommendation to a senior consumer, the agent or insurer if no agent is involved, must make reasonable efforts to obtain information concerning the senior’s financial and tax status, investment objectives, and other information considered to be reasonable by the insurance agent or insurer in making the recommendation.

An insurance agent, or an insurer if no agent is involved, shall not have any obligation to a senior consumer related to any recommendation if the senior refuses to provide relevant information requested by the agent or insurer, decides to enter into an insurance transaction that is not based on such recommendation, or fails to provide complete or accurate information.

An agent’s or an insurer’s recommendation shall be reasonable under all circumstances actually known to the agent or insurer at the time of the recommendation.

An insurer or agent shall ensure that a system to supervise recommendations which is reasonably designed to comply with this section is established to include maintaining written procedures and conducting periodic reviews of its records that are designed to detect and prevent violations of this section.

A managing general agent (MGA) and an insurance agency must adopt a “system” established by an insurer to supervise recommendations of its agents to achieve compliance with this section or must establish and maintain such a system to include:

- maintaining written procedures;
- conducting periodic reviews of records that are reasonably designed to assist in detecting and preventing violations of this section.

The legislation allows an insurer to contract with a third party, including a MGA or an insurance agency, to establish and maintain the above “system” with respect to agents under contract with or employed by the third party. An insurer must make reasonable inquiry to ensure that the third party is performing the specified functions and must take action, which is reasonable under the circumstances, to enforce the contractual obligation. In making reasonable inquiry, an insurer must annually obtain a certificate from a third party senior manager who has responsibility for the delegated functions that the manager has a reasonable basis to represent, and does represent, that the third party is performing the required functions; and, based on reasonable selection criteria, periodically select third parties for a review to determine whether the third parties are performing the required functions. An insurer that contracts with a third party and complies with the above requirements is deemed to have fulfilled its responsibilities.

However, an insurer, MGA, or insurance agency is not required to review all transactions solicited by an agent, or include in its system of supervision of insurance agent’s recommendations to senior consumers of products *other than* the annuities offered by the insurer, MGA, or agency. An insurer, MGA, or insurance agency contracting with an insurer shall, when requested, provide a certification or provide a statement that the MGA or agency is unable to meet the certification requirement.

The OIR and the DFS respectively, may order an insurer or agent to take corrective action for any senior consumer harmed by a violation of this section by such insurer or agent. A MGA or insurance agency may also take corrective action against an agent for similar violations. Any penalty under the Insurance Code for specified violations may be reduced or eliminated, according to a schedule adopted by the OIR or DFS, if corrective action for the senior consumer was taken promptly after discovery of the violation.

Insurers, MGAs, insurance agencies, and agents must maintain and make available to the appropriate agency records of the information collected from senior consumers used in making the recommendations that were the basis for insurance transactions for 5 years after the transaction is completed. Such records may be maintained in paper, photographic, mechanical, electronic or other specified media.

The bill exempts specified recommendations which pertain to:

- direct-response solicitations which do not involve recommendations based on information collected from a senior consumer; and
- contracts used to fund an employee pension or welfare benefit plan that is covered by the Employee Retirement and Income Security Act; plans specified under the Internal Revenue Code (IRC) if established by an employer; particular government or church plans under the IRC; nonqualified deferred compensation arrangements maintained by an employer or plan sponsor; settlements or assumptions of liabilities associated with personal injury litigation or claim resolution process; or prepaid funeral contracts.

The bill provides that compliance with the National Association of Securities Dealers (NASD) conduct rules in effect on January 1, 2004, will satisfy the requirements under this bill for the recommendation of variable annuities. However, this provision does not limit the enforcement by the DFS or the OIR of the provisions under the bill.

Section 4. Provides that, except for this section and section 2, which shall take effect upon becoming a law, this act shall take effect July 1, 2004.

IV. Constitutional Issues:

A. Municipality/County Mandates Restrictions:

None.

B. Public Records/Open Meetings Issues:

None.

C. Trust Funds Restrictions:

None.

V. Economic Impact and Fiscal Note:**A. Tax/Fee Issues:**

Life insurance policies and annuity contracts sold to non-U.S. residents by an unauthorized alien insurer meeting the criteria of this bill would be exempt from the premium tax. The Office of Insurance Regulation has said that there will be minimal, if any, fiscal impact, but no official estimate of the fiscal impact has been determined.

B. Private Sector Impact:

The provisions of the bill (section 1 of the bill) would benefit alien insurance companies because such entities could establish offices in Florida to serve non-U.S. residents, without having to obtain a certificate of authority. Authorized insurers currently serving non-U.S. residents may find increased competition for sales.

Proponents of this legislation state that most variable annuity and life insurance products sold in the international market now contain imbedded investment elements. Often these products are customized. Non-U.S. residents generally will be subject to U.S. withholding tax with respect to returns related to the investment elements of these products. The same variable annuity and life insurance products issued by alien or offshore insurers are not subject to the U.S. withholding tax. Consequently, products issued by U.S. insurers are not generally tax efficient for non-resident purchasers.

These proponents also assert that the bill will benefit the economy of South Florida. A recent study by the Beacon Council estimates that annual premium income from sales of insurance products to Latin Americans is in the billions of dollars and that, if such products could be sold and serviced from Florida, Florida's economy would experience substantial economic benefit in terms of jobs created and other benefits.

The bill appears to expand the fundraising ability of not-for-profit entities to facilitate charitable gifts through the coordinated use of life insurance policies and annuity contracts (section 2 of the bill). According to proponents of the charitable organization provisions, the current low cost fixed-yield capital markets serve as the funding mechanism that allow donors to effectively make substantial monetary gifts to favored charities upon their (donors') death.

Under the provisions of this bill, unsuitable annuity sales to senior investors may be curbed and thus these seniors could avoid costly financial mistakes. There would be an indeterminate administrative cost to life insurance companies that will now be required to train agents and develop procedures for keeping necessary documentation on annuity sale recommendations made to senior clients.

C. Government Sector Impact:

According to representatives with the Office of Insurance Regulation, the additional reviews and monitoring responsibilities provided for under section 1 of the bill can be absorbed within existing resources.

Representatives with both DFS and OIR state that section 3 of this bill creates no fiscal impact for either agency.

VI. Technical Deficiencies:

None.

VII. Related Issues:

None.

VIII. Amendments:

None.

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