

The Florida Senate
BILL ANALYSIS AND FISCAL IMPACT STATEMENT

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

Prepared By: The Professional Staff of the Committee on Banking and Insurance

BILL: SPB 7010

INTRODUCER: For consideration by the Banking and Insurance Committee

SUBJECT: OGSR/Examination Techniques or Procedures/Office of Financial Regulation

DATE: February 2, 2015 **REVISED:** _____

ANALYST	STAFF DIRECTOR	REFERENCE	ACTION
1. <u>Matiyow</u>	<u>Knudson</u>	_____	Pre-meeting

I. Summary:

SPB 7010 is the result of an Open Government Sunset Review (OGSR) by the Banking and Insurance Committee staff of a public records exemption in s. 517.2016, F.S., for certain information held by the Office of Financial Regulation (OFR).

In 2010, the Florida legislature passed CS/HB 1059 creating a new public records exemption relating to the regulation of Securities. The Florida Securities and Investor Protection Act (Act) governs the regulation of securities transactions in Florida. The State's Office of Financial Regulation (OFR) is designated as the regulator to enforce the Act in Florida. The OFR may make investigations and examinations within or outside of Florida as it deems necessary. Section 517.2016, F.S., protects information that would reveal examination techniques or procedures used by the OFR pursuant to the Act. Such Information may be provided by the OFR to another governmental entity having oversight or regulatory or law enforcement authority.

Pursuant to the Open Government Sunset Review Act, the exemption will repeal on October 2, 2015, unless reenacted by the Legislature. This bill continues the exemption and does not expand the scope of the public records exemption.

II. Present Situation:

Public-Records Law

Article I, s. 24(a) of the State Constitution sets forth the state's public policy regarding access to government records. The section guarantees every person a right to inspect or copy any public record of the legislative, executive, and judicial branches of government. The Legislature, however, may provide by general law for the exemption of records from the requirements of Article I, s. 24(a) of the State Constitution. The general law must state with specificity the public necessity justifying the exemption (public necessity statement) and must be no broader than necessary to accomplish its purpose.¹Public policy regarding access to government records is

¹ Section 24(c), Art. I, Fla. Const.

addressed further in the Florida Statutes. Section 119.07(1), F.S., guarantees every person a right to inspect and copy any state, county, or municipal record.

The Open Government Sunset Review Act² provides that a public records or public meetings exemption may be created or maintained only if it serves an identifiable public purpose. In addition, it must be no broader than is necessary to meet one of the following purposes:

- Allows the state or its political subdivisions to effectively and efficiently administer a governmental program, which administration would be significantly impaired without the exemption.
- Protects sensitive personal information that, if released, would be defamatory or would jeopardize an individual's safety; however, only the identity of an individual may be exempted under this provision.
- Protects trade or business secrets.³

In addition, the Legislature must find that the identifiable public purpose is compelling enough to override Florida's open government public policy and that the purpose of the exemption cannot be accomplished without the exemption.⁴

The OGSR also requires specific questions to be considered during the review process.⁵ In examining an exemption, the OGSR asks the Legislature to carefully question the purpose and necessity of reenacting the exemption.

If, in reenacting an exemption, the exemption is expanded, then a public necessity statement and a two-thirds vote for passage are required.⁶ If the exemption is reenacted without substantive changes or if the exemption is narrowed, then a public necessity statement and a two-thirds vote for passage are *not* required. If the Legislature allows an exemption to sunset, the previously exempt records will remain exempt unless provided for by law.⁷

Regulation of Securities

The securities industry is subject to both federal and state laws and regulations. The primary federal regulator is the Securities and Exchange Commission (SEC), which oversees the key participants in the securities industry such as securities exchanges, securities brokers and dealers, investment advisors, and mutual funds.⁸ The SEC is concerned primarily with promoting the

² Section 119.15, F.S.

³ *Id.*

⁴ Section 119.15(6)(b), F.S.

⁵ Section 119.15(6)(a), F.S. The questions are:

- What specific records or meetings are affected by the exemption?
- Whom does the exemption uniquely affect, as opposed to the general public?
- What is the identifiable public purpose or goal of the exemption?
- Can the information contained in the records or discussed in the meeting be readily obtained by alternative means? If so, how?
- Is the record or meeting protected by another exemption?
- Are there multiple exemptions for the same type of record or meeting that it would be appropriate to merge?

⁶ FLA. CONST., art. I, s. 24(c).

⁷ Section 119.15(7), F.S.

⁸ See <http://www.sec.gov/about/whatwedo.shtml> (Accessed January 22, 2015).

disclosure of important market-related information, maintaining fair dealing, and protecting against fraud.

The state's Office of Financial Regulation (OFR), through the Division of Securities, regulates the sale of securities in, to, or from Florida by firms, branch offices and individuals affiliated with these firms to determine compliance with Florida law. A securities dealer or investment adviser is prohibited from conducting business from a branch office in Florida unless the branch office is registered with the OFR.⁹ A "branch office" is "any location in this state of a dealer or investment adviser at which one or more associated persons regularly conduct the business of rendering investment advice or effecting any transactions in, or inducing or attempting to induce the purchase or sale of, any security."¹⁰ It also includes any location that is held out as a place where such actions occur is also a branch office.

The Financial Industry Regulatory Authority (FINRA), an independent, not-for-profit organization, also is an important regulatory body.¹¹ FINRA performs a number of functions, including registering and educating securities industry participants. FINRA operates the Central Registration Depository and the Investment Adviser Registration Depository, which are central databases for registering, reporting, and disclosing information within the securities industry.

Florida Securities and Investor Protection Act¹²

The Florida Securities and Investor Protection Act (Act) governs the regulation of securities transactions in Florida. The Office of Financial Regulation (OFR) is designated as the regulator to enforce the Act. The OFR may make investigations and examinations within or outside of Florida as it deems necessary to:

- determine whether a person has violated or is about to violate any provision of the Act or a rule or order under the Act; or
- aid in the enforcement of the Act.¹³

Investigations and Examinations

Current law provides a public records exemption for information related to investigations and examinations conducted by the OFR pursuant to the Act.¹⁴ Information relative to an investigation or examination by the OFR, including any consumer complaint, is confidential and exempt¹⁵ from public records requirements until the investigation or examination is completed or

⁹ S. 517.12(5), F.S.

¹⁰ S. 517.021(4), F.S.

¹¹ See <http://www.finra.org/AboutFINRA/P125239> (Accessed January 22, 2015).

¹² The act is codified in chapter 517, F.S.

¹³ Section 517.201(1)(a), F.S.

¹⁴ Section 517.2016, F.S.

¹⁵ There is a difference between records the Legislature designates as exempt from public records requirements and those the Legislature deems confidential and exempt. A record classified as exempt from public disclosure may be disclosed under certain circumstances. (*See WFTV, Inc. v. The School Board of Seminole*, 874 So.2d 48, 53 (Fla. 5th DCA 2004), review denied 892 So.2d 1015 (Fla. 2004); *City of Riviera Beach v. Barfield*, 642 So.2d 1135 (Fla. 4th DCA 1994); *Williams v. City of Minneola*, 575 So.2d 687 (Fla. 5th DCA 1991). If the Legislature designates a record as confidential and exempt from public disclosure, such record may not be released by the custodian of public records, to anyone other than the persons or entities specifically designated in the statutory exemption. *See* Attorney General Opinion 85-62, August 1, 1985.

ceases to be active. However, the information remains confidential and exempt if the OFR submits it to any law enforcement or administrative agency or regulatory organization for further investigation.¹⁶ In addition, certain information remains confidential and exempt after the investigation or examination is completed or ceases to be active,¹⁷ including information that would disclose investigative techniques or procedures.

III. Effect of Proposed Changes:

This bill removes the scheduled repeal date of October 2, 2015, for s. 517.2016, F.S., the public records exemption for examination techniques and procedures used by the OFR pursuant to the Florida Securities and Investor Protection Act.

According to the OFR, maintaining the confidentiality of examination techniques and procedures is essential for protecting the integrity of the examination programs that they use to regulate the securities industry. If these investigative tools are made public through an open records requests or other means, the securities industry could use them to thwart effective examinations, cover up illegal conduct, and circumvent the law.¹⁸ Additionally, the OFR is a member of the North American Securities Administrators Association (NASAA). NASAA is a multi-state association of regulators that coordinates sweeps and pools information, examinations and techniques. If Florida's confidentiality of the modules used by NASAA is not preserved, there is great concern other member states who utilize the NASSA modules would be significantly impaired as well.

IV. Constitutional Issues:

A. Municipality/County Mandates Restrictions:

None.

B. Public Records/Open Meetings Issues:

This bill continues a current exemption but does not expand the scope of an existing public records exemption; therefore, a simple majority vote of the members present and voting in each house of the Legislature is required for passage.

C. Trust Funds Restrictions:

None.

¹⁶ Section 517.2015(1)(a), F.S.

¹⁷ For purposes of the exemption, an investigation or examination is considered "active" so long as OFR or any law enforcement or administrative agency or regulatory organization is proceeding with reasonable dispatch and has a reasonable good faith belief that the investigation or examination may lead to the filing of an administrative, civil, or criminal proceeding or to the denial or conditional grant of a license, registration, or permit. Section 517.2015(1)(a), F.S.

¹⁸ Email from OFR staff received September 2, 2014 on file with Banking and Insurance staff.

V. Fiscal Impact Statement:

A. Tax/Fee Issues:

None.

B. Private Sector Impact:

None.

C. Government Sector Impact:

According to the OFR¹⁹, being a member state of NASAA allows the OFR the ability to leverage its limited resources and save on regulatory costs. In order for the OFR to remain a member of NASSA the public record exemption on examinations and techniques of securities may not be permitted to sunset.

VI. Technical Deficiencies:

None.

VII. Related Issues:

None.

VIII. Statutes Affected:

This bill substantially amends section 517.2016 of the Florida Statutes.

IX. Additional Information:

A. Committee Substitute – Statement of Changes:

(Summarizing differences between the Committee Substitute and the prior version of the bill.)

None.

B. Amendments:

None.

This Senate Bill Analysis does not reflect the intent or official position of the bill's introducer or the Florida Senate.

¹⁹ Email from OFR staff received September 2, 2014 on file with Banking and Insurance staff.